

# Symbolic/Hate Speech

# Expressive Conduct

**Regulation of expressive conduct must:**

- 1. fall within the Government's constitutional powers**
- 2. further an important or substantial governmental interest**
- 3. be unrelated to the suppression of free expression;**
- 4. and, be no greater than is essential to the furtherance of the governmental interest.**

***Tinker v. Des Moines Independent  
Community School District (1969)***

**Students may express their own opinions as long as they do not “materially and substantially interfere with” the operation or requirements of the school or impinge on the rights of others.**

***Minersville School Dist.  
v. Gobitis (1940)***

**Sup Ct rules (8-1) that public schools could  
compel students to salute the American  
Flag and recite the Pledge of Allegiance  
despite religious objections**

**After case, mobs burn down JW churches,  
beat JWs and – in one case castrate, in  
another tar and feather (literally)**

**Mobs largely organized by American Legion**

# **West Virginia State Board of Education v. Barnette (1943)**

**“If there is any fixed star in our constitutional constellation, 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 therein.”**

# **Fighting Words**

**Fighting words are words intentionally directed toward another person which are so venomous and full of malice as to cause the hearer to suffer emotional distress or incite him/her to immediately retaliate physically.**

## ***Cohen v. California* (1971)**

**“... it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”**

# ***Barnes v. Glen Theatre, Inc. (1991)***

**Glen Theatre operated a peep show w/ no minors allowed**

**Law stated that dancers must wear, at a minimum, pasties and g-strings to provide basic coverage of the dancer's body.**



## ***Barnes v. Glen Theatre, Inc. (1991)***

**“The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohibited**

# ***Barnes v. Glen Theatre, Inc. (1991)***

## **Scalia (concurring)**

**... certain activities not because they harm others but because they are considered immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy.”**

# **Texas Penal Code 42.09. Desecration of Venerated Object (1989)**

**(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.**

# Reaction to Texas v. Johnson:

1989 federal statute prohibiting flag desecration

That statute voided in *U.S. v. Eichman* (1990)

Attempt to propose constitutional amendment protecting the flag: fails in Senate by **63-37 in 1995** & **66 to 34 in 2006**

# Hate Crimes 2008, by victim

<b>Bias</b>	<b>Number</b>	<b>%</b>
<b>Racial</b>	<b>3,992</b>	<b>51.3</b>
<b>Religious</b>	<b>1,519</b>	<b>19.5</b>
<b>Sexual Orientation</b>	<b>1,297</b>	<b>16.7</b>
<b>Ethnicity/Nat'l Origin</b>	<b>894</b>	<b>11.5</b>
<b>Disability</b>	<b>78</b>	<b>1</b>

# Hate Crimes, 2008, Race, by Victim

<b>Bias</b>	<b>Number</b>	<b>%</b>
<b>Black</b>	<b>2,876</b>	<b>72.6</b>
<b>White</b>	<b>716</b>	<b>17.3</b>
<b>Asian</b>	<b>137</b>	<b>3.4</b>
<b>Native American</b>	<b>54</b>	<b>1.3</b>
<b>Multiple Groups (i.e. interracial couples)</b>	<b>209</b>	<b>5.5</b>
<b>Hispanic (Ethnicity)</b>	<b>561</b>	

# Hate Crimes, 2008, Religion, by Victim

<b>Bias</b>	<b>Number</b>	<b>%</b>
<b>Jews</b>	<b>1,055</b>	<b>65.7</b>
<b>Other</b>	<b>212</b>	<b>13.2</b>
<b>Muslims</b>	<b>123</b>	<b>7.7</b>
<b>Catholics</b>	<b>75</b>	<b>4.7</b>
<b>Protestants</b>	<b>60</b>	<b>3.7</b>
<b>Atheists/Agnostics, etc</b>	<b>14</b>	<b>.9</b>
<b>Multiple Groups</b>	<b>67</b>	<b>4.2</b>

# Hate Crimes, 2008, Sexual Orientation, by Victim

<b>Bias</b>	<b>Number</b>	<b>%</b>
<b>Gay Men</b>	<b>948</b>	<b>57.5</b>
<b>Anti-Gay (organizations)</b>	<b>415</b>	<b>27.3</b>
<b>Lesbians</b>	<b>194</b>	<b>11.6</b>
<b>Heterosexuals</b>	<b>33</b>	<b>2.0</b>
<b>Bisexuals</b>	<b>27</b>	<b>1.6</b>



# Hate Crimes, 2008, Utah

Race	Religion	Sexual orientation	Ethnicity	Disability
14	9	9	8	0

# **St. Paul Ordinance**

**Whoever places on public or private property, a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct & shall be guilty of a misdemeanor.**

# Underinclusive

**“Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas — to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality — are not covered.”**

# **Disfavored Content**

**“An ordinance not limited to the favored topics ... would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out.”**

# ***Wisconsin v. Mitchell* (1993)**

**Penalty may be enhanced when defendant:**

**(b) Intentionally selects the person against whom the crime ... is committed or selects the property which is damaged or otherwise affected by the crime ... because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property**

# ***Virginia v. Black* (2003)**

## **Virginia Code §18.2-423:**

**It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place ...**

**Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.**

# *Hill v. Colorado* (2000)

**Protesters within one hundred feet of any healthcare facility may not approach within eight feet of any other person (without consent) for the purpose of protest, education, distribution of literature or counseling**