A PENNY FOR YOUR THOUGHTS: POST-*MITCHELL* HATE CRIME LAWS CONFIRM A MUTATING EFFECT UPON OUR FIRST AMENDMENT AND THE GOVERNMENT'S ROLE IN OUR LIVES

I. INTRODUCTION

> ROPER: So now you'd give the Devil benefit of law!
> MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?
> ROPER: I'd cut down every law in England to do that!
> MORE: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—[do] you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.[1]

Human laws are clumsy and necessarily incomprehensive. It is easy to sympathize with a desire to punish every evil that we presume to perceive. But, living in a world where human laws have reign, subjects must accept, if regrettably, the limited capacity of those laws. Human law has limited capacity because humanity's perception and understanding are restrained. This deficiency necessarily limits the legitimate jurisdiction and purpose of human law.[2] In the same vein,

---

1. ROBERT BOLT, A MAN FOR ALL SEASONS 66 (Vintage Books 1990) (1960).
2. As St. Thomas Aquinas reveals in the SUMMA THEOLOGICA:

> Human law is said to permit certain things, not as approving of them, but as being unable to direct them. And many things are directed by the Divine Law, which human law is unable to direct, because more things are subject to a higher than to a lower cause. Hence the very fact that human law does not meddle with matters it cannot direct, comes under the ordination of the eternal law. It would be different, were human law to sanction what the eternal law condemns. Consequently it does not follow that human law is not derived from the eternal law, but that it is not on a perfect equality with it.

St. Thomas Aquinas concluded that though some vices are condemned by "eternal law"[3] and "Divine Law,"[4] human law lacks legitimate jurisdiction to do so.[5] If human law condemned hatred and everything else that eternal law condemns, then human law would be equal to eternal law, rather than a derivation of it.[6] The Bible teaches that Divine Law condemns hatred,[7] and that it is only God who truly discerns, understands, and tests the ways of the heart.[8]

It is from this basis that one may conclude that human law lacks jurisdiction to govern the human heart. Far beneath the outward appearance of Fallen Man,[9] hidden among the secret affairs of the

---

2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA Pt. I-II, Q. 93, Art. 3, Reply Obj. 3 (Fathers of the English Dominican Province trans., Christian Classics 1981).

3. According to Aquinas,

> [E]ternal law is a type [model] existing in the Divine mind. Therefore it is unknown to all save God alone. . . . So then no one can know the eternal law, as it is in itself, except the blessed who see God in His Essence. But every rational creature knows it in its reflection, greater or less. . . . We cannot know the things that are of God, as they are in themselves; but they are made known to us in their effects. . . .

Id. Q. 93, Art. 2, Obj. 1, 3, Reply Obj. 1.

4. *See id.* Q. 91, Art. 4 (Aquinas explained Divine Law as that part of the eternal law which God made known by special revelation).

5. *Id.*

6. *Id.* Q. 93, Art. 3, Reply Obj. 2.

7. *See Leviticus* 19:17, *Deuteronomy* 19:11, *Matthew* 5:22, *Galatians* 5:20.

8. *See, e.g.*, 1 *Samuel* 16:7 (King James). (". . . for the LORD seeth not as man seeth; for man looketh on the outward appearance, but the LORD looketh on the heart"); 1 *Chronicles* 28:9 (King James). (". . . for the LORD searcheth all hearts, and understandeth all the imaginations of the thoughts . . ."); *Psalms* 7:9 (King James). ("Oh let the wickedness of the wicked come to an end; but establish the just: for the righteous God trieth the hearts and reins."); *Psalms* 44:21 (King James). ("[S]hall not God search this out? For he knoweth the secrets of the heart"): *Psalms* 139:22-24 (King James). ("I hate them with perfect hatred: I count them mine enemies. Search me, O God, and know my heart: try me, and know my thoughts: and see if there be any wicked way in me, and lead me in the way everlasting."); *Jeremiah* 17:9-10 (King James). ("The heart is deceitful above all things, and desperately wicked: who can know it? I the LORD search the heart, I try the reins, even to give every man according to his ways, and according to the fruit of his doings"); *Jeremiah* 20:12 (King James). ("But O LORD of hosts, that triest the righteous, and seest the reins and the heart, let me see thy vengeance on them: for unto thee have I opened my cause"); *Revelation* 2:23 (King James). ("And I will kill her children with death; and all the churches shall know that I am he which searcheth the reins and hearts: and I will give unto every one of you according to your works").

9. *See* FRANCIS A. SCHAEFFER, A CHRISTIAN MANIFESTO 125 (1981) (Christian theologian, Francis Schaeffer, explains, "Man is not basically good, bound only by social,

heart or imagination of the thoughts, is found the womb and residence of *hatred*; and from deep within the tangled complexity of the human mind may it send as a minion, *intent*. But, motives are various, and *intent* serves many masters, some anonymous. And, to further complicate matters, it is possible for Man to falsely portray a motive. The "tangled" complexity of the human mind is distinct from that of a computer chip, which is "ordered" complexity. The active human mind is a twisted, disorderly cyclone of emotion, thought, desire, love, hate, instinct, and urge. *Hatred* sends *intent* as a minion from this cyclone to be judged by Man. This is one scenario where it is appropriate to "punish the messenger," and leave hatred (or whatever it was) to be judged by God. A fine example of this "tangled complexity" is O.J. Simpson's interesting explanation that, "Even if I did do this, it would have to have been because I loved her very much, right?"[10] Which master from deep within the seeming "kaleidoscope mind" in Simpson's hypothetical scenario sent the punishable minion, *intent*? While the Los Angeles jury may punish the minion, it lacks the capacity to seek out and regulate the master. Humanity is not fit for this job. Indeed, Divine Law warns of this dilemma, teaching that, "The heart is deceitful above all things, and desperately wicked: who can know it? I the Lord search the heart, I try the reins, even to give every man according to his ways, and according to the fruit of his doings."[11]

Aquinas summarizes this Scriptural idea when noting multiple reasons for God's revelation of the Divine Law.[12] Among these is a reason peculiarly instructive to the issue of human law proscribing hatred: "man is not competent to judge of interior movements, that

---

economic, and political chains. . . . Man is not intrinsically unselfish, corrupted only by outward circumstances. He is fallen; he is not what he was created to be").

10. Celia Farber, *Whistling in the Dark*, ESQUIRE, Feb. 1998, at 54, 58. (O.J. Simpson, a popular American athlete, was acquitted of a double murder charge in California in 1996).

11. *Jeremiah* 17:9-10 (King James).

12. *See* AQUINAS, *supra* note 2, Q. 91, Art. 4, Obj. 3 at 1005 (Aquinas offered four reasons that Divine law was necessary to direct human conduct: "First, because . . . . man is ordained to an end of eternal happiness. . . . Secondly . . . on account of the uncertainty of human judgment. . . . Thirdly, because . . . man is not competent to judge of interior movements, that are hidden. . . . Fourthly, because . . . human law cannot punish or forbid all evil deeds. . . .").

are hidden . . . ."[13] Though human legislators may not agree as to which laws are actually or properly derived from eternal law, they should at least abide by the principle that what naturally escapes humanity's perception and understanding should likewise escape human law's jurisdiction.

Unfortunately, they do not. Perhaps in response to understandable indignation among voters, state legislatures have seen fit to pass "hate crime" statutes. The majority of these legislatures have passed statutes which serve to enhance the penalty for certain criminal behavior when it is related to or motivated by the actor's "hate" or, more generally, bias.[14] Illinois, among other states, has passed a statute that, instead of enhancing a penalty for a particular crime, actually creates an entirely new crime.[15]

Proponents of such laws have attempted to justify their position by asserting that the incidence of hate crimes has risen steadily.[16] Some have gone so far as to infer an "epidemic" from the data.[17] Even so, a thorough and convincing argument has been made against such assertions and implications.[18] Moreover, a sense of urgency to act against bigoted actions should never be the basis for compromising the fundamental right of free thought and differing beliefs.

---

13. *Id.*

14. *See e.g.*, ALA. CODE § 13A-5-13 (Michie 1996); CAL. PENAL CODE § 422.7 (West 1988 & Supp. 1991); DEL. CODE ANN. Tit. 11 § 1304 (1997); FLA. STAT. ANN. § 775.085 (West 1991); 720 ILL. COMP. STAT. 5/12-7.1 (West 1994); IOWA CODE ANN. § 729A.2 (West 1997); LA. REV. STAT. ANN. § 14:107.2 (West 1998); MISS. CODE ANN. § 99-19-301 (1997); MONT. CODE ANN. § 45-5-221 (1996); NEV. REV. STAT. § 193.1675 (1995); R.I. GEN. LAWS § 42-28-46 (1996); S.D. CODIFIED LAWS § 22-19B-1 (1997); TEX. CODE CRIM. PROC. art. 42.014 (Vernon Supp. 1994); WASH. REV. CODE ANN. § 9A.36.078 (West 1997); WIS. STAT. § 939.645 (West 1990).

15. 720 ILL. COMP. STAT. 5/26-1 (West 1994).

16. *See, e.g.* H.R. Rep. No. 981, 102d Cong., 2d Sess. 3 (1992); Daniel Goleman, *As Bias Crime Seems to Rise, Scientists Study Roots of Racism*, N.Y. TIMES, May 29, 1990, at C1 ("Everybody who collects data reports a steady increase in hate crimes in the last year or two").

17. Eric Zorn, *A Trend That's . . . Well, Epidemic*, CHI. TRIB., Mar. 23, 1994, at N1.

18. *See generally* James B. Jacobs and Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366 (1996) (Jacobs and Henry examine the possibility of a contrived "epidemic," and show considerable cause for questioning the reliability of hate crime data compiled by the Anti-Defamation League, the Southern Poverty Law Center's Klanwatch Project, and the FBI, effectively demonstrating the political and subjective nature of counting hate crimes).

Such a fundamental right, as stated before, is rooted in a principle that there are some evils that are properly beyond the jurisdiction of human law. This article builds upon this principle in an analysis of state coercion toward acceptable, or at least non-punishable, private reasoning. While this principle was semantically dodged by the Supreme Court in *Wisconsin v. Mitchell*,[19] it was flatly ignored in certain subsequent case law. Specifically, recent Illinois precedent serves as an example to confirm the threat of *Mitchell* to punish characteristically private notions as if they were actual, discernable, criminal intentions or conduct subject to state regulation.

Part II of this article will lay the groundwork for the subject, analyzing the basic, relevant parameters of the First Amendment right of free speech, including the Supreme Court's controversial ruling in *Mitchell*. Part III will investigate an Illinois appellate case of 1996, *In Re Vladimir P.*,[20] in an effort to illustrate the troubling effects that *Mitchell* has precipitated. The article will conclude with short comments on the reasoning and implications behind the legislative expansion of the government's role.

II. THE BASIC PARAMETERS OF FREE SPEECH

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . ."[21] Freedom of speech being a fundamental right, the Fourteenth Amendment prohibits violation of such by state legislatures.[22] Legislators of hate crime statutes, in attempting to punish and deter the hatefulness of crime, must successfully hurdle the Constitution's protection of speech. However, the U.S. Supreme Court's definition of the scope of the First Amendment has offered little assistance for the leap.

The first step in analyzing a statute that proscribes the reasoning or motive behind a crime is to seek out the breadth of the First Amendment. "Speech" is found to be literally protected, but are thoughts within the scope? Does the First Amendment permit our government to regulate the beliefs that may or may not compel verbal

19. 508 U.S. 476 (1993).
20. 670 N.E.2d 839 (Ill. App. 1996).
21. U.S. CONST. amend. I.
22. Lovell v. City of Griffin, 303 U.S. 444, 450 (1938).

or other forms of expression? *Abood v. Detroit Board of Education*[23] provides the answer. In *Abood*, appellants argued that they were prohibited from refusing to associate with their union's contributions for political purposes.[24] In holding for the appellant, the Court explained that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[25] This opinion makes it clear that the First Amendment applies not only to expressions such as conduct, but to reasoning encompassing all forms of belief which citizens may develop and cultivate.[26] Under this Constitutional interpretation, a question of application arises. What happens when a government wishes to punish a belief, but finds itself unable to reliably detect such a hidden, private, mental process? Absent any recognition of mind reading or psychokinesis, the state is resigned to regulate the subtle, even latent notions that it perceives at work behind proscribed conduct.[27]

First Amendment precedent offers little assistance for prospective legislators of hate crime. For example, the "fighting words" exception[28] has proven to be highly restrictive. Under this exception, the U.S. Supreme Court has found that there are certain verbal expressions that by their recalcitrant nature are beyond the scope of the First Amendment's protection. Such words must be "likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[29] The "fighting words" exception has been narrowly

23. 431 U.S. 209 (1977).

24. *Id.* at 234.

25 *Id.* at 234-35.

26. *See* United States v. Schwimmer, 279 U.S. 644 (1929). The decision in *Abood* may have been an echo of the dissent of Justice Holmes in *Schwimmer*. In *Schwimmer*, Justice Holmes wrote in his dissent: "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate." *Id.* at 654-55 (Holmes, J., dissenting).

27. For fictional works depicting this scenario, *see generally* EUGENE ZAMIATIN, WE (1924); GEORGE ORWELL, 1984 (1949). For non-fictional works depicting this scenario, *see generally* Wisconsin v. Mitchell, 508 U.S. 476 (1993).

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

29. *Id.* at 574.

defined,[30] however, and the Court has recently found that it does not automatically pierce the protection of the First Amendment.[31] Besides, the Supreme Court has not upheld any convictions under this doctrine since it was conceived in 1942.

Another exception is found in the context of important governmental interests.[32] In 1965, Congress prohibited the mutilation of a selective service certificate.[33] The Supreme Court, in *United States v. O'Brien*,[34] recognized that although such a law had the effect of limiting anti-war expression, such a limitation was only an incidental restriction on the right to free speech. Furthermore, the law was justified by a sufficiently important governmental interest: regulation of the accompanying non-speech elements.[35] In 1989, the Court reaffirmed this precedent in *Texas v. Johnson*.[36] Here, the defendant burned an American Flag in violation of a Texas statute that prohibited a person from knowingly offending another through the desecration of specific types of sites and objects.[37] The Court held that such a limitation on expression was unconstitutional, since the law was based on the content of the message expressed by the desecration. Likewise, Texas failed to assert a governmental interest

30. *See* Lewis v. City of New Orleans, 415 U.S. 130 (1974) (words that convey or are intended to convey disgrace are not "fighting words"); Cohen v. California, 403 U.S. 15, 20 (1971) (the state was found not to have exercised its police power in preventing a speaker "from intentionally provoking a given group to hostile reaction").

31. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

32. *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105, 118 (1991) (State may regulate speech directly based on its message upon showing that the law serves a compelling state interest); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (State may impose reasonable time, place, and manner restrictions upon showing of significant government interest).

33. U.S. v. O'Brien, 391 U.S. 367, 375 (1968) (citing 32 C.F.R. § 1617.1 (1962)).

34. 391 U.S. 367 (1968).

35. *Id.* at 376.

36. 491 U.S. 397 (1989).

37. *Id.* at 400. The Texas statute read, in pertinent part:

> (a) A person commits an offense if he intentionally or knowingly desecrates: (1) a public monument; (2) a place of worship or burial; or (3) a state or national flag. (b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

TEX. CODE ANN. § 42.09 (West 1989).

sufficient to support the limitation.[38] The Court reasoned that since the Texas statute permitted the State to punish speech based merely on the content of the message, "the most exacting scrutiny" should be applied.[39] By overturning the conviction in *Johnson*, the Court emphasized a foundational principle of the First Amendment regarding the government's neutrality toward the subjective offensiveness of a person's ideas: "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[40] The *Johnson* Court rejected the argument that the proscribed conduct may have offended a group or led to a disturbance of the peace, and stated that the narrow "fighting words" exception did not apply.[41] In fact, the law was found to be contrary to a principal function of free speech, which is "to invite dispute."[42]

Regarding racist or bigoted speech, the Court has also recognized protection in the First Amendment.[43] In 1978, the United States Court of Appeals for the Seventh Circuit decided such an issue in *Collins v. Smith*.[44] Skokie, a largely Jewish village, attempted to prohibit the National Socialist Party of America (NSPA) from marching in front of the Skokie city hall.[45] Skokie eventually passed a number of ordinances in pursuit of this goal.[46] The ordinances placed conditions upon the granting of a parade permit, requiring that the marching assembly would not "portray criminality, depravity or a lack of virtue

38. *Id.* at 417.

39. *Id.*

40. *Id.* at 414. *See also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988) (First and Fourteenth Amendments prohibited a public figure from recovering damages for tort of intentional infliction of emotional distress, by reason of a magazine's publication of an advertisement parody, without showing in addition that that publication contained a false statement of fact that was made with actual malice).

41. *Johnson*, 491 U.S. at 408.

42. *Id.* at 408-09 (quoting Terminello v. Chicago, 337 U.S. 1, 4 (1949)).

43. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969) (reversing the conviction of a Ku Klux Klan leader and holding that the First Amendment protects expression advocating racial violence); *c.f.*, Street v. New York, 394 U.S. 576 (1969) (holding that the public expression of ideas "may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

44. 578 F.2d 1197 (7th Cir. 1978).

45. *Id.* at 1199.

46. *Id.*

in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation."[47] The Skokie ordinances also prohibited "the dissemination of any materials, which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so."[48] The court found these ordinances to be content-based and outside of the reach of the "fighting words" doctrine.[49] The Village argued that such ordinances were justified because a demonstration by the NSPA could possibly inflict emotional damage on the residents, many of whom were survivors of the Nazi holocaust. Ultimately, the court refused to permit a limitation upon free speech in anticipation of such a damage.[50] The court supported this position by quoting the U.S. Supreme Court, emphasizing that the First Amendment's protection of free speech focuses on the content of the expression, not merely the expression: "[a]ny shock effect must be attributed to the content of the ideas expressed . . . . It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[51]

The issue of special, emotional damage addressed in *Collins* resurfaced in the case of *R.A.V. v. City of St. Paul*.[52] In this landmark case, the Court struck down a municipal ordinance that prohibited actions "which one [knew] or [had] reasonable grounds to know" would cause "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[53] The Supreme Court applied an analysis similar to that used in *Collins*; it addressed the applicability of the "fighting words" doctrine while recognizing that though emotional distress may be real and even significant, the source of this harm is the idea behind an expression:

47. *Id.* (quoting Skokie, Ill., Ordinance 77-5-N-994, § 27-56(c) (May 2, 1977)).
48. *Collins*, 578 F.2d at 1199 (quoting Skokie, Ill., Ordinance 77-5-N-995, § 28-43.1 (May 2, 1977)).
49. *Id.* at 1200-03.
50. *Id.* at 1205.
51. *Id.* at 1206 (quoting Street v. New York, 394 U.S. 576, 592 (1969)).
52. 505 U.S. 377 (1992).
53. *Id.* at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)).

> What makes the anger, fear, sense of dishonor, etc., produced by the violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily.[54]

This reasoning focuses on the Constitutional significance of the impact of an idea, not on the mode of expression of that idea. Therefore, the distinction between a "money-motivated" crime and a "hate-motivated" crime is rooted in something that the *R.A.V.* court has recognized as beyond the scope of government's jurisdiction.

When the Supreme Court granted certiorari to hear *Wisconsin v. Mitchell,*[55] the *R.A.V.* opinion was approximately a year old. *Mitchell* involved a type of hate crime statute that enhanced penalties beyond the maximum statutory penalty of a crime.[56] In *Mitchell*, Todd Mitchell was convicted in the Circuit Court of Kenosha County, Wisconsin, for aggravated battery, a crime that carried a maximum sentence of two years.[57] The Wisconsin Supreme Court reversed the conviction,[58] relying on the U.S. Supreme Court's analysis of content-based regulations of expression in *R.A.V. v. City of St. Paul.*[59] But, upon further review by the U.S. Supreme Court, the Wisconsin hate crime statute was held to be constitutional.

Redefining the issue of "special harms" addressed in *Collins* and *R.A.V.*, the Court reasoned that because crimes such as physical

---

54. *Id.* at 392-93.

55. 508 U.S. 476 (1993).

56. *Id.* at 481, n.1 (citing to WIS. STAT. § 939.645(1)(b) (1989-90)). In 1993, the Wisconsin hate crime statute read in pertinent part:

> (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2): (a) Commits a crime under chs. 939 to 948. (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property . . . .

WIS. STAT. § 939.645(1)(b) (1989-90).

57. *Mitchell*, 508 U.S. at 480.

58. State v. Mitchell, 485 N.W.2d 807 (Wis. 1992).

59. 505 U.S. 377 (1992).

assault are not expressive conduct under the First Amendment, the violence of the crimes is not protected by the Constitution: "Violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection . . . ."[60] Special harms from expressed ideas, which the *R.A.V.* court had addressed as attributable to the impact of the idea communicated,[61] were noted to be separate and distinct from a communicative impact, and thus punishable: "[t]he First Amendment does not protect violence."[62]

The Court justified the statutory punishment of hateful motive by citing cases in which sentencing judges had considered a variety of factors in determining the severity of sentence to impose upon a defendant who was already convicted.[63] Also, the Court relied on precedent, specifically *Dawson v. Delaware*[64] and *Barclay v. Florida*,[65] which allowed the admission into evidence of a defendant's racial animus when relevant to the proceedings. From these cases, the Court held that a defendant's abstract beliefs may not be taken into account by a sentencing judge, but evidence of racial hatred is admissible when relevant to the commission of an offense.[66] Justice Thomas, in his dissenting opinion in *Dawson*, wrote that the majority opinion recognized that "the First Amendment limits the aspects of a defendant's character that [the sentencing judge] may consider." The truth of this assertion is discovered in the recognition that a judge's discretionary consideration of aggravating factors is significantly different than legislatively regulating a motive. Apart from the general, human inability to reliably identify hidden motives, another interesting dilemma surfaces: just because an aggravating factor can

60. *Mitchell*, 508 U.S. at 484 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)).

61. *R.A.V.*, 505 U.S. at 393.

62. *Mitchell*, 508 U.S. at 484 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).

63. *Id.* at 489 (citing to Payne v. Tennessee, 501 U.S. 808, 818-20 (1991); United States v. Tucker, 404 U.S. 443, 446 (1972); Williams v. New York, 337 U.S. 241, 246 (1949)).

64. 503 U.S. 159 (1992).

65. 463 U.S. 939 (1983).

66. *Mitchell*, 508 U.S. at 486.

be considered in determining a convicted criminal's sentence does not mean that the substance of that factor can be prohibited by law.[67]

The *Mitchell* Court also held that the Wisconsin hate-crime statute was analogous to federal and state anti-discrimination laws, which had been upheld as constitutional.[68] The Court used Title VII of the Civil Rights Act of 1964[69] as an example of a constitutional statute that prohibits discrimination in the public sphere, specifically in employment practices.[70] The Court reasoned that both the Wisconsin hate-crime statute and Title VII are aimed at unprotected conduct, not expression, and thus are both permissible content-neutral conduct regulations.[71] However, the Court did not address the significance of the difference between a person's actions in a private and public sphere. While the government's interest in equal opportunity may justify anti-discrimination laws, such laws were created to address "the consequences of employment practices, not the underlying motivation."[72] This is evidenced by Title VII, where proof of biased motive is not even necessary to bring a case; it is sufficient to bring proof of a disparate impact upon different groups resulting from a specific employment practice.[73]

III. *IN RE VLADIMIR P.* AS A DEMONSTRATION OF *MITCHELL'S* FLAWS

Certain flaws in the Supreme Court's *Mitchell* decision become especially apparent in a recent Illinois case. The 1996 Illinois

67. *See* Susan Gellman, *Hate Crime Laws Are Thought Crime Laws*, 1992/1993 ANN. SURV. AM. L. 509 (1993). Gellman cogently argues that,

> [A] judge may consider such factors as education, employment, and religion to assess whether an offender is likely to secure gainful employment or to commit future crimes. However, a legislature could not constitutionally enact a penalty enhancement that is triggered whenever the offender is poorly educated or unemployed.

Id. at 522.

68. *Mitchell*, 508 U.S. at 487. (citing *Roberts*, 468 U.S. at 628 (1984); Hishon v. King & Spalding, 467 U.S. 69, 78 (1984); Runyon v. McCrary, 427 U.S. 160, 176 (1976)).

69. 42 U.S.C. § 2000e to e-17 (1988) (Title VII of the Civil Rights Act of 1964 prohibits discriminatory employment practices).

70. *Mitchell*, 508 U.S. at 487 (citing 42 U.S.C. § 2000e-2(a)(1) (1988)).

71. *Id.*

72. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

73. *See, e.g.*, Wards Cove Packing Co. v. Antonio, 490 U.S. 657 (1989).

appellate case, *In Re Vladimir P.*,[74] serves as the clearest example of a fruit borne of the "corrupted seed" of the controversial *Mitchell*. Such flaws include an overlooking of the precedent set by the Supreme Court in *R.A.V. v. City of St. Paul*,[75] and a blurred distinction between motive, mens rea (guilty mind), and conduct. Both of these flaws, which concern freedom of expression and due process, will be analyzed in the context of the facts of *Vladimir P.* Finally, the *Vladimir P.* court's opinion regarding the proof of a hate crime violation deserves attention for the purpose of understanding the implications of expanding the government's role into regulation of the human heart.

The respondent in *Vladimir P.*, aged 15, was convicted of violating the Illinois hate crime statute[76] for aggravated assault upon a Jewish boy, Bergovoy.[77] Bergovoy was walking home and wearing clothing accessories that symbolized his religious beliefs,[78] when he passed by Vladimir and Igor, who were both parties in the case.[79] Both Vladimir and Igor were in the company of a third youth on the steps of an apartment building.[80] An unknown number of the three youths began shouting at Bergovoy: "F--- you Jew, get out of here Jew, I am going to kill you Jew, f--- you Jew."[81] Igor and respondent then both threw knife parts at Bergovoy: Igor threw a knife handle

74. 670 N.E.2d 839 (Ill. App. 1996).
75. 505 U.S. 377 (1992).
76. 720 ILL. COMP. STAT. 5/12-7.1 (West 1994). The statute reads in pertinent part:

> (a) A person commits hate crime when, by reason of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, he commits assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, mob action or disorderly conduct as these crimes are defined [in specific sections of the Code], respectively, or harassment by telephone as defined in [a specific section of the Obscene Phone Call Act].

720 ILL. COMP. STAT. 5/12-7.1 (West 1994).
77. *Vladimir*, 670 N.E.2d at 841.
78. *Id.* Bergovoy was wearing a head covering (yarmulke) and prayer tassels (tzitzis). *Id.*
79. *Id.*
80. *Id.*
81. *Vladimir P.*, 670 N.E.2d at 841 (expletive deleted).

and respondent threw a knife blade.[82] Bergovoy perceived this attack and ran home frightened for his safety. Bergovoy's mother later accompanied her son to investigate the incident. They encountered Igor, who approached and yelled, "F--- you Jew."[83] Bergovoy and his mother then called the police. When a police officer investigated, the respondent, Vladimir, told him that "they were bored and that Bergovoy looked 'funny' when he went by."[84] At trial, Vladimir's mother testified that respondent was Jewish and knew what Bergovoy's head covering and tassels represented.[85]

A. Overlooking R.A.V.

The Illinois Appellate Court upheld Vladimir's conviction and rejected arguments that the Illinois hate-crime statute was unconstitutional.[86] The court recognized that a fundamental difference between the Wisconsin statute[87] examined in *Mitchell* and the Illinois statute examined in *Vladimir P.* was that the Wisconsin statute was a penalty enhancer while the Illinois statute created a crime within itself.[88] The court nevertheless brushed off this incon-sistency as insignificant and relied upon *Wisconsin v. Mitchell* to justify its ruling, stating "this distinction does nothing to diminish the applicability of the Supreme Court's analysis on the issue of whether 12-7.1 [the Illinois hate-crime statute] impermissibly criminalizes thought."[89]

But, such an analysis of Supreme Court precedent is incomplete. Immediately prior to deciding *Mitchell*, the U.S. Supreme Court, in *R.A.V. v. City of St. Paul*,[90] ruled on a Minnesota ordinance[91] which,

82. *Id.*
83. *Id.* (expletive deleted).
84. *Id.*
85. *Id.*
86. *Id.*
87. WIS. STAT. § 939.645(1)(b).
88. *Vladimir P.*, 670 N.E.2d at 843.
89. *Id.*
90. 505 U.S. 377 (1992).
91. ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990). The Minnesota ordinance prohibited cross-burning, among other conduct, by making it a crime to "display a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.*

like the Illinois hate-crime statute, created a separate crime for conduct based on biased motivation, punishing conduct on the basis of the ideas expressed by the conduct.[92] The Supreme Court held the ordinance to be facially invalid, stating that "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[93] Rather than discussing the applicability of the *R.A.V.* ruling, the *Vladimir P.* court again referred to the analysis of *Mitchell*, emphasizing that the First Amendment does not legalize criminal conduct.[94] The Supreme Court, in *Mitchell*, distinguished its ruling from that in *R.A.V.*, stating "[T]he ordinance struck down in *R.A.V.* was explicitly directed at expression . . . [this statute is] aimed at conduct unprotected by the First Amendment."[95] The *Vladimir P.* court adopted this reasoning in upholding the Illinois hate crime statute: "'a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.'"[96]

Such an argument is problematic in that it seems to imply that opponents of hate-crime statutes would actually advocate using the First Amendment as a shield against punishment of expressive criminal conduct. But clearly, an argument against punishing the beliefs or hatred that have motivated a person's criminal conduct is not an argument that the First Amendment protects that criminal conduct from punishment.

Rather, a proper analysis of *R.A.V.* and First Amendment precedent instructs that while the First Amendment protects only certain types of expression, it also protects the viewpoints, opinions, and beliefs behind expression, generally. In other words, whether or not the expression itself finds protection under the First Amendment, the viewpoints, notions, and beliefs behind it are always protected.[97]

92. *R.A.V.*, 505 U.S. at 380-81.

93. *Id.* at 391.

94. *Vladimir P.*, 670 N.E.2d at 843.

95. Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993).

96. *Vladimir*, 670 N.E.2d at 843 (quoting *Mitchell*, 508 U.S. at 484).

97. The idea is not unprecedented in First Amendment jurisprudence that protected beliefs remain protected even if they motivate unprotected actions. *See* Cantwell v. Connecticut 310 U.S. 296, 303-04 (1940) (The Court stated that "[T]he [First] Amendment embraces two concepts, -- freedom to believe and freedom to act. *The first is absolute* but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." (emphasis added)). *See also* Reynolds v. United States 98 U.S. 145,

To argue otherwise would be to deny the precedent of *Abood v. Detroit Board of Education* which held that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[98] Indeed, the Supreme Court in *R.A.V.* reinforced this concept by moving one step beyond the affirmation that content-based regulations of expression are presumptively invalid. The Court held that through "practical operation, . . . the [Minnesota] ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination."[99] Thus, while the *Vladimir P.* court correctly recognized that the First Amendment does not protect expressions such as assault, it failed to recognize that an assailant's beliefs, motivational or otherwise, remain protected.

B. Motive, Mens Rea, and Conduct

The *Vladimir P.* court, through its misguided reliance on *Mitchell*, inherited a seeming disability to distinguish between motive, mens rea, and conduct, as well as an inconsistent determination of what exactly is being punished by hate-crime legislation. These faults pervade the court's decision in its analysis of arguments on the grounds of freedom of expression, due process, and proof beyond a reasonable doubt. However, before analyzing the *Vladimir P.* opinion fully, it is helpful to first briefly trace the possible roots of the confusion.

The confusion may be traced back to the U.S. Supreme Court's analysis of motive and mens rea in *Mitchell*. The Court discussed the important factors that are considered in determining what sentence to impose on a previously convicted defendant.[100] Seemingly in support of its assertion that "[t]he defendant's *motive* for committing the

166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices"). *See generally* Gary Stuart McCaleb, *A Century of Free Exercise Jurisprudence: Don't Practice What You Preach*, 9 REGENT U. L. REV. 253 (1997).

98. 431 U.S. 235, 234-45 (1977). *See supra* notes 23-26 and accompanying text.

99. *R.A.V.*, 505 U.S. at 391.

100. *Mitchell*, 508 U.S. at 485.

offense is one important factor,"[101] the Court quoted from a case which expounded on the punitive significance of *mens rea*, not *motive*: "Deeply ingrained in our legal tradition is the idea that the more *purposeful* is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."[102] Having established this premise, the Court moved immediately to a conclusion regarding the relevance of *motive* as an aggravating circumstance: "Thus, in many States the commission of a murder, or other capital offense, for pecuniary gain is a separate aggravating circumstance under the capital sentencing statute."[103]

The Court's peculiar syllogism raises a puzzling question. Why would the punitive significance of mens rea be relevant to the conclusion that motive is an appropriate factor for consideration in determining the punishment for a convicted defendant? It is a fundamental error to confuse mens rea with motive. The Court's description of criminal conduct as "purposeful" is surely a reference to the guilty mind (or mens rea) of the actor. The determination of a defendant's mens rea centers on the issue of specific intent, and the question of whether the defendant committed the actus reus intentionally.[104] This should not be mistaken for motive, which has been properly described as the "moving power which impels to action,"[105] "induces action"[106] or "gives birth to a purpose."[107] Indeed, motive has traditionally been contrasted with a defendant's state of mind, a required element of crimes, in the determination of criminal culpability. Whenever it is established that a person committed a crime, with whatever state of mind was required for the mens rea of the particular offense, all of the requisites of criminal guilt are present, even if no possible motive for the deed can be shown.[108] Thus, was the Supreme Court's seemingly irrelevant

101. *Id.* (emphasis added).
102. *Id.* (emphasis added) (quoting Tison v. Arizona, 481 U.S. 137, 156 (1987)).
103. *Mitchell*, 508 U.S. at 485.
104. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.02[C] (1987).
105. People *ex rel.* Hegeman v. Corrigan, 87 N.E. 792 (N.Y. 1909).
106. State v. Santino, 186 S.W. 976, 977 (Mo. 1916).
107. People v. Kuhn, 205 N.W. 188, 189 (Mich. 1925).
108. *See* Commonwealth v. Danz, 211 PA. 507, 517 (1905) (Distinguishing motive from elements of a crime, holding that, "[t]here can be no escape from punishment for crime when all the elements of it are proved, whether the evidence be positive or circumstantial, simply because the motive lies hidden in the heart of the only one who knows it.")

premise in *Mitchell* a harmless mix-up? Or was it a sign of increasing confusion among the courts regarding what mental process is key to determining a violation of a hate crime?

The decision in *Vladimir P.* confirms the latter. The confusion has been transmitted through precedent and has been compounded through an approach that interprets "selection" as "conduct." The trend is seen among hate-crime proponents who interpret selection as an "act" in order to advance the notion that hate crimes are determined not by a showing of motive, but rather by the volition of the "act" of selection. One proponent showed enthusiasm for this new focus, alleging how it escapes the motive question entirely:

> The simple elegance of this approach is that it neatly sidesteps what has surfaced in some of the case law as a true doctrinal and philosophical tangle about what mental process is going on inside the mind of the offender—be it focused on motivation, purpose, intent, or some other kind of mental activity—in determining whether a hate crime has occurred. Instead, this formulation concentrates on the actual "act" of intentional selection, which is at the root of any hate crime.[109]

This reasoning was adopted in *Vladimir P.*, as the court attempted to separate the idea of motive from the "act" of selection. Whether such a separation was achieved can be analyzed through a comparison of the court's response to the respondent's due process and freedom of expression claims.

The respondent in *Vladimir P.* argued that the Illinois hate crime statute violated his Constitutional rights under the Due Process Clause of the Fourteenth Amendment.[110] At issue was whether the statute's phrase "by reason of" was impermissibly vague.[111] The statute read, "[a] person commits hate crime when, *by reason of* the actual or perceived race, color, creed, religion [etc.] . . . of another individual or

109. Richard Corday, *Transcript: Free Speech and the Thought We Hate*, 21 OHIO N.U. L. REV. 871, 873 (1995).

110. *Vladimir P.*, 670 N.E.2d at 844.

111. *Id.*

group of individuals, he commits assault, battery [etc.] . . . ."[112] The court attempted to explain the phrase by quoting the Supreme Court of Washington's analysis of the same issue: "In ordinary usage 'because of' means 'by reason of' or 'on account of.' When read *as a whole*, this language is clear and provides adequate notice that *the prohibited conduct is the selection of crime victims from certain specified categories.*"[113] A fundamental error is apparent from this analysis. In attempting to separate the causal-motive element from the selection element, the court defines the crime *in its entirety* as the selection of the crime victim from certain specified categories. But, this distinction presented "as a whole" would apply absurdly to anyone, regardless of motive, whose selected victim had the universal attribute of race. Since selection of such victims for criminal behavior represents a question of mens rea, it is easier for the court to define the proscribed conduct of a hate crime "as a whole" without dealing with the messy business of including an explanation of how the element of "hate" is shown. But, what is the use of a hate/bias crime statute, which, without any reference to bias, beliefs, hatred, or motive, punishes merely the intentional selection of victims of identified characteristics?

The ignored truth of the matter is that motive is the factor that separates meaning-laden selection from random selection. If the goal of hate crime legislation is to address the "greater individual and societal harm" of bias-inspired conduct,[114] then analytically detaching the criminal's bias-motive from his selection is counterproductive. The type of selection being targeted for punishment is inextricably intertwined with motive. Proponents of hate crime legislation must

112. 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West 1994 & Supp. 1997) (emphasis added). *supra* note 76 and accompanying text.

113. *Vladimir P.*, 670 N.E.2d at 844 (citation omitted) (alteration in original) (quoting State v. Talley, 858 P.2d 217, 229 (Wash. 1993) (emphasis added)).

114. *Mitchell*, 508 U.S. at 487-88 ("[T]he Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm"). *See also Vladimir P.* 670 N.E.2d at 845 ("It has been widely documented that victims of bias-motivated crimes suffer harmful psychological effects, and these crimes are more likely to provoke retaliatory crimes and incite political unrest."); State v. Vanatter, 869 S.W.2d 754 (Mo. 1994) ("While 574.093 [the Missouri hate-crime statute] admittedly creates a new motive-based crime, its practical effect is to provide additional punishment for conduct that is already illegal but is seen as especially harmful because it is motivated by group hatred").

admit that it is not random, intentional selection that they wish to punish. They wish to punish only intentional selections resulting from legislatively enumerated motives. Through this unavoidable reasoning, a hate crime legislator must choose between writing a hate crime statute that either counterproductively punishes intentional, categorical selection,[115] or unconstitutionally punishes a criminal's private motivational notions.

The *Vladimir P.* court apparently recognized this dilemma, and attempted to explain its decision by focusing on the causal connection between the criminal's reasoning and the victim's characteristic. The court wrote that, "[t]he phrase 'by reason of' clearly indicates for police officers and offenders that there must be a causal connection between a victim's race, religion, etc., and the offender's reason for choosing that person as a victim."[116] But, this analysis is also problematic: without addressing the offender's beliefs, it represents a flawed understanding of motive and reasoning. Does a bias-motivated criminal select a victim by reason of the victim's religion or by reason of the criminal's beliefs about/hatred toward the victim's religion? It would not make much sense to argue that the offender's motive was the "category" of religion. A proper understanding of motive addresses not the external characteristics of the criminal's victim, but rather the internal reasoning and beliefs of the criminal. This distinction warrants a reexamination of the wording of the

115. *See* Gellman, *supra* note 67, at 512-3, analyzing the reasoning in *Mitchell*:

> The Wisconsin statute upheld in *Mitchell* . . . was defended as punishing not bigotry, but the special harms to the victim and others created by "intentional selection of the victim" because of ethnicity. It therefore would apply where a victim is selected because of race, in a situation that has nothing to do with bigotry and creates no risk of the special harms which are said to justify the extra punishment. For example, *A* goes to her car and sees that the windshield has been smashed. A bystander tells her that the deed was done just a few seconds ago, by an Asian. *A* looks around and sees, among a dozen people, only one Asian, *B*, whom she then assaults. *A*'s selection of *B* was based upon his ethnicity, although it was significant only for identification, not for bias. Nevertheless, the law applies even though none of its purposes are implicated. If it doesn't, then the law demonstrably *is* punishing bigotry, not "intentional selection."

Id.

116. *Vladimir P.*, 670 N.E.2d at 844.

Illinois hate crime statute.[117] The statute does not actually mention anything about a person's beliefs or hatred: "[a] person commits hate crime when, by reason of the actual or perceived race, color, creed, religion [etc.] . . . of another individual or group of individuals, he commits assault, battery [etc.] . . . ."[118] But, as discussed previously, in order for a hate crime statute to fulfill the purpose of a hate crime statute, it must punish belief-motivated or hate-motivated conduct.[119]

The *Vladimir P.* court seemingly attempts to compensate for this problem by offering a different and contradictory analysis (still within the same opinion, but this time addressing the argument over freedom of expression). Rather than tracing a causal connection between the victim's characteristic and the offender's reason for choosing the victim, the court inserts a requirement that the selection be connected to the offender's beliefs or hatred:

> We find that the statute at issue here does not punish an individual for merely thinking hateful thoughts or expressing bigoted beliefs. Instead, section 12-7.1 punishes an offender's criminal conduct in choosing a victim *by reason of those beliefs or hatred*, and then committing one of the criminal acts included in section 12-7.1.[120]

How can this interpretation of the hate crime statute be reconciled with the court's other analysis in which the statute's language prohibited selection by reason of category, with no reference to the selector's beliefs about or hatred toward that category?

They cannot be reconciled. Clearly, the *Vladimir P.* court in its due process claim analysis attempted to avoid connecting motive with selection, preferring to conclude that the statute's prohibition focused on the mens rea of the "act" of selection of specific categories of victims. But here, in its analysis of the freedom of expression claim, the court found the connection to be unavoidable. In order to effectively explain that the statute does not require the government to

117. 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West 1994 & Supp. 1997), *supra* note 76 and accompanying text.

118. *Id.*

119. *See infra* note 114 and accompanying text.

120. *Vladimir P.*, 670 N.E.2d at 843 (emphasis added).

read the thoughts of non-criminals, the court blatantly admitted that such a "selection" must be by reason of a criminal's motivational "beliefs or hatred." It apparently did not bother the *Vladimir P.* court that there existed no mention of "beliefs" or "hatred" in the statute being interpreted. Liberal inferences are designed to bridge such "gaps." Besides, such work is necessary for a court bold enough to attempt an impossible task: to maintain a singular interpretation that retains the definitive purpose of a "hate" crime statute,[121] yet purports to punish the offender based merely upon the mens rea of the "act" of categorical selection.

C. Proof Beyond a Reasonable Doubt

The respondent's final contention in *Vladimir P.* was that the evidence was insufficient to prove him guilty of the hate crime.[122] Noting that the State's burden of proof was guilt beyond a reasonable doubt, the court responded that when a minor challenges that sufficiency, the court's task is to review the evidence in a light most favorable to the prosecution, and overturn only if it found that "no rational trier of fact could have found the offense beyond a reasonable doubt."[123]

The respondent, Vladimir, asserted and the court admitted that the facts of the case show no evidence that Vladimir shouted the religious insults at the victim, Bergovoy.[124] The significance of this defense would seem obvious: such evidence was necessary for the trier of fact to supposedly determine that Vladimir had beliefs about or hatred toward Bergovoy's religion, and that such beliefs or hatred motivated Vladimir's assault. Since no such evidence existed, the charge of a "hate" crime should not have been even applicable to Vladimir. But, the court's will was not so easily thwarted: it demonstrated a remarkable faith in a human being's ability to discern and identify another's intimate hatred or beliefs from even the most subtle of pre-criminal actions or omissions. The court reasoned as follows:

---

121. *See supra* note 114 and accompanying text.
122. *Vladimir P.*, 670 N.E.2d at 845.
123. *Id.* (citing *In re* W.C., 657 N.E.2d 908, 923 (Ill. 1995)).
124. *Id. See also supra* text accompanying notes 77-85.

> The evidence . . . demonstrates that, even if it was Igor [Vladimir's companion] who uttered the offensive religious slurs, respondent made no effort to leave the scene or disassociate himself with Igor. Rather, as respondent himself told Officer Roytman, Igor threw the knife handle at Bergovoy and respondent followed by throwing the blade. Under these circumstances, the trier of fact was entitled to infer that the youths were not acting independently, but rather in concert and that respondent participated in all of the acts.[125]

Is Vladimir's failure to "leave the scene" of a verbal insult or to disassociate himself with a vocal racist enough evidence for a trier of fact to conclude anything about the specific beliefs which motivated his subsequent assault?

Apparently, the court deemed such omissions entirely adequate even to support a conclusion that the respondent *shared* the beliefs of the vocal companion before or during the assault. Thus, not only does a hate crime statute allow the state to punish the supposedly perceivable motivating beliefs of a criminal, but the trier of fact is permitted to "cut and paste" those beliefs onto criminal bystanders who fail to do what the trier of fact believes a non-bigot should have done when hearing those beliefs verbally expressed.

The facts reveal that Vladimir told a police officer at the station that he and Igor "were bored and that Bergovoy looked 'funny' when he went by."[126] But, the court discredited the evidentiary significance of such a confession: "Immediately after hearing anti-Semitic shouts, respondent admittedly committed an assault on the 13-year-old target of the abuse. The trial judge could properly infer that respondent's motive for his conduct was not the result of boredom, but was caused 'by reason of' Bergovoy's religion."[127] Faced with such strained logic, are criminals thus forewarned that in order to protect their motivating ideas from punishment, they are to make reasonable efforts to disavow ideological associations before or during a crime?

125. *Id.*
126. *Vladimir P.*, 670 N.E.2d at 841.
127. *Id.* at 845.

More specifically, should a criminal assailant who is motivated by boredom or amusement, but in the company of a vocal religious bigot, be expected to somehow assert a disclaimer before or during the assault, such as, "the views expressed by my fellow assailant are not necessarily the views of Vladimir P."? A desperate court reaching beyond its capacity to discern beliefs has pulled the exacting nature of Law into gutters of absurdity.

At the root of the misanalysis are two logical fallacies. The first is that coincidence of action necessarily proves beyond a reasonable doubt coincidence of motive: that respondent's motive is the same as that of his companion merely because they acted simultaneously. The second, auxiliary fallacy is *post hoc, ergo propter hoc*, a common error of concluding that one event caused a later event simply because it happened earlier. Such is to say that correlation proves causation: that an assailant who first hears anti-Semitic shouts and then assaults a Jewish victim must have committed the assault from an anti-Semitic motive. These logical fallacies, however, are only a symptom of the larger problem found in the conclusion that human government can reliably detect the secret affairs of the heart or imagination of the thoughts let alone exercise authority to regulate them.

IV. CONCLUSION

A well-intentioned desire to regulate the private, biased, motivational notions of criminals should not overwhelm the deeply rooted, traditional freedoms of the First Amendment, nor compromise the integrity of the legal distinction between motive and mens rea. Confusing the regulation of mens rea with the regulation of motive, the volition of a crime with its compelling notion, is akin to the fallacy of legislatively entangling the regulation of mental illness with the regulation of "mental abnormality,"[128] and no less dangerous to

128. *See generally* Lance L. Losey, Note, *The Sexually Violent Predator Act – A Dangerous Alternative*, 8 REGENT U. L. REV. 123, 140-44 (1997) Losey warns of the deleterious consequences of effectively equating mental illness, which cripples volition, with "mental abnormality," which is "any emotional state that motivated deviant conduct, including strong desires to engage in such behavior, . . . [which] would . . . include virtually anyone who engages in seriously antisocial conduct." *Id.* at 143, n. 98 (quoting Schopp & Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437, 451) (1995)).

liberty. The privacy of our motivational opinions, regardless of whether or how we express them, is as necessary to the security of our God-given liberty as the opinions themselves are distinguishable from criminal action or intention.

It has been proposed that "hate inspired" crimes can inflict greater harm on individuals and society than crimes of other motivations, and that the victim's community often feels "isolated, vulnerable, and unprotected by the law."[129] But, the shock effect of such crimes is properly attributed to the constitutionally protected ideas of the criminal.[130]

And, regardless of subjective "feelings" to the contrary, the law does protect the victim's community through ensuring equal justice for all: "all" being a term that includes the victim *and* the criminal. Moreover, even if a hate crime law was to remedy such a societal "feeling," the issue is not properly the efficacy of the means, but whether they are just and constitutional.

The twisted judicial fallacies of cases such as *Vladimir P.* could be avoided by the basic recognition that beliefs and hatred, motivational or otherwise, are beyond human jurisdiction: that "man is not competent to judge of interior movements, that are hidden . . . ."[131] When the heavy hand of government enumerates for regulation not only actions and intentions, but motivational notions, it has trespassed into a new jurisdiction, grasping at reins not meant for human hands.

SCOTT T. NOTH

129. Steven M. Freeman, *Hate Crime Laws: A Potent Weapon Against Crimes of Bigotry*, 56 TEX. B.J. 1150, 1150 (1993).

130. *See* Street v. New York, 394 U.S. 576, 592 (1969)).

131. 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA Pt. I-II, Q. 91, Art. 4. at 1005 (Fathers of the English Dominican Province trans., Christian Classics 1981).