No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER OF THE CROWN HEIGHTS COALITION, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE AMERICAN JEWISH COMMITTEE

ELAINE R. JONES
ERIC SCHNAPPER
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

SAMUEL RABINOVE
RICHARD T. FOLTIN
KENNETH S. STERN
THE AMERICAN JEWISH COMMITTEE
165 East 56 Street
New York, New York 10002
(212) 751-4000

Counsel for Amici

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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INTEREST OF AMICI[1]

The Crown Heights Coalition was formed on August 22, 1991, at the behest of Brooklyn Borough President Howard Golden, in response to a racial crisis in the Crown Heights neighborhood of Brooklyn, in which African-Americans, Caribbean-Americans, and Lubavitch Hasidic Jews live. This racial crisis was precipitated by the tragic automobile accident in which Gavin Cato, a seven year old black boy, was killed by a car driven by a Lubavitch, and the apparently retaliatory murder of Yankel Rosenbaum, a twenty-nine year old Lubavitch scholar, by a group of black youths. The Crown Heights Coalition includes thirty-six educational, religious, civic and elected leaders representing local Lubavitch Hasidim, Caribbean-Americans, and African-Americans. Dr. Edison O. Jackson, President of Medgar Evers College, and Rabbi Shea Hecht, Board Chairperson, National Committee for the Furtherance of Jewish

[1] Copies of letters from the parties consenting to the filing of this brief have been filed with the Clerk.

Education, serve as Co-Chairpersons. The Coalition has identified and is endeavoring to alleviate the underlying causes of racial and ethnic tensions in Crown Heights, including a lack of cultural awareness and interaction, problems in police-community relations, inadequate youth services, and concerns that one group or another has received preferential treatment by city officials. The members of the Coalition share a conviction that a respect for and tolerance of racial, religious and cultural differences is essential to the well being of their community.

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist African-Americans to secure their constitutional and civil rights by means of litigation. Since 1965 the Fund's attorneys have represented plaintiffs seeking to enforce a wide variety of statutes which prohibit intentional discrimination on the basis of race. The constitutionality of these statutes has been called into question by the decision below. Individuals represented by the Fund's attorneys have been the victims of

intentionally discriminatory conduct which violated criminal civil rights provisions similar to the statute declared unconstitutional by the Wisconsin Supreme Court.

The American Jewish Committee, a national organization with over thirty chapters, was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It is AJC's conviction that the security and the constitutional rights of Jewish Americans can best be protected by helping to preserve the security and constitutional rights of all Americans, irrespective of race, creed, or national origin. The constitutionality of criminal statutes such as the Wisconsin law at issue in this case is of particular concern to AJC because Jews and Jewish religious institutions have been and continue to be a particular target of bias motivated criminal activity.

SUMMARY OF ARGUMENT

Unlike the statute held unconstitutional in *R.A.V. v. St. Paul*, 120 L.Ed.2d 305 (1992), the statute at issue in this case is concerned with conduct, not expression. Section

939.645 authorizes an enhanced sentence where the victim of a crime was selected on the basis of race, etc., regardless of whether the perpetrator, by word or expressive conduct, conveyed any message to the victim or the public. This Court has long held that neither violence nor intentional discrimination are protected by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Bob Jones University v. United States*, 461 U.S. 574 (1983). The imposition of an enhanced sentence for a racially motivated crime was expressly held permissible in *Barclay v. Florida*, 463 U.S. 939 (1983).

If the First Amendment barred the imposition of additional criminal sanctions, or penalty enhancement, based on a defendant's motive, numerous federal and state laws would have to be struck down as unconstitutional. Six federal criminal provisions apply to conduct undertaken with a racial motive. Eight federal laws impose criminal penalties for attacks on various federal officials "on account of" their performance of official duties. Wisconsin law imposes an

enhanced penalty for an assault on a juror "by reason of any verdict . . . assented to by the person." (Wisconsin Stat. 940.20). These statutes are indistinguishable from the Wisconsin law held invalid by the court below.

Section 939.645 serves the state's vital interest in deterring and punishing bias related crimes. Such crimes have a unique capacity to terrorize entire groups, to interfere with constitutionally protected activity, and to trigger retaliatory criminal acts.

The existing decisions of this Court provide suitable safeguards to assure that section 939.645 is not abused. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Dawson v. Delaware*, 117 L.Ed.2d 309 (1992).

ARGUMENT

Since the end of the Civil War, when the Constitution was amended to replace protection of chattel slavery with a guarantee of equal justice, the national government has utilized the force of the criminal law to prohibit, deter and punish various forms of invidious discrimination. The 1866

Civil Rights Act contained in section 2 a criminal provision forbidding certain types of unequal treatment "by reason or . . . color or race."[2] The 1870 Civil Rights Act, adopted following the ratification of the Fifteenth Amendment, imposed criminal penalties on those who denied citizens an equal right to vote "without distinction of race, color, or previous condition of servitude."[3] In 1875 Congress declared it a misdemeanor for any person responsible for the selection or summoning of jurors to discriminate "on account of race, color or previous condition of servitude."[4] Today there are a total of six federal criminal provisions that prohibit conduct based on an invidiously discriminatory motive. Most of these, like the 1866 Civil Rights Act, apply to discrimination on the basis of race; other subsequently

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[2] 14 Stat. 27 (1866). This provision is now codified in 18 U.S.C. §241.

[3] 16 Stat. 140 (1870). The analogous provisions are now codified in 18 U.S.C. §245.

[4] 18 Stat. 336 (1875). This Court sustained the prosecution of a state judge under this statute. *Ex Parte Commonwealth of Virginia*, 100 U.S. 339 (1880).

enacted prohibitions also apply to discrimination on the basis of national origin, religion, and sex.[5]

Wisconsin, like several dozen other states, has adopted a criminal provision similar to these federal criminal civil rights provisions. The question presented by this case is whether the First Amendment prohibits the states and the federal government from enacting criminal prohibitions against invidious discrimination.

I. SECTION 939.645 DOES NOT VIOLATE THE FIRST AMENDMENT.

Section 939.645 provides that the penalty for most[6] crimes may be increased if the prosecution proves beyond a reasonable doubt that the defendant selected the victim of the crime, or the property damaged or affected by the crime, "because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the

[5] 18 U.S.C. §§242, 243, 245, 246, 247; 42 U.S.C. §3631.

[6] The enhanced penalty in section 939.645 applies to the crimes prohibited by chapters 939-948 of the Wisconsin Statutes. These chapters encompass most of the criminal provisions of the Wisconsin statutes.

owner or occupant of that property." What the actual sentence imposed will be remains a decision for the sentencing judge. In order to trigger application of section 939.645, the prosecution must prove beyond a reasonable doubt two distinct elements: first, that the defendant made a deliberate choice of victim, rather than, for example, robbing whomever he chanced first to meet, and, second, that the choice was made on the basis of race or one of the other specified grounds.

On the face of the statute, however, it is irrelevant *why* the perpetrator may have utilized race, etc., to select his victim. The statute does not require proof that the defendant harbored animosity toward a particular group,[7] and does not authorize an enhanced penalty merely because the defendant may believe that his own race, religion or ethnic group is superior. Section 939.645 would apply, for

[7] Some penalty enhancement statutes do require proof of racial or other class animus. In our view such a requirement poses no constitutional problem. See *Bray v. Alexandria Women's Health Clinic*, 61 U.S.L.W. 4080 (1993).

example, if a black perpetrator selected a black victim in the belief that the police were less likely to investigate crimes against racial minorities. The law would be equally applicable to a defendant who, although personally indifferent to matters of theology, made a tactical decision to rob Quakers in the belief that they were less likely to offer forcible resistance. Of course in any particular case it may be that a defendant made a race-based choice of victim, not as a matter of tactics, but because of some belief regarding, for example, the moral worth of the targeted group. But the Wisconsin law does not require that the defendant adhere to any such view, and such views, if not the basis for the selection of the victim, would be legally irrelevant.

The First Amendment, of course, protects the rights of all persons, law abiding and criminal alike, to hold whatever beliefs they please regarding race, religion, ancestry, disability, and sexual orientation. But where an individual's beliefs lead him or her to engage in otherwise

criminal activity, the First Amendment affords no protection for that conduct. In striking down the state flag desecration statute in *Texas v. Johnson*, 491 U.S. 397 (1989), this Court emphasized that

> nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate. We also emphasize that Johnson was prosecuted *only* for flag desecration--not for trespass, disorderly conduct, or arson.

491 U.S. at 412 n. 12. Justice Stevens correctly observed in *United States v. Eichman*, 496 U.S. 310, 322 (1990) (dissenting opinion), that "the communicative value of a well-placed bomb in the Capitol does not entitle it to the protection of the First Amendment . . ." The Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), admonished:

> The First Amendment does not protect violence. "Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'". . . [V]iolent conduct is beyond the pale of constitutional protection.

458 U.S. at 916, 933. Even speech can be criminalized where it is an effective "incitement to imminent lawless action."

Brandenburg v. Ohio, 395 U.S. 444, 449 (1969). *A fortiori* lawless action itself enjoys no constitutional protection merely because it may have been prompted by such verbal incitement. The First Amendment provides to every individual the right to believe Proudhon's quip that "Property is theft", but accords to no one the right to steal.

Brandenburg applied the First Amendment to protect the right of members of the Ku Klux Klan to both adhere to and express deplorably racist and anti-Semitic *beliefs*. 395 U.S. at 446, 447, 446 n. 1. But this Court has repeatedly rejected First Amendment challenges to the authority of the government to forbid discriminatory *conduct*.

> [A]cts of invidious discrimination . . . cause unique evils that government has a compelling interest to prevent--wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.

Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984); *see Board of Directors v. Rotary Int'l*, 481 U.S. 537 (1987).

> [P]arents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable . . . . [b]ut it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.

Runyon v. McCrary, 427 U.S. 160, 176 (1976); see *Bob Jones University v. United States*, 461 U.S. 574, 602-04 (1983); *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973) ("although the Constitution does not proscribe private bias, it places no value on discrimination. . . .").

The ordinance held unconstitutional in *R.A.V. v. St. Paul*, 120 L. Ed. 2d 305 (1992), is clearly distinguishable from the statute in the instant case. The law in *R.A.V.* was concerned with speech, not with action; it forbad the use of symbols, graffiti, or appellations (e.g. racial epithets) which would arouse "anger, alarm or resentment in others on the basis of race," etc. 120 L.Ed. 2d at 315. This Court held that even where speech as such was subject to government control because, e.g., it involved fighting words, libel or obscenity, those controls had to be content neutral; the St.

Paul ordinance, although directed at fighting words, was fatally defective because it specifically treated some fighting words differently than others. 120 L. Ed. 2d at 323-26.

The statute at issue in this case, on the other hand, is directed not at expression, whether through words or symbolic acts, but at conduct, regardless of whether that conduct has any expressive element[8] and regardless of what any such expressive element may be. Thus, section 939.645 is fully applicable if the victim at issue was chosen on the basis of race, etc., even though the perpetrator may never have intended to communicate any message to his victim or others. In the instant case there appears to have been no such intent or message; the victim in all likelihood assumed at the time of the crime that he was being assaulted for his shoes. Conversely, under the Wisconsin law even the most overtly racist message conveyed in connection with a crime would be irrelevant unless the victim was selected by means

[8] "One could violate this statute while remaining entirely mute." *People v. Grupe*, 532 N.Y.S. 2d 815, 818, 141 Misc. 2d 6 (N.Y. Crim. Ct. 1988).

of one of the forbidden criterion. Thus if a perpetrator had killed a randomly selected victim, and then pinned to the body a diatribe vilifying some racial group, the Wisconsin statute would not apply.

R.A.V. does not, as the court below evidently believed,[9] impart some special constitutional protection to a defendant's "racial or other discriminatory animus". On the contrary, *R.A.V.* made clear that under other statutes a state could have penalized the very cross burning in that case. The Court observed that Minnesota had available to it for that purpose several laws which were neutral with regard to any message that R.A.V. may have intended to convey. 120 L. Ed. 2d at 328. The majority referred expressly to two Minnesota provisions which, like the statute in the instant case, provided for enhanced penalties where certain crimes were committed "because of the victim's . . .

[9] Pet. App. A16.

race, color, religion, sex, sexual orientation, disability . . . age, or national origin."[10]

The Court in *R.A.V.* specifically held that the enforcement of anti-discrimination laws would raise no problems under the First Amendment, even where--as is not, of course, the case here--the discrimination had been effectuated by means of words rather that physical actions.

> [S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. . . . Thus, for example, sexually

[10] 120 L. Ed. 2d at 315 nn. 1 and 2. Minnesota Statutes § 606.595(Supp. 1992), cited at p. 315 and footnote 1 as among the laws under which R.A.V. might have been punished, authorizes an enhanced sentence for intentional damage to property if the perpetrator caused the damage because of the race, etc., of the owner or another.

Footnote 2 notes that the petitioner in *R.A.V.* had indeed been charged under, but "did not challenge", Minnesota Statute §609.2231(4). The cited subparagraph 4 is the portion of the Minnesota assault statute which authorizes an enhanced penalty for "[w]hoever assaults another because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability . . . ,age, or national origin."

> derogatory "fighting words", among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. . . . 29 CFR §1604.11 (1991).

120 L. Ed. 2d at 322. The Title VII regulation cited by the Court in *R.A.V.* proscribes as sexual harassment verbal or physical acts which have "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. §1604.11(a) (1991). See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-67 (1986).

R.A.V. also properly recognized that a statute which protected only "certain persons or groups" would ordinarily have difficulty meeting "the requirements of the Equal Protection Clause." 120 L. Ed. 2d at 323. One of the core requirements of the Equal Protection Clause is that all persons should enjoy to an equal degree the protection which the law provides against murder, assault, and other criminal acts. As one member of the Thirty-Ninth Congress explained, "All the people, or all the members of a state or

community, are equally entitled to protection."[11] That concept of equal protection was of central importance to the framers of the Fourteenth Amendment, and explains the use of the word "protection" in the phrase equal protection.[12] The Wisconsin statute at issue in this case, however, does not provide for an enhanced penalty if members of some favored race, religion or other group or class are the victims of crime.[13] Individuals of every race, creed, national origin

[11] Cong. Globe, 39th Cong., 1st sess. 2962 (1866). Senator Wilson admonished:

> "[T]he poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and proudest man in the land. . . . [T]he poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land . . . . [T]he poor man's cabin, though it may be the cabin of a poor freedman in the depths of the Carolinas, is entitled to the protection of the same law that protects the palace of a Stewart or an Astor . . . . "

Id. at 343.

[12] The original intent of the framers of the Fourteenth Amendment in this regard is set out in the Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc., in No. 88-305, *South Carolina v. Gathers.*

[13] In contrast, a state could provide special protection, including a provision for enhanced punishment, for individuals performing governmental or other important functions, or for individuals, such

and sexual orientation are protected to an equal degree by the law.

This Court's decision in *Dawson v. Delaware,* 117 L. Ed. 2d 309 (1992), is fairly dispositive of the validity of the Wisconsin statute at issue in the instant case. The defendant in *Dawson* advanced essentially the same argument accepted by the court below, that "the Constitution forbids the consideration in sentencing of any evidence concerning beliefs or activities that are protected under the First Amendment." 117 L. Ed. 2d at 318. This Court expressly rejected any such "per se" rule. 117 L. Ed. 2d at 316-17. The Court held that admission of the evidence at issue in *Dawson* was constitutional error because the particular past associations and beliefs of the defendant there "had no relevance to" the crime at issue, and were apparently adduced "simply because the jury would find those beliefs

as children, who are particularly vulnerable to attack. A list of such statutes is set forth in Appendix A of the Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc., in No. 88-305, *South Carolina v. Gathers.*

reprehensible." 117 L. Ed. 2d at 317-18. But the Court added that such evidence could indeed be considered, and provide the basis for a heavier sentence, where the beliefs at issue were the motive for the underlying crime.

> We have previously upheld the consideration, in a capital sentencing proceeding, of evidence of racial intolerance . . . where such evidence was relevant to the issues involved. In *Barclay v. Florida*, 463 U.S. 939 . . . (1983), for example, we held that a sentencing judge in a capital case might properly take into consideration "the elements of racial hatred" in Barclay's crime as well as "Barclay's desire to start a race war." . . . In *Barclay* . . . 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. . . . We concluded that it was most proper for the sentencing judge to "tak[e] into account the elements of racial hatred in this murder."

117 L. Ed. 2d at 316-18; *see Barclay v. Florida*, 463 U.S. 939,949 (1983) (plurality opinion) ("The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder.").

Wisconsin law makes precisely the distinction mandated by *Dawson*. Section 939.645 does not permit the

imposition of an enhanced sentence merely because a defendant adhered to racist or intolerant beliefs; had his case arisen in Wisconsin, David Dawson's membership in the Aryan Brotherhood would have been irrelevant under section 939.645, and could not have led to the application of that statute. Wisconsin sanctions admission of evidence regarding a defendant's beliefs only where, as was the case in *Barclay*, those beliefs were demonstrably a factor in the commission of the crime at issue.

II. THE DECISION OF THE COURT BELOW IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND WITH BASIC PRINCIPLES OF CRIMINAL LAW

The interpretation of the First Amendment advanced by the Wisconsin Supreme Court represents an extraordinary and unwarranted departure from the established principles of constitutional and criminal law. The central premise of the decision below is that the First Amendment precludes the states or national government from considering the mental state of a person who committed a forbidden act.

> The statute punishes the "because of" aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection. . . . The physical assault . . . is the same whether he was attacked because of his skin color or because he was wearing "British Knight" tennis shoes. Mitchell's . . . motivation . . . , his thought which impelled him to act, is the reason his punishment was enhanced. . . . Punishment of one's thought, however repugnant the thought, is unconstitutional.

(Pet. App. A9-A15) (Emphasis in original).

This proposed constitutional analysis is at odds with basic principles of criminal law that were universally accepted at the time when the First Amendment was adopted. Since at least 1600 it has been a fundamental precept of Anglo-American law that *actus not facit reum nisi mens sit rea*, an act does not make one guilty unless his mind is guilty. W. LaFave, *Principles of Criminal Law* 60 (1978). This requirement was welcomed as a modification of medieval law, which at times imposed a species of strict

liability in criminal law.[14] Thus eighteenth century authorities were in agreement that no crime was committed unless the perpetrator had acted with "an evil intention." 1 W. Hawkins, *A Treatise of the Pleas of the Crown*, 65 (1716); T. Wood, *An Institute of the Laws of England*, 340 (1772). It is inconceivable that the framers of the First Amendment intended to overturn one of the most important principles of common law jurisprudence.

To this day proof of some mental element is required for virtually all criminal offenses. A number of statutes which lacked such a mens rea requirement have been struck down as unconstitutional.[15] In *Screws v. United States*, 325 U.S. 91 (1945), this Court sustained the criminal provision of the 1866 Civil Rights Act from constitutional

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[14] The evolution of this principle is discussed in F. Pollock and F. Maitland, *The History of English Law*, v. ii, ch. viii, §2 (Milsom, ed., 1968). Pollock and Maitland trace this doctrine to St. Augustine. *Id.* at 476. Other authorities contend the mens rea requirement had its roots in Roman law. Note, 26 *Marquette L.Rev.* 92, 92 (1942).

[15] *See* W. LaFave and A. Scott, Jr., *Criminal Law*, 144-46 (1972); *Lambert v. California*, 355 U.S. 225 (1957); *Robinson v. California*, 370 U.S. 660 (1962).

attack by reading into that section a requirement that the prosecution prove the defendant had acted with an "evil motive" or "bad purpose", such as "purposeful discrimination." 325 U.S. at 101, 103. It is inconceivable that such a mens rea requirement, at least ordinarily necessitated by the Due Process Clause, is paradoxically forbidden by the First Amendment.

The interpretation of the First Amendment endorsed by the court below would, if accepted by this Court, wreak havoc with the criminal provision of the United States Code. That interpretation would, of course, compel the conclusion that all six federal laws criminalizing particularly serious forms of invidious discrimination are unconstitutional. Section 3631 of 42 U.S.C. imposes criminal penalties on any person, "whether or not acting under color of law", who uses force or threats of force against any other person, "because of his race color, religion, sex or national origin" in

connection with the sale or leasing of real property.[16] Section 245(b)(2) of 18 U.S.C. imposes similar penalties on any one, "whether or not acting under color of law," who by force or threats of force interferes with certain federally protected activities "because of" the victim's "race, color, religion or national origin." 18 U.S.C. §247(a)(2) prohibits destruction of or damage to religious property "because of the religious character of that property." Criminal penalties are imposed by 18 U.S.C. §246 on anyone who denies benefits under certain federally funded programs "on account of political affiliation, race, color, sex, religion, or national origin." Section 242 of 18 U.S.C., which forbids imposing unequal punishments "by reason of . . . color, or race", is limited to conduct occurring "under color of law"; in *United States v. Price*, 383 U.S. 787 (1966), this Court held that under some circumstances private parties may be

[16] The lower courts have consistently rejected First Amendment challenges to section 3161. *United States v. Gilbert*, 813 F.2d 1523 (9th Cir. 1987); *United States v. Lee*, 935 F. 2d 952 (8th Cir. 1991); *United States v. Palmer*, Crim. No. 91-50063-03 (W.D.La), Memorandum Ruling, Oct. 30, 1992.

prosecuted under section 242. Of the federal criminal civil rights statutes, only 18 U.S.C. §243, prohibiting racial discrimination in jury selection, is expressly limited to conduct by government officials.

Equally clearly, the interpretation of the First Amendment adopted by the court below would invalidate all eight federal statutes which prohibit acts of violence against federal judges, jurors, witnesses, marshals, and other officials where those acts were taken "on account of" the performance of official duties.[17] Also invalid would be provisions of Title 18 declaring it a crime to give something of value to an official "because of any official act" (18 U.S.C. §201(c)), or to file false claims "with a view to securing payment" (18 U.S.C. §550), declaring an accessory after the fact any person who aids an offender "in order to hinder . . . apprehension" (18 U.S.C. §3), forbidding discrimination in public accommodations against members of the armed forces "because of th[eir] uniform" (18 U.S.C. §244), and conspiracies and the use of force against any person "because of his having exercised" federally protected rights (18 U.S.C. §§ 241, 245.) Another thirty federal laws provide that a variety of acts are unlawful if, but only if, engaged in for a particular "purpose" specified in the statute.[18] Still other provisions of Title 18 include a requirement of "intent" which refers, not to what the perpetrator himself did, but to the reason the perpetrator took that course of action.[19]

The decision below would have a dramatic impact as well on state criminal laws. Of course, any criminal law prohibiting invidious discrimination would be

[17] 18 U.S.C. §§111(a)(2)(persons designated in section 1114), 115(a) (judge, law enforcement officer, or others designated in section 1114), 372 (any person holding any office under the United States), 1114 (judge, United States Attorney, United States marshal, employee of the F.B.I., or other listed officials), 1201(persons designated in section 1114), 1503 (grand or petit juror), 1513 (witness), 2231 (person executing search warrant.)

[18] 18 U.S.C. §§47, 288, 494, 495, 500, 505, 551, 594, 595, 598, 599, 605, 608, 706, 707, 793, 796, 842, 877, 917, 1007, 1010, 1014, 1231, 1342, 1384, 1582, 1721, 1857, 1951.

[19] *See, e.g.* 18 U.S.C. §§33, 215, 549, 953, 1507.

unconstitutional.[20] Also invalid would be state laws providing enhanced penalties where the victim of an assault was selected because he or she had engaged in some governmental activity. Wisconsin has three such statutes. Section 940.20, for example, classifies as a Class D felony a battery committed against a witness or juror "by reason of the person having attended or testified as a witness or by reason of any verdict or indictment assented to by the person." The same battery against the same victim would be classified differently in the absence of such a motive. Unlike the statute at issue in the instant case, which merely authorizes an increased penalty, section 940.20 goes further and classifies as a serious felony conduct which might otherwise be a misdemeanor. (See Wis. Stat. §940.19).[21]

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[20] Wisconsin Statutes §942.04, for example, declares it a misdemeanor to discriminate on the basis of race, color, creed, national origin or disability in various public accommodations, or in automobile insurance rates.

[21] Section 943.01 classifies as a Class D felony criminal damage to property of a witness or juror "by reason of the owner's having attended or testified as a witness or by reason of any verdict or indictment assented to by him"; under other circumstances criminal damage to property may be a misdemeanor. Section 943.015 classifies as a Class D felony criminal damage to the property of a revenue official or his or her family "in response to any action taken in an official capacity" by that official.

As amicus Cook County correctly observed in its brief in support of certiorari, the decision below calls into question the constitutionality of almost all state criminal statutes.

> Virtually the entire Illinois criminal code, as in other jurisdictions, relies on proof of intent (indeed, this element of proof operates for the protection of those who commit acts without *mens rea.*) With specific intent crimes, the State must prove that an individual does an act with a further object. Under each of these statutes, the State must prove beyond a reasonable doubt the thought process of the offender . . . .[22]

Under Wisconsin law, for example, a defendant can be shown to have acted intentionally if the state proves he or she acted with "a purpose to do the thing." (Wis. Stat. § 939.23(3)). Conversely, a defendant must be exonerated under certain circumstances if he or she can show that he or she acted "for the purpose of preventing or terminating"

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[22] Brief Amicus Curiae Cook County, Illinois, in Support of Petitioners, pp.10-11 (emphasis in original; footnote omitted.)

unlawful interference with his or her person or property. (Wis. Stat. §§ 939.48, 939.49) In Wisconsin, as in every other state, there are numerous criminal provisions which, like the provisions of Title 18 noted above, require proof that a defendant acted with a particular purpose. See, e.g., Wis. Stat. §943.10 (burglary requires proof of both unlawful entry and a purpose of stealing or committing a felony).

The decision below is also inconsistent with widely utilized sentencing practices and statutes. Until now the motive which prompted a defendant to commit a crime was regarded as an important consideration in determining his or her sentence. W. LaFave and A. Scott, Jr., *Criminal Law* 208 (1972). Thus it was hitherto thought sensible to impose a greater sentence for a burglary if the crime was committed to acquire funds to finance a bank robbery. Numerous capital punishment laws list among the statutory aggravating factors a motive deemed particularly heinous, such as murders committed to avoid arrest,[23] to prevent

[23] See, e.g., *Stringer v. Black*, 117 L.Ed. 2d 367,375 (1992).

testimony,[24] or for pecuniary gain.[25] Under the latter type of statute, where two murderers committed identical acts, and both subsequently filed claims for the life insurance of their victims, they might receive different sentences if one murderer merely knew that he would receive the insurance payment while the other was actually motivated by that fact.[26]

Of course a defendant in any criminal case might seek to win a reduced sentence by proving that he had acted out of a sympathetic motive, such as a desire to feed his children. But if, as the court below suggests, the First Amendment bars enhancement of a sentence because of a heinous motive, it must also bar reduction of a sentence on the basis of a more benign motives. A statutory scheme

[24] See, e.g., *Blystone v. Pennsylvania*, 494 U.S. 299, 310 n. 1 (Brennan, J., dissenting) (1990).

[25] See, e.g., *Lewis v. Jeffers*, 111 L.Ed. 2d 606,615 n. 1 (1990).

[26] Note, "Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes", 101 *Col. L.Rev.* 178, 192-93 (1992), *citing State v. Madsen*, 609 P.2d 1046, 1053 (Ariz. 1980), *cert. denied*, 449 U.S. 873 (1980).

which reduced sentences upon proof of a benign motive would be difficult to distinguish in practice from a scheme which increased sentences for non-benign motives. Under either system a criminal who stole for a noxious purpose would receive a heavier sentence than one who stole for more understandable though still illegal reasons. Under a statute authorizing lenity for benign motives, the prosecution would be entitled to seek to rebut a claim of benign motive by showing, for example, that the defendant in fact acted out of racial animus. Cf. *Payne v. Tennessee*, 115 L. Ed. 2d 720 (1991). The First Amendment argument advanced by the defendant in the instant case could severely limit the ability of defendants to adduce mitigating evidence in other instances.[27]

[27] The First Amendment cannot preclude a state from considering such mitigating evidence, because in capital cases, at least, the states are required to consider *all* mitigating circumstances. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

Apparently recognizing the tension between its reasoning and longstanding sentencing practices, the court below added:

> 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. (Pet. App. A17 n. 17)

This purported distinction undermines the lower court's entire analysis. If a sentencing *judge* could impose a heavier sentence on a defendant who acted with a racial motive, it is difficult to see the constitutional defect in a *statute* which merely authorized that very practice.

If the decision below is correct, it is difficult to see how this Court could uphold the constitutionality of Title VII or any other federal, state or local civil rights law. Title VII, like 42 U.S.C. §1981, prohibits invidiously motivated discriminatory employment practices, and compensatory and punitive damages are available under Title VII *only* for acts of intentional discrimination. 42 U.S.C. §1981a (1992 Supp.)

The court below suggested that Title VII is distinguishable from the statute at issue in this case, asserting that Title VII prohibits a "discriminatory act", while section 939.645 assertedly punishes not "an act" but "a mental process." (Pet. App. A20). Under Section 939.645, it asserted,

> [t]he 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.

(Pet. App. A20) This pivotal passage in the decision below is virtually unintelligible. Selection decisions by an employer are not different from selection decisions by a mugger. In the case of a Title VII violation, an employer, having decided that its employment needs require the hiring, promotion, demotion or dismissal of an employee, selects on the basis of race or another forbidden criterion the employee to be so treated. If a Wisconsin employer launched a campaign of racial harassment that included

physical beatings, those beatings would violate both Title VII and section 393.645. It is difficult to see how under such circumstances the application of Title VII could be valid if the application of section 393.645 to the same act for the same reasons would violate the First Amendment.

The decision below suggests that Title VII might be saved from invalidity if its proposed constitutional analysis were limited to criminal statutes. The introduction of a generally lower level of First Amendment scrutiny in non-criminal cases, however, would be a largely unprecedented and dangerously far reaching change. The seminal decision in *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964), turned on the application to civil libel claims of principles that had been first established in a criminal law context. Unquestionably the $1.25 million damage award overturned in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which would have literally destroyed the NAACP, was substantially more serious than the five day jail term upheld in *Walker v. Birmingham*, 388 U.S. 307 (1967). A more

stringent level of scrutiny for sentencing statutes would as a practical matter mean that the small number of individuals who commit serious criminal acts would enjoy more constitutional protection than the far larger group of law abiding citizens.

The notion that the First Amendment precludes consideration of whether a person acted with a discriminatory motive is refuted by the very language of the Constitution itself. The Fifteenth Amendment prohibits denial of the right to vote "on account of race," and the Nineteenth Amendment forbids denial of the franchise "on account of sex." A court asked to enforce either of these constitutional provisions, in the absence of a facially discriminatory law or practice, would have to inquire into the motives of the officials at issue. Indeed, the free speech guarantee of the First Amendment itself requires at times that the courts inquire whether a disputed official action was motivated by a desire to suppress speech. *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1988). It would be

paradoxical if the First Amendment prohibited a court from inquiring into, or providing a remedy for, a violation of the First Amendment itself. Equally importantly, the Fourteenth Amendment precludes government officials from making selection or other decisions on the basis of race. *Washington v. Davis*, 426 U.S. 229 (1976). If the prosecutor in this case had invoked section 939.645 because of hostility to black defendants, or out of special solicitude for white victims, such an application of that section would have violated the Fourteenth Amendment. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

Apparently acknowledging that the criminal law can consider the intent of a defendant, the court below asserts that section 393.645 is invalid because it deals not with intent but with motive. For this genuinely revolutionary change in First Amendment and criminal jurisprudence, the court below relied primarily on an entry in *Black's Law Dictionary*, insisting that the distinction between intent and motive is "crucial." (Pet. App. A11 n. 11). The First

Amendment, however, was not adopted to codify the views of the editors of this or any other dictionary.[28] Other authorities maintain that motive is often an essential element of a crime,[29] that the distinction between intent and motive is purely semantic,[30] and that intent includes any motive which the legislature has required the prosecution to prove.[31] This Court's decision in *Screws v. United States*, 325 U.S. 91 (1945), used the terms motive and intent interchangeably. The more recent and at times arcane academic debate about the meaning of and relationship between intent and motive cannot provide a basis for any constitutional distinction.

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[28] The distinction between motive and intent in *Black's Law Dictionary* is not made, for example, in B. Garner, *A Dictionary of Modern Legal Usage* (1987).

[29] Hitchler, "Motive As An Essential Element of Crime," 35 *Dick.L.Rev.* 105 (1931).

[30] W. LaFave and A. Scott, Jr., *Criminal Law* 204 (1972).

[31] Note, "Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes," 101 *Col. L.Rev.* 178, 190 (1993); see also W. Cook, "Act, Intention and Motive in the Criminal Law," 26 *Yale L.J.* 645, 661 (1917) ("*motive* is merely a name for a certain kind of desire and intention").

III. SECTION 939.645 SERVES IMPORTANT STATE INTERESTS

This Court has repeatedly recognized that there is a vital governmental interest in preventing acts of discrimination.

> [T]he State's strong historical commitment to eliminating discrimination . . . plainly serves compelling state interests of the highest order. . . . .[D]iscrimination . . . deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

Roberts v. United States Jaycees, 468 U.S. 609, 624-25 (1984). *R.A.V. v. St. Paul* recognized that the states have a compelling interest in ensuring "the basic human rights of members of groups that have historically been subjected to discrimination." 120 L. Ed. 2d at 325. We set out in Appendix A the most recent FBI report on bias related crimes.

The states have a particularly important interest in preventing criminal conduct targeted on the basis of, or inflicted because of, a victim's race, religion, or other group characteristic. Bias related crimes inflict on the victim an

injury wholly different in kind from the physical or financial harm caused by ordinary criminal conduct. Such crimes are an attack on the right of the victim to participate equally, if at all, in American society, and can inflict serious and long lasting injury to the dignity of the victim.[32] Such attacks are likely to induce in the victims a sense of separation from and rejection by the larger community "that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). Fear of such attacks is likely to terrorize members of the racial, religious, or other targeted group in a manner entirely unlike fear of ordinary random crime. It is for that reason that the investigation of organized attacks of this type are conducted under the Domestic Counterterrorism Program of the Federal Bureau of Investigation.[33]

[32] *People v. Grupe*, 532 N.Y.S. 2d 815, 820, 141 Misc. 2d 6 (N.Y.Crim. Ct. 1988) ("bias-related violence [causes] emotional as well as physical scars.")

[33] F. Clarke, "Hate Violence in the United States", *FBI Law Enforcement Bulletin*, 14, 15 (January 1991.)

Crimes targeted at particular groups are likely to deter members of the victimized group from engaging in constitutionally or legally protected activities. The somewhat sparse legislative history of the Wisconsin law indicates that the state was particularly concerned with incidents of this sort. The sponsor[34] and supporters of the Wisconsin legislation pointed to three types of such protected activities which had been the focus of crimes targeted at particular groups.

First, they cited a highly publicized incident in which the home of a black resident in a predominantly white Milwaukee suburb had been vandalized.[35] One witness

[34] We set out in Appendix B the statement issued by the sponsor of section 939.645 when it was introduced.

[35] Statement of State Senator Mordecai Lee, Senate Judiciary Committee Public Hearing on SB 442, January 7, 1988 ("Racial epithets were recently spray-painted on the home of a new black resident in the Milwaukee suburb or Brown Deer."); *Milwaukee Community Journal*, Nov. 18, 1987 (incidents the bill would cover include one in which "a Black woman living in Brown Deer returned to her home to find racist epithets scrawled on her door.") *Wisconsin State Journal*, January 8, 1988 ("The bill was motivated by such incidents as . . . the recent spray painting of racist slogans on a home bought by a black woman in the Milwaukee suburb of Brown Deer . . . .").

observed that such crimes obstructed Wisconsin's open housing law:

> Enactment of this legislation will further protect persons who exercise their right to live peacefully anywhere by greatly enhancing the punishment for criminal acts prompted by the race of the target or the target's property.[36]

This is the same concern which prompted Congress in 1988 to amend Title VIII to prohibit race based crimes connected with the ownership or rental of housing. See 42 U.S.C. §3631.

Second, supporters of the legislation pointed to criminal attacks against racial and religious minorities that had occurred on Wisconsin college campuses. In one repeatedly cited incident, members of an all-white fraternity at the University of Wisconsin-Madison had assaulted an African-American and a Jewish member of another

[36] Statement of Robert H. Friebert on Hate Crimes Bill, January 7, 1988, p.3.

fraternity while screaming racial and religious epithets.[37] This concern was consistent with a 1990 Minnesota Police Study that noted a serious upsurge in bias related attacks on campuses.[38] These incidents had become a major factor in

[37] Statement of State Senator Mordecai Lee, Senate Judiciary Committee Public Hearing on SB 442, January 7, 1988 (fraternity members "were assaulted in an incident in which anti-semitic and anti-black hostilities were expressed"); *Milwaukee Community Journal*, November 18, 1987 (bill would address recent assault on fraternity members "during which anti-Semitic and anti-Black hostilities were expressed."); Testimony in Support of AB 599 of Nancy Weisenberg, January 14, 1988. p. 2 (fraternity assault demonstrates need for legislation.) This assault is also discussed in articles in *The Defender* (November 9, 1987), *The Capitol Times* (December 19, 1987; December 21, 1987), and *The Milwaukee Journal* (November 1, 1987; November 4, 1987.) Other incidents of campus violence directed at minority groups are discussed in *The Milwaukee Journal*, May 6, 1987, and *The Guardian*, December 7, 1988.

[38] Minnesota Board of Peace Officer Standards and Training, *Bias Motivated Crimes* (1990):

> "The incidence of hate violence . . . on college campuses has dramatically increased . . . United States Justice Department figures show that the number of school-related, racial incidents investigated by the department increased by almost 50 percent in 1988. . . . Over the past several years, American Colleges and Universities have experienced a disquieting resurgence of racial and ethnic intolerance-most notably bias-related violence. . . . A 1987 study of ethnoviolence on campus . . . reported bias-motivated incidents on seventy campuses across the U.S."

Pp. 11-14. See C. Clay, "Campus Racial Tensions: Trend or Aberration?", *Thought and Education, the NEA Education Journal*,

deterring minority students from attending the University of Wisconsin at Madison.[39] It was particularly important that Wisconsin deal effectively with such on-campus discrimination, because racial incidents which deterred minorities from attending a college, or which created a hostile educational atmosphere, would place the university in violation of Title VI of the 1964 Civil Rights Act, and could lead to a termination of all federal financial assistance to the school. Cf. 29 C.F.R. §1604.11.

Third, supporters of the legislation expressed concern about a series of incidents in which buildings used for religious activities had been vandalized because of the

V(1) (Spring, 1990), pp. 21-36; L. Guydon, "Racial Turmoil Rising on U.S. Campuses", *Pittsburgh Post-Gazette*, May 11, 1989; C. Leatherman, "More Anti-Semitism is Being Reported on Campuses, But Educators Disagree on How To Respond To It," *Chronicle of Higher Education*, February 7, 1990, pp. A39-A40; National Institute Against Prejudice and Violence, *Ethnoviolence on Campus: The UMBC Study*, (1987); K. Stern, *Bigotry on Campus: A Planned Response* (1990).

[39] R. Jones, "Racist Incidents Hurt UW Recruiting Efforts", *Milwaukee Journal*, November 1, 1987.

religion of the congregants.[40] Congressional concern about similar incidents nationally led to the enactment in 1988 of 42 U.S.C. §247, which prohibits damage to religious property "because of the religious character of that property."

The states also have a vital interest in eradicating crimes targeted at distinct racial, religious or other groups because of the grave and unique danger that this particular category of crime will lead to further criminal acts. The example of one bias related crime is all too likely to trigger other similar attacks against the same victimized groups. Although racial, religious and other biases remain regrettably common in our society, few people who harbor such views ordinarily vent their biases through criminal acts. One such incident, however, may easily set an example that other individuals will follow. Equally seriously, even a single highly publicized incident can pose a grave risk that

[40] Statement by State Senator Mordecai Lee, Senate Judiciary Committee Public Hearing on SB 442, January 7, 1988; *Wisconsin Jewish Chronicle*, January 15, 1988; Statement of Robert H. Friebert on Hate Crimes Bill, January 7, 1988, p. 1; *Wisconsin State Journal*, January 8, 1988; Testimony of Nancy Weisenberg in Support of AB 599, January 14, 1988, p. 2.

retaliatory crimes will be committed against a victim of the same race, religion or ancestry as the original perpetrator. "Assaultive behavior motivated by bigotry . . . readily -- and commonly do[es] -- escalate from individual conflicts to mass disturbances." *People v. Beebe*, 67 Or. App. 738, 680 P.2d 11, 13 (1981).

Most importantly, crimes targeted at a particular racial, religious, or other group threaten, in the words of a recent Attorney General, "to tear apart the moral fabric of our society."[41] The world in which we live reminds us daily of the uniqueness and fragility of the tolerance that is the birthright of every American. From Sarajevo to the Sudan, from the Indian subcontinent to Nagorno-Karabagh, communities and nations are today being torn apart with

[41] Media Release, April 4, 1991. U.S. Department of Justice, Federal Bureau of Investigation, p. 1 (Attorney General Thornburgh.). See also Keynote Address by John R. Dunne, Assistant Attorney General, Civil Rights Division, Before the Anti-Defamation League, October 28, 1992, p. 4 ("I believe that today's 'public enemy no. 1' is not some bank robber or even some drug dealer. In my mind, public enemy no. 1 is that growing mob who commit crimes of hatred, tearing deep holes in the fabric that binds our society together. Their acts subvert our nation's promise of liberty and equality and they must be stopped.").

almost unimaginable ferocity and bloodshed by racial, ethnic, and religious differences. The promise of America is that the peoples who in the Old World nursed generations of hatred will here be able to live, work and prosper peacefully together, respecting and enriched by their differences, black and white, Arab and Jew, Christian and Muslim, Catholic and Protestant, Greek and Turk, Japanese and Chinese, Serb, Croat and Bosnian. It is a promise that brought millions of immigrants to our shores, and which our nation fought a Civil War to keep.

The state of Wisconsin has wisely enacted a variety of civil rights laws to safeguard that national commitment. The state has concluded, as reasonably it might, that in some circumstances the full force of the criminal law should be resorted to. That the state and national governments should deal firmly and effectively with racially and religiously targeted crimes is not merely constitutionally permissible; it is a moral and practical imperative in a nation as diverse as the United States. The First Amendment does not require

Wisconsin to stay its hand until its cities are divided by barricades and its neighborhoods have been devastated by "ethnic cleansing."

IV. ESTABLISHED CONSTITUTIONAL SAFEGUARDS SHOULD ASSURE THAT THE APPLICATION OF SECTION 939.645 IS CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS

(1) The court below argued that section 939.645 is unconstitutional because otherwise protected speech might be introduced in evidence to prove that a defendant selected his victim on the basis of race, etc. (Pet. App. A17-A19) That aspect of the Wisconsin court's decision is plainly inconsistent with this Court's decision in *Dawson v. Delaware*. *Dawson* held that evidence of otherwise protected speech can in fact be introduced, where relevant, in a criminal proceeding. 117 L.Ed. 2d at 316-17. *A fortiori* a criminal prohibition cannot be invalid merely because such evidence might be relevant in a proceeding to enforce that law.

Evidence of statements made by a criminal defendant are routinely introduced at either the guilt or penalty phase of a proceeding. Remarks by a defendant that he intends to commit a crime, such as "I am going to kill her"[42] or "I am going to pick up this guy and rob him,"[43] are exceedingly probative. Frequently statements by a defendant, such as threats of violence[44] or the offer of a bribe,[45] are part of the crime itself. Confessions[46] and implausible denials[47] may and often are introduced in evidence.

The existing decisions of this Court, if adhered to in the implementation of section 939.645, should be sufficient

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[42] *Lewis v. Jeffers*, 111 L.Ed. 2d 606,614 (1990).

[43] *Blystone v. Pennsylvania*, 494 U.S. 299, 301 (1990); see also *Sawyer v. Smith*, 111 L.Ed. 2d 193, 203 (1990) (defendant explained his actions were intended to show "just how cruel he could be"); *Stanford v. Kentucky*, 492 U.S. 361, 366 (1989)(defendant proposed to kill "whoever was behind the counter" because "a dead person can't talk"); *Thompson v. Oklahoma*, 487 U.S. 815, 860 (1988)(Scalia, J., dissenting)("We're going to kill Charles.")

[44] *Williams v. United States*, 117 L.Ed. 2d 341, 351 (1992).

[45] *Evans v. United States*, 119 L.Ed. 2d 57,65 (1992).

[46] *Illinois v. Perkins*, 110 L.Ed. 2d 243, 252 (1990).

[47] *Estelle v. McGuire*, 116 L.Ed. 2d 385, 394 (1991).

to prevent that provision from being abused. Where a defendant was engaged in the types of political activity that lie at the core of First Amendment values, a state must with exactitude distinguish between protected activities and activities which are unlawful. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). "[T]here must be 'clear proof that a defendant "specifically intend[s] to accomplish [his or her aims] by resort to" ' " criminal conduct. *Id.* at 919. "[T]his intent must be judged 'according to the strictest law,' for 'otherwise there is a danger that one in sympathy with . . . legitimate aims . . . but not specifically intending to accomplish them by resort to [unlawful conduct], might be punished for his adherence to lawful and constitutionally protected purposes . . . .'" *Id.* The appellate courts have a constitutional responsibility to conduct an independent examination to ascertain a statute has been constitutionally applied. *Id.* at 915 n. 50.

The likelihood that section 939.645 would have any significant chilling effect is remote. In order to be subject

to the Wisconsin statute, a defendant must first have committed a separate criminal offense. Thus, section 939.645 by its very nature could not have a deterrent effect on anyone except an individual who already contemplates committing a crime. The number of such individuals is of course small in comparison with the total population, and criminals as a group are virtually by definition not easily deterred by fear of criminal sanctions.

Were a prosecutor to offer evidence of statements on racial or religious issues in an attempt to prove the *guilt* of a defendant, the First Amendment problems would be more serious. Even individuals who had committed no crime, and had no intent to do so, could legitimately be deterred from making statements which might result in an indictment and trial. The First Amendment has long been understood to bar prosecution for impassioned and inflammatory statements that fell short of a call for imminent lawless action; the use of those same statements to prove complicity in a non-speech crime could raise similar constitutional

issues. *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 924-930. As a practical matter, generalized statements reflecting racial or religious bigotry, although quite probative in a Title VII case, would be worth significantly less in a case in which a plaintiff or prosecutor alleged a defendant had engaged in violent conduct. At the height of Jim Crow, when most of the white population of the South was biased against African Americans and practiced discrimination in virtually all aspects of their lives, only a relatively small number of individuals resorted to violence to preserve segregation. In our own era, although lingering racial and religious prejudices and stereotyping remain all too common, most Americans who still entertain such views do not express them through assault, murder, or acts of terrorism. For that reason, evidence of a defendant's statements regarding racial or religious issues may only be adduced to demonstrate guilt of a crime where there is a nexus between those statements and criminal activity. See, e.g., *Barclay v.*

Florida, 463 U.S. 939 (1983); *United States v. Mills*, 704 F.2d 1553, 1558-60 (11th Cir. 1983).

(2) In determining whether to admit into evidence statements made by a defendant which reveal racial or religious bias, a court must weigh the probative value of the evidence against its potential to unfairly prejudice a jury against that defendant. See Rule 403, Fed. R. Evid. That risk is obviously particularly great where a jury is composed largely or exclusively of members of the group against which the defendant has made biased statements. Under some circumstances the admission of inflammatory evidence of little or no relevance would violate the Due Process Clause. *Payne v. Tennessee*, 115 L. Ed. 2d 720, 739-40 (O'Connor, J., concurring), 743 (Souter, J., concurring) (1991).

(3) Although section 939.645 could literally be applied to a defendant who selected as his victim a member of his own race or religion, as a practical matter most applications of the Wisconsin law will involve crimes committed by a member of one racial or religious group

against a member of another. The states are free to impose an enhanced penalty where a victim was chosen on the basis of race, or where a crime was racially motivated, but the states may not impose such an enhanced penalty merely because the perpetrator and victim were of different races or different faiths. A state may not inflict an enhanced penalty because of the race of a victim, *McCleskey v. Kemp*, 481 U.S. 279, 292 n. 8 (1987), or because of the race of the perpetrator. 18 U.S.C. §242. *McCleskey* makes clear that a state could not, for example, impose a greater sentence on blacks who kill whites than on whites who kill blacks. Such enhanced penalties for inter-racial crimes were one of the evils of the Slave Codes and Black Codes which the Fourteenth Amendment was adopted to end.

The rule in *McCleskey* would be entirely eviscerated if under section 939.645 a jury were permitted to infer that a victim had been selected on the basis of race from the mere fact that the perpetrator and victim were of different races. The quantum of additional evidence necessary to

justify submitting a section 939.645 issue to a jury should be great enough to exclude *most* interracial crimes, and thus "genuinely narro[w]" the law. *Barclay v. Florida*, 463 U.S. 939, 960 (1983). The Wisconsin courts appear to construe section 939.645 to require substantially more than that a perpetrator and victim were of different races or religions. (Pet. App. A43, A108.)

(4) In the instant case the Wisconsin law requires the state to prove beyond a reasonable doubt that a victim was chosen on the basis of race or religion, and the jury was so instructed. By placing this burden on the prosecution, Wisconsin has materially reduced the danger that section 939.645 might be applied under circumstances which would violate the First or Fourteenth Amendments. The necessity of finding race or religion based victim selection beyond a reasonable doubt makes it less likely that a jury would apply the section on the basis of statements of little direct relevance, or of evidence consisting primarily of the fact that

the perpetrator and victim belonged to different religious or racial groups.

Many states deal have chosen to deal with the problem addressed by section 939.645 by providing that a separate crime occurs where a perpetrator selects his a victim, or commits a crime, on the basis of race or religion. Where state law defines this conduct as constituting a distinct crime, a number of constitutional safeguards apply, including a requirement of proof beyond a reasonable doubt. Although the states enjoy considerable leeway in deciding whether to treat motive or conduct as an additional crime, or as a factor in sentencing, at some point a sentence enhancement could be so great as to require application of the constitutional safeguards applicable to proof of a distinct crime, including proof beyond a reasonable doubt that the greater sentence should be imposed. In the instant case section 939.645 increases the maximum permissible sentence for aggravated battery, the crime of which Mitchell was convicted, from two to five years, and Mitchell was in fact

sentenced to four years in jail. Since Wisconsin law itself required the prosecution to establish beyond a reasonable doubt the applicability of section 939.645, there is no need for the Court to determine in this case whether the Due Process Clause itself required the prosecution to do so.

CONCLUSION

For the above reasons, the decision of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

ELAINE R. JONES
ERIC SCHNAPPER
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

SAMUEL RABINOVE
RICHARD T. FOLTIN
KENNETH S. STERN
The American Jewish Committee
165 East 56th Street
New York, New York 10002
(212) 751-4000

Counsel for Amici

APPENDIX

APPENDIX A

JANUARY 1993 FBI HATE CRIME STATISTICS

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

FOR IMMEDIATE RELEASE

Director William S. Sessions today released the first data available from the FBI's statistical program on hate crimes. The program was initiated in response to the Hate Crime Statistics Act of 1990 and is being implemented by law enforcement agencies across the Nation. "While these initial data are limited," commented Director Sessions, "they give us our first assessment of the nature of crimes motivated by bias in our society." The data cover calendar year 1991 and were supplied by nearly 3,000 law enforcement agencies in 32 states. Hate crime occurrences were recorded by 27 percent of the 2,771 agencies participating; the remainder reported no such offenses came to their attention.

A total of 4,558 hate crime incidents involving 4,755 offenses were reported in 1991. Among the offenses measured, intimidation was the most frequently reported hate crime, accounting for 1 of 3 offenses. Following were destruction/damage/vandalism of property, 27 percent; simple assault, 17 percent; aggravated assault, 16 percent; and robbery, 3 percent. The remaining offense types; murder, forcible rape, burglary, larceny-theft, motor vehicle theft, and arson; each accounted for 1 percent or less of the total.

Racial bias motivated 6 of 10 offenses reported; religious bias, 2 of 10; and ethnic and sexual-orientation bias, each 1 of 10. Among the specific bias types, anti-black offenses accounted for the highest percentage, 36 percent of the total. Anti-white and anti-Jewish motivations followed with 19 and 17 percent, respectively.

Information concerning the offenders was unknown for 43 percent of the incidents reported. Considering incidents for which suspected race of the offender was

reported, 65 percent of the hate crimes were committed by whites, 30 percent by blacks, and 2 percent by persons of other races. The remainder of the incidents were committed by groups of offenders not all of the same race.

The accompanying tables provide specific hate crime data. A more comprehensive report is planned for the spring of 1993.

Hate Crime Offense Codes Reported, 1991

	Number	Percent*
Murder	12	0.3
Forcible Rape	7	0.1
Robbery	119	2.5
Aggravated Assault	773	16.3
Burglary	56	1.2
Larceny-theft	22	0.5
Motor Vehicle Theft	0	0.0
Arson	55	1.2
Simple Assault	796	16.7
Intimidation	1,614	33.9
Destruction/Damage/ Vandalism of Property	1,301	27.4
Total Number of Offense Types	4,755	100.0

*Because of rounding, percentages do not add to total.

Hate Crime Bias-Motivations Reported 1991

Bias-Motivation	Number	Percent*
Race	2,963	62.3
Anti-White	888	18.7
Anti-Black	1,689	35.5
Anti-American Indian/ Alaskan Native	11	0.2
Anti-Asian/Pacific Islander	287	6.0
Anti-Multi-Racial Group	88	1.9
Ethnicity	450	9.5
Anti-Hispanic	242	5.1
Anti-Other Ethnicity/ National Origin	208	4.4
Religion	917	19.3
Anti-Jewish	792	16.7
Anti-Catholic	23	0.5
Anti-Protestant	26	0.5
Anti-Islamic (Moslem)	10	0.2
Anti-Other Religion	51	1.1
Anti-Multi-Religious Group	11	0.2
Anti-Atheism/Agnosticism/ etc.	4	0.1
Sexual Orientation	425	8.9
Anti-Homosexual	421	8.9
Anti-Heterosexual	3	0.1
Anti-Bisexual	1	0.0
Total	4,755	100.0

*Because of rounding, percentages may not add to totals.

Suspected Race of Offenders in Hate Crimes, 1991

Suspected Race of Offender	Number of Incidents	Percent
White	1,679	36.8
Black	769	16.9
American Indian/ Alaskan Native	12	0.3
Asian/Pacific Islander	47	1.0
Multi-racial group	77	1.7
Unknown	1,974	43.3
Total Incidents	4,558*	100.0

*A single incident may involve more than one offense.

Agency Participation in Hate Crime Reporting, 1991

State	Agencies Participating*	Incidents Reported
ARIZONA	1	48
ARKANSAS	169	10
CALIFORNIA	2	5
COLORADO	194	128
CONNECTICUT	29	69
DELAWARE	58	29
GEORGIA	2	23
IDAHO	98	33
ILLINOIS	26	133
INDIANA	1	0
IOWA	201	89
KANSAS	3	6
KENTUCKY	1	0
LOUISIANA	6	0
MARYLAND	156	431
MASSACHUSETTS	30	200
MINNESOTA	42	225
MISSISSIPPI	4	1
MISSOURI	18	136
NEVADA	1	16
NEW JERSEY	271	895
NEW MEXICO	1	0
NEW YORK	773	943
OHIO	30	80
OKLAHOMA	7	99
OREGON	39	296
PENNSYLVANIA	50	277
TENNESSEE	2	1
TEXAS	28	95
VIRGINIA	19	53
WASHINGTON	206	196
WISCONSIN	303	41
Total	2,771	4,558

*Includes agencies participating in Program whether or not any incidents were experienced.

APPENDIX B

STATEMENT OF SPONSOR OF SECTION 939.645

[Letterhead Omitted]

STATEMENT BY STATE SENATOR MORDECAI LEE
SENATE JUDICIARY COMMITTEE PUBLIC HEARING ON SB 442
JANUARY 7, 1988

One of the great lessons of history is that a system of government or justice is only as good as its ability to protect the rights of the minority. Right now there seems to be an increase in the incidence of crimes that are motivated by religious or social hatred, known as 'hate crimes.' I believe we need to keep our history lessons in mind and change Wisconsin's laws to address the problem of hate crimes.

Racial epithets were recently spray-painted on the home of a new black resident in the Milwaukee suburb of Brown Deer. Swastikas were painted on a synagogue in

Ozaukee County. Catholics were harassed by a group called the 'Alamo Foundation,' and here in Madison members of a Jewish fraternity were assaulted in an incident in which anti-semitic and anti-black hostilities were expressed.

Representative Louis Fortis and I introduced Senate Bill 442 at the request of a broad coalition of organizations, including Christian, Jewish, black, disabled and Native American groups. This bill is one step toward combatting these far-reaching and intimidating crimes.

Senate Bill 442 proposes additional criminal penalties when an offense is proven to have been motivated by religious or social bias. Secondly, it creates a new category of criminal damage to property when such property is a church, synagogue, cemetery, ethnic center or 'venerated object,' a term I hope will be added to the bill in a clarifying amendment. Finally, the bill gives victims of hate crimes more opportunities for civil actions against persons who commit such crimes.

Fifteen other states, including Ohio and Illinois, have recognized the need to enhance penalties for hate crimes. It's important to remember that the victims of hate crimes extend far beyond the direct victims of a racially or socially biased assault or act of vandalism. Entire communities become the victims, and I fear we're seeing this kind of thing more and more often.

I hope that you'll agree to address the problem of hate crimes and support this bill.