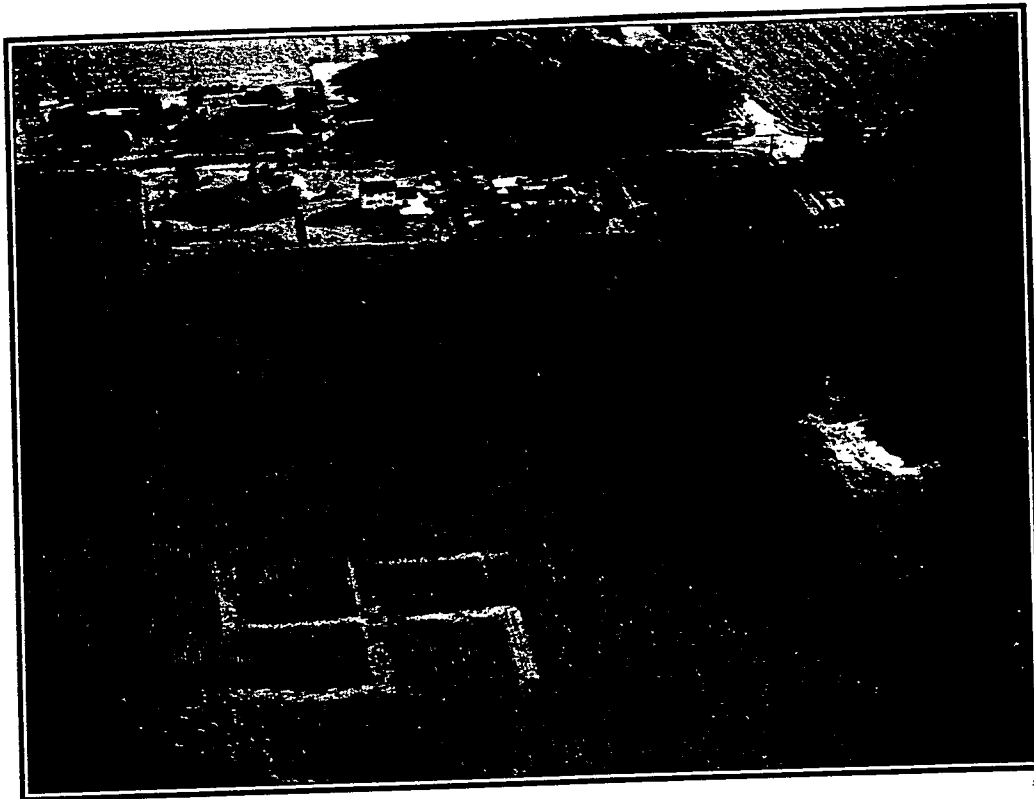

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A swastika in a cornfield, Washington Township, Mercer County, N.J., July 10, 1998

ILLEGAL THOUGHTS

Hate speech, hate crime and the First Amendment

HARVEY A. SILVERGLATE

AUTHOR GEORGE ORWELL UNDERstood the dangers of punishing "bad thoughts" more clearly than most of us do. "Most of us" includes a large and increasingly vocal and effective coalition of often well-meaning civil-rights activists, legislators, politicians, editorialists and journalists, lawyers, academics and "group rights" advocates intent on reformulating our legal codes according to a double standard: that the victimization of certain citizens, based on the perpetrator's point of view, should bring enhanced punishment.

This move toward penalizing certain points of view that motivate selective attacks—dubbed "hate crimes"—has taken root in our legal system despite the First Amendment, which purportedly protects one's viewpoint as well as the intellect and conscience that inform and determine that viewpoint. The U.S. Supreme Court has authorized enhanced penalties for hate

crimes even though it has found "hate speech" to be constitutionally protected. One wonders why this action does not as well violate the 14th Amendment, which, after a bloody Civil War, finally promised all Americans "the equal protection of the laws."

In a society that values legal equality, can some victims' pain, and even their lives, be worth more than others'? Does, and indeed should, the Constitution allow prosecutions and enhanced penalties that hinge upon the victim's group identity and the offender's belief system?

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THE LEGAL MOVEMENT to penalize hateful thoughts and words has adopted three major methods: hate-speech codes, harassment codes and hate-crimes prosecution.

First, on college campuses, came prohibitions on speech that might insult or discomfort members of "historically disadvantaged groups." Proponents of speech codes justified the restrictions on academic freedom and the First Amendment (which binds public institutions only) by claiming they would "level the playing field" for people previously excluded or marginalized based on gender, race or sexual orientation. This neo-Marxian prescription for achieving equality by allocating speech rights unequally gained a considerable academic following in the early 1980s.

However, when the first three court tests invalidated speech codes at the University of Wisconsin, the University of Michigan and Stanford University (where an unusual state statute extended First Amendment protections to private institutions), proponents of punishing hate speech adopted a new and remarkably successful technique. Purporting to give up on "hate-speech codes," they instead promulgated "harassment codes." Harassment included not only the traditional types of proscribable annoying behavior but also pure speech that "harassed" by creating a "hostile educational environment" for members of historically disadvantaged groups. Suddenly, to call a student an epithet, to disparage her race or gender, or merely to say something disturbing was not simply offensive but "harassment." Thus, the campus hate-speech battles of the 1980s continued, albeit under a different guise, in the 1990s and now into the new century. They test whether public institutions can evade academic freedom and free-speech guarantees simply by substituting "harassment" for "hate-speech."

The movement to limit free speech in the name of a more "comfortable" and "welcoming" environment did not stay confined within ivy walls for long. Trends beginning in higher education eventually find their way into the greater society. With substantial government encouragement and heavy-handed coercion, private industry began to adopt workplace harassment rules that barred not only acts making minority workers' lives miserable but also words creating a "hostile work environment." Litigation has burgeoned over this backdoor effort to regulate speech in the workplace—speech that is constitutionally protected on the street from government interference. In the

courts, the workplace speech restrictions have fared better than the campus restrictions, in part because courts have traditionally protected academic freedom beyond any other applicable constitutional rights.

THE MOVEMENT TO RESTRICT AND punish speech based on its perceived hate content has been most successful in an entirely different realm: criminal law. Hate-crimes statutes have, surprisingly, sidestepped the First Amendment arguments that derailed the campus speech codes and enmeshed campus and workplace "harassment" codes in seemingly endless litigation.

In a society that values legal equality, can some victims' pain, and even their lives, be worth more than others'?

Under the guise of punishing hate crimes, the legal system now penalizes one's views, one's words, one's reading habits, one's associations and indeed one's very thoughts. Because the distinction lies in the perpetrator's perceived hateful views and words, hate-crime laws provide a backdoor way to punish views and words that, in the absence of an associated crime, would qualify as constitutionally protected expression. In other words, once someone breaks the law, he exposes himself to additional punishment for his beliefs and words.

The movement's triumph is clear in the juxtaposition of two seminal Supreme Court cases decided one year apart, in starkly opposite (and some would say inconsistent) directions. This remarkable pair of cases tells us an enormous amount about the direction and likely future of hate-speech and hate-crimes enforcement in real-world, nonacademic settings.

In the first, *R.A.V. v. City of St. Paul* (1992), the Supreme Court ripped the heart out of the effort to penalize the mere utterance of "bad" speech, no matter how hateful (e.g., burning a cross on a black family's property). For the half century preceding this unanimous decision, the court had ruled on a wide variety of unpopular speech, establishing a First Amendment framework protecting speech that was violently anti-Semitic (*Terminiello v. Chicago*, 1949); cursed and torched the American flag (*Street v. New York*, 1969); was pornographic (*Miller v. California*, 1973); advocated violence against blacks and Jews (*Brandenburg v. Ohio*, 1969); was grossly disrespectful and offensive—a vulgar reference to conscription on a jacket worn in a courthouse (*Cohen v. California*, 1971); intentionally induced emotional distress (*Hustler Magazine v. Falwell*, 1988); and advocated the violent overthrow of the government (*Sweezy v. New Hampshire*, 1957).

YET THE *R.A.V.* HATE-SPEECH CASE was remarkable not only for the hateful expression protected and its expansive definition of "expression" but also because of the court's theory in invalidating what it viewed as an impermissible governmental effort: singling out "hate speech" for punishment but not other speech that enjoyed official approbation. In *R.A.V.*, the court addressed a municipal ordinance that made it a crime to place "on public or private property a symbol ... 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."

Justice Antonin Scalia wrote for himself and four other concurring justices that even if cross-burning might be a proscribable category of speech, the ordinance was invalid because it singled out a category based upon its viewpoint. In other words, the ordinance might have been valid if it outlawed all speech seen as threatening to others or breaking the peace. However, it punished offensive speech addressing particular subjects, namely race, creed and color. This violated the First Amendment principle that the government, to the extent it can curtail speech at all to serve a compelling governmental interest, may not use the criminal law to protect one point of view and punish its opposite. In one of the opinion's more memorable statements, Scalia wrote: "One could [under St. Paul's ordinance] hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence on the basis of religion."

In other words, the city of St. Paul could not penalize adherents of an officially disfavored viewpoint—here, racism—without similarly limiting those currently deemed to be the good guys. In a battle between perceived anti-racists and racists, to the extent it is fought on the field of expression, the government cannot use the criminal code to tilt the balance in favor of one side.

The *R.A.V.* decision was a victory for the "golden rule" of free-speech doctrine: we must treat others as we would insist upon being treated. "Equal protection under the law" means that we are all protected by, or potential victims of, the same laws. Because the orthodoxy of today may be the unpopular minority viewpoint of tomorrow, all citizens stand to gain in the long run by the equal legal treatment of all points of view.

It was widely assumed that *R.A.V.*, by invalidating attempts to outlaw "hate speech," similarly doomed hate-crimes laws. (In recent years, such statutes have proliferated, and groups such as gays have fought for inclusion as protected categories.)

Remarkably, when one of these sentence-enhanced cases reached the Supreme Court one year after *R.A.V.*, the justices decided—again unanimously—to uphold the statute. The same justices who voted to invalidate St. Paul's hate-speech ordinance in *R.A.V.* voted to affirm the hate-crimes statute in *Wisconsin v. Mitchell* (1993). Mitchell, a black man, had been convicted of racially motivated aggravated battery against a white victim. As such, his sentence was substantially longer than it would have been had he not harbored racist views or had he picked on someone of his own race. Mitchell and his friends had just seen the movie *Mississippi Burning*, about the murder of civil-rights workers, and the attack was deemed to be racial revenge.

The Supreme Court thus upheld a statute to increase the sentence when the defendant "intentionally selects the person against whom the crime ... is committed or selects the property which is damaged or otherwise affected ... because of race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property."

In so doing, the Supreme Court appears to have drawn—for now, anyway—the line between unconstitutional prosecution of hate speech and the permissible prosecution of hate crimes, at least when it comes to sentence enhancement. This attempted solution rests on a seemingly sensible distinction. (The difference between words and actions and between thoughts and actions is useful,

More than 4,000 demonstrators throng New York's Fifth Avenue for a rally in memory of Matthew Shepard, Oct. 19, 1998.

if sometimes blurred.) But it will likely raise a series of First Amendment concerns as we gain more experience with these cases.

For example, in an ordinary assault-and-battery case, the law requires proof only that the defendant committed the crime, that he intended to do so (i.e., it was no accident) and that he was not legally justified (e.g., it was neither legitimate self-defense nor consented to). However, a hate-crimes prosecution adds another element: The state must prove the defendant's motivation was a racial, religious or other proscribed species of hatred. This requires, at least, delving into what the defendant said to his victim or to others that casts light on his motives.

It also requires drawing inferences and conclusions from more troublesome categories of evidence. For example, in an Ohio case, *State v. Wyant* (1992, vacated in 1993, reviewed and remanded in 1994), involving an argument between members of different races over loud music, the defendant had to explain and defend his inner thoughts, feelings and attitudes. He also had to testify about whether and how he had associated with black people in his neighborhood.

In other cases, prosecutors seek to prove bias via the defendant's political affiliations, magazine subscriptions, or the books and magazines found in a home search. Now it is virtually certain that a defendant's Net-surfing habits also will become fodder for inquisitive investigators and prosecutors.

Such a development—while inevitable given prosecutors' need to probe the minds and hearts of defendants to prove motive—would be profoundly unsettling. After all, in the landmark case *Stanley v. Georgia* (1969)—in which police found illegal obscene materials while searching for gambling paraphernalia—the Supreme Court held that the defendant could not be prosecuted for mere possession of such materials in the privacy of his home. The materials were illegal, but the Constitution "recognized the significance of man's spiritual nature, of his feelings and of his intellect," the ruling said.

This realm was not within the state's purview, Justice Thurgood Marshall wrote for the majority: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." The protection of the human mind, heart, intellect and spirit is at the heart of the First Amendment, which equally prohibits the state from stopping a citizen from expressing his views and from forcing him to mouth views in which he does not believe.

The same notion was the basis of a landmark 1943 opinion, *West Virginia Board of Education v. Barnette*, in which the Supreme Court ruled that the state could not force a Jehovah's Witness child to pledge allegiance to the flag in school because the child viewed the flag as a prohibited "graven image."

"If there is any fixed star in our constitutional constellation," Justice Robert Jackson wrote for the majority in one of the most quoted and cited sentences in American jurisprudence, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith" in it. One must remember, too, that this case was decided during World War II, when the nation placed a heavy premium on patriotism.

Can we truly say that this "fixed star in our constitutional constellation" is honored, and the promise of liberty is kept, when the state arrogates to itself the power to delve into the heart and mind to increase the penalty for hatred? Is it not enough, in a free society, to hold citizens accountable for their acts but not for their thoughts?

Understandably, a decent society is revolted when Matthew Shepard is brutally murdered because of his sexual orientation, or when James Byrd Jr. is dragged to a horrible death near Jasper, Texas, because he is black. While the Supreme Court has resisted those who would punish haters based merely on beliefs and words, it has not resisted the pressure to punish "hateful" criminals more severely than more "decent" ones, even when their crimes are objectively the same.

The cost in terms of diminished liberty (of the defendant) and equality (of the victim) incurred in hate-crimes prosecutions might be too high. Any attack on freedom of speech and thought weakens the fabric of the liberty protecting us all. It is called the "golden" rule for a reason.