

# 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.**

# **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.**

**5-4 vote upheld law**

***Barnes v. Glen Theatre, Inc. (1991)***  
**(Rehnquist, majority)**

**"The requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the state still seeks to prevent it."**

***Barnes v. Glen Theatre***  
**(Scalia, concurring)**

**“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 A merican society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy.”**



***Barnes v. Glen Theatre, Inc. (1991)***  
**(White, dissenting)**

**“Petitioners also state that the evils sought to be avoided by applying the statute in this case would not obtain in the case of theatrical productions, such as ‘Salome’ or ‘Hair.’ Neither is there any evidence that the State has attempted to apply the statute to nudity in performances such as plays, ballets, or operas.”**

***Barnes v. Glen Theatre, Inc. (1991)***  
**(White, dissenting)**

**“The purpose of forbidding people to appear nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in theaters and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates.”**

# **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 (Scalia for majority)**

**“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**

**(Scalia for majority)**

**“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*: Statute**

**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.**