VII. HATE VIOLENCE STATUTES AND THE FIRST AMENDMENT 1/

In 1992, the United States Supreme Court in R.A.V. v. St. Paul (1992) 505 U.S. 377 [112 S.Ct. 2538, 120 L.Ed.2d 305] struck down a St. Paul, Minnesota hate speech ordinance as unconstitutional under the First Amendment because it was impermissibly content-based. This confusing decision threw into question the constitutionality of state statutes which provide civil and criminal remedies for acts of bias-motivated (or hate) violence, including California's. Relying on R.A.V., California defendants challenged the constitutionality of California's Penal Code hate violence statutes.2/

A subsequent United States Supreme Court decision decided in 1993, Wisconsin v. Mitchell (1993) 508 U.S. 476 [113 S.Ct. 2194, 124 L.Ed.2d 436], upheld a Wisconsin bias-motivated penalty enhancement statute as constitutional and narrowed the potential scope of the R.A.V. decision affecting hate crimes statutes. Four pre- and post-Mitchell California cases challenging California's hate crimes statutes have also been upheld by California appellate courts.3/

This article will detail California's various hate violence statutes, and discuss the different constitutional challenges to these provisions upheld or to be decided by the California Supreme Court.

California has two civil statutes covering hate violence: the Ralph (Civ. Code § 51.7) and Bane (Civ. Code § 52.1) Civil Rights Acts. The Ralph Act provides that it is a civil right to be free of violence or its threat because of a person's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute. The Bane Act's Civil Code section 52.1 provides a civil remedy whenever a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the federal or

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1/ By Ann Noel, Commission Counsel with the California Fair Employment and Housing Commission. Copyright held by the State Bar of California. This chapter is taken from a larger manual, "Representing Victims of Hate Violence in Civil Proceedings: A Manual for Attorneys on the Ralph and Bane Civil Rights Acts."

2/ To date, there are no published California appellate decisions on the constitutionality of either the Ralph Act or civil portions of the Bane Act.

3/ Cf. People v. Joshua H. (1993) 13 Cal.App.4th 1734 [17 Cal.Rptr.2d 291], rev. den.; People v. Superior Court (Aishman) (1995) 10 Cal.4th 735 [42 Cal.Rptr.2d 377]; and People v. M.S. 10 Cal.4th 698 [42 Cal.Rptr.2d 355]; and People v. Steven S. (1994) 25 Cal. App.4th 598 [31 Cal.Rptr.2d 644], rev. den. These decisions are discussed in more detail below. In a fifth decision, People v. Baker (1994) 26 Cal.App.4th 629 [25 Cal.Rptr.2d 372], the California Supreme Court initially granted review, 28 Cal.Rptr.2d 794, 870 P.2d 385, but then dismissed review and remanded the case to the Court of Appeal. (45 Cal.Rptr.2d 206 [902 P.2d 224].)

state Constitution or laws. Note that there is no bias-motivation component to the civil portion of the Bane Act. Both laws provide broad pecuniary, injunctive and equitable relief. (Civ. Code § 52.)

A plethora of Penal Code provisions proscribe acts of hate violence. This article will discuss only those which have to date been constitutionally challenged before the California Supreme Court. The Bane Act's Penal Code section 422.6, subdivision (a), makes it a misdemeanor to interfere by force or threat of force with a person's federal or state statutory or Constitutional rights "because of the other person's race, color, religion, ancestry, national origin, disability, gender or sexual orientation." Penal Code section 422.6, subdivision (b), creates a companion misdemeanor for damaging someone's property because of bias. Penal Code section 422.6, subdivision (c), provides that no person can be convicted of violating subdivision (a) based upon speech alone, expect upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.

Penal Code section 422.7 turns misdemeanors (except Penal Code section 422.6) into felonies if the crime is motivated by bigotry. Penal Code section 422.75 provides for sentencing enhancements for bias-motivated felonies.

In addition, Penal Code section 11411, subdivision (c), provides, "Any person who burns or desecrates a cross or other religious symbol, on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property" is guilty of a crime, which may be prosecuted as either a misdemeanor or a felony.4/

A. R.A.V. v. St. Paul

In R.A.V. v. St. Paul, supra, 505 U.S. 377 [112 S.Ct. 2538], the U.S. Supreme Court struck down a "bias-motivated" crime ordinance of St. Paul, Minnesota as unconstitutional under the First Amendment. R.A.V., a white juvenile, burned a cross inside the fenced yard of an African-American family who lived across the street. He was charged under two statutes: Minnesota's hate crimes statute, which he did not challenge, and a "fighting words" ordinance.5/

The "fighting words" ordinance made it a misdemeanor to:

4/ In addition to these statutes, there are numerous other Penal Code provisions which have not been challenged to date. (See Pen. Code §§ 190.2, subd. (a)(16); 302; 422.9; 594.3; 1170.75; 1170.8; 1170.85; 11412; and 11413.)

5/ "Fighting words" refers to "conduct which itself inflicts injury or tends to incite imminent violence." (R.A.V. v. St. Paul, supra, 505 U.S. at 380 [112 S.Ct. at p. 2541], citing Chaplinsky v. New Hampshire (1942) 315 U.S. 568, 572.)

> place[] 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 ...." (R.A.V. v. St. Paul, supra, 505 U.S. at 379 [112 S.Ct. at p. 2541].)

The Minnesota Supreme Court construed this ordinance narrowly to cover only "fighting words" to cure its constitutional defects. (R.A.V. v. St. Paul, supra, 505 U.S. at 378 [112 S.Ct. at p. 2540].) Justice Antonin Scalia, writing for the majority, accepted the Minnesota Supreme Court's finding that the ordinance was limited to "fighting words." Nonetheless, the Court still found the ordinance facially invalid because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." (Id., at 381 [2542].)

Thus, the Court expanded First Amendment protection beyond previously established bounds. It held that even as to speech such as "fighting words" which is generally not protected by the First Amendment, the government may not engage in content-based regulation of that otherwise unprotected speech. The Court found that the St. Paul ordinance created content discrimination because it proscribed only certain "fighting words" that insult or provoke violence on the basis of race, color, creed, religion or gender, and not "'fighting words' in connection with other ideas -- to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality ...." (Id., at p. 391 [2547].)

The Court further held that the ordinance failed the "strict scrutiny" test triggered by content discrimination. While the ordinance promoted a compelling interest in ensuring the basic human rights of members of groups that have historically been subjected to discrimination, including the right of group members to live in peace where they wish, it was not "necessary" to serve that interest since content-neutral law not limited to the "favored topics" would have had "precisely the same beneficial effect." (R.A.V. v. St. Paul, supra, 112 S.Ct. at p. 395 [2550].)

1. Speech v. Conduct

While R.A.V. extends First Amendment protection to previously unprotected speech, it does not extend such protection to non-expressive conduct. Indeed, Justice Scalia observed that "since 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 prescribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech." (R.A.V. v. St. Paul, supra, 112 S.Ct. at p. 389 [2546] (Emphasis added).)

As discussed more fully below, all courts that have upheld their hate crimes statutes as constitutional, including the United State Supreme Court in Wisconsin v. Mitchell, supra, 508 U.S. 476 [113 S.Ct. 2194], have used the rationale that their statutes proscribe conduct rather than speech.

2. Exceptions in R.A.V. for Content-Based Regulation of Speech

Justice Scalia recognized that the "prohibition against content discrimination ... is not absolute" (R.A.V. v. St. Paul, supra, 505 U.S. at p. 387 [112 S.Ct. at p. 2545]) and articulated three exceptions. California appellate courts have used these various exceptions to justify the constitutionality of Penal Code sections 422.6, 422.7, 422.75, and 11411.

a. The "No Significant Danger of Idea or Viewpoint Discrimination" Exception

Even where there is content discrimination, the R.A.V. Court recognized as a first exception "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is prescribable" then, "no significant danger of idea or viewpoint discrimination exists." (R.A.V. v. St. Paul, supra, 505 U.S. at p. 388 [112 S.Ct. at p. 2545].) For example, a state may lawfully prohibit obscenity which is patently offensive in its prurience but cannot prohibit obscenity only because it contains offensive political messages.

b. The "Secondary Effects" Exception

Second, if a content-defined sub-class of prescribable speech happens to be associated with particular 'secondary effects' of the speech, the regulation is "'justified without reference to the content of the ... speech.'" (R.A.V. v. St. Paul, supra, 505 U.S. at p. 389 [112 S.Ct. at p. 2546], citing Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 48.) Thus, for example, sexually derogatory "fighting words" may produce a violation of the general prohibition against sex discrimination in employment practices under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2). (R.A.V. v. St. Paul, supra, 505 U.S. at p. 389 [112 S.Ct. at p. 2546].) The R.A.V. Court specifically cited anti-discrimination laws such as 42 U.S.C. §§1981, 1982, and 2000e-2 and 18 U.S.C. §242, after which Penal Code section 422.7 is modeled (People v. Lashley (1991) 1 Cal.App.4th 938, 947), as laws consistent with the First Amendment principle that "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." (R.A.V. v. St. Paul, supra, 505 U.S. at p. 390 [112 S.Ct. at pp. 2546-2547].)

c. The "No Realistic Possibility of Official Suppression" Exception

Finally, the Court explained that "to validate such selectivity (where totally prescribable speech is at issue) it may not even be necessary to identify any particular 'neutral'

basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." (Id., at p. 390 [2547] (emphasis added).)

Most state statutes covering hate violence, including California's, are not as poorly drafted as the St. Paul hate speech statute and prohibit conduct rather than mere speech. After R.A.V., courts throughout the country split on whether their more narrowly written statutes were constitutional.6/

B. Wisconsin v. Mitchell

Wisconsin v. Mitchell, supra, 508 U.S. 476 [113 S.Ct. 2194], laid to rest concerns that many felt about the viability of hate crimes statutes after the United States Supreme Court decision in R.A.V. v. St. Paul, supra, 505 U.S. 377 [112 S.Ct. 2538]. In Mitchell, the Supreme Court held that a defendant's First Amendment rights were not violated by the application of a hate crimes penalty enhancement provision in sentencing him.

Defendant Todd Mitchell's sentence for aggravated battery was enhanced under a Wisconsin statute because he intentionally selected his victim because of the victim's race. This statute is virtually identical to California's Penal Code section 422.75.

In an unanimous decision written by Chief Justice William Rehnquist, the high court held that courts may take into account bias motive in sentencing. While a sentencing judge may not take into consideration a defendant's abstract beliefs, no matter how obnoxious to most people, the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because they are protected by the First Amendment. (Wisconsin v. Mitchell, supra, 508 U.S. at pp. 485-486 [113 S.Ct. at p. 2200], citing Dawson v. Delaware (1992) 503 U.S. 159 [112 S.Ct. 1093, 117 L.Ed.2d 309]; and Barclay v. Florida (1983) 463 U.S. 939 [103 S.Ct. 3418; 77 L.Ed.2d 1134 (plurality opinion).) The Court held that discriminatory motive can be considered in commission of a crime just as it may be

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6/ Prior to the Wisconsin v. Mitchell Supreme Court decision, California, New York, Oregon, and Florida upheld their statutes. See People v. Joshua H., supra, 13 Cal.App.4th 1734; People v. San Diego County Superior Court (Aishman) (1993) 15 Cal.App.4th 1593 [19 Cal.Rptr.2d 444]; People v. Miccio (N.Y.City Crim. Ct. 1992) 589 N.Y.S.2d 762; People v. Mulqueen (Dist. Ct. 1992) 589 N.Y.S.2d 246; People v. Grupe (N.Y.City Crim. Ct. 1988) 532 N.Y.S.2d 815; State v. Plowman (1992) 314 Ore. 157 [838 P.2d 558]; State v. Martin (1991) 109 Ore.App. 483 [818 P.2d 1301]; State v. Hendrix (1991) 107 Ore.App. 734 [813 P.2d 1115]; and Dobbins v. State of Florida (Fla.App. 1992) 605 So.2d 922. Two other states, Wisconsin and Ohio, invalidated their statutes. See State v. Mitchell (1992) 169 Wis.2d 153 [485 N.W.2d 807] and State v. Wyant (1992) 64 Ohio St.3d 566 [597 N.E.2d 450]. The invalidation of Wisconsin's statute was overturned in Wisconsin v. Mitchell, supra, 508 U.S. at pp. 482-83 [113 S.Ct. 2194, at p. 2198].

considered in state and federal anti-discrimination laws. (Wisconsin v. Mitchell, supra, 508 U.S. at p. 487 [113 S.Ct. at p. 2200], citing Roberts v. United States Jaycees (1984) 468 U.S. 609, 628 [104 S.Ct. 3244, 3255, 82 L.Ed.2d 462]; Hishon v. King & Spalding (1984) 467 U.S. 69, 78 [104 S.Ct. 2229, 2235, 81 L.Ed.2d 59]; and Runyon v. McCrary (1976) 427 U.S. 160, 176 [96 S.Ct. 2586, 2597, 49 L.Ed.2d 415].)

The High Court distinguished the Minnesota statute in R.A.V. from the Wisconsin penalty enhancement statute. Whereas the Minnesota statute purported to prohibit and punish the utterance of certain bias-motivated "fighting words" and thus was impermissibly content-based, the Wisconsin statute prohibits conduct unprotected by the First Amendment. (Wisconsin v. Mitchell, supra, 508 U.S. at p. 487 [113 S.Ct. at pp. 2200-01].)

Notably, the United States Supreme Court also stated that it was permissible for a state to single out for enhancement bias-motivated crimes because of the greater individual and societal harm they inflict, citing for support briefs by the state of Wisconsin and its amici. (Wisconsin v. Mitchell, supra, 508 U.S. at pp. 487-88 [113 S.Ct. at p. 2201].)

Finally, the High Court dismissed the overbreadth argument as too speculative a hypothesis to support Mitchell's overbreadth claim, finding it "difficult, if not impossible, to conceive of a situation" where someone would suppress "their bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property." (Wisconsin v. Mitchell, supra, 508 U.S. at p. 489 [113 S.Ct. at p. 2201].)

C. California Cases Upholding Hate Crimes Statutes

Four California cases have definitively upheld the constitutionality of various California hate crimes statutes. 7/ They are discussed below. All of the cases hold that the

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7/ The California Supreme Court decided two of the cases, People v. Superior Court (Aishman), supra, 10 Cal.4th 735, and People v. M.S., supra, 10 Cal.4th 698; and has denied review in the remaining two cases, People v. Joshua H., supra, 13 Cal.App.4th 1734 and People v. Steven S., supra, 25 Cal.App.4th 598. In a fifth case, People v. Baker, supra, 28 Cal.Rptr.2d 794, the California Supreme Court initially granted review (28 Cal. Rptr.2d 794) and then later denied it and remanded it back to the Court of Appeal (45 Cal.Rtpr.2d 206). The Baker appellate decision had also upheld the

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particular challenged penal code statute is constitutional because the law prohibits conduct rather than speech.

In People v. Joshua H., supra, 13 Cal.App.4th 1734, a 17-year-old skinhead, Joshua H., challenged the constitutionality of his conviction under Penal Code section 422.7 for his gaybashing of his next door neighbor. Section 422.7, part of the criminal portion of the Bane Act, permits a misdemeanor to be punished as a felony if it is a hate crime.

In a well-written opinion, the California Sixth District Court of Appeal distinguished section 422.7 from the Minnesota ordinance in R.A.V. and held that section 422.7 does not proscribe expression but rather an especially egregious type of conduct -- that of selecting crime victims on the basis of race, color, religion, ancestry, national origin, or sexual orientation. (People v. Joshua H., supra, 13 Cal.App.4th at p. 1738.) The Joshua H. court also relied upon all three of the First Amendment exceptions delineated by Justice Scalia in R.A.V. v. St. Paul, supra, 112 S.Ct. at 2545-2549, to underscore that Penal Code section 422.7 is constitutional. The California Supreme Court denied review of this case.

In People v. Superior Court (Aishman), supra, 10 Cal.4th 735, the California Supreme Court upheld the constitutionality of Penal Code section 422.75, subdivision (b), which enhances sentences for bias-motivated felonies. In Aishman, the defendants were convicted of assaulting a trio of Mexican men that the defendants accused of being rapists.

As evidence of bias in victim selection, the state relied upon various statements purportedly made by the defendants. For example, Aishman is alleged to have talked of "hitting home runs with Mexicans" and Inman had both a swastika and "Thank God I'm White" tattooed on his arms.

The defendants alleged that Penal Code section 422.75, subdivision (b), violated their constitutional rights of free speech. Aishman argued the statute was facially invalid as a punishment for his speech (the statements he allegedly made about "hitting home runs with Mexicans"); was unconstitutional insofar as the motivational phrase "because of" was impermissibly vague; and last urged that the statute was overbroad.

The court adopted the state's construction of the motivational phrase, that the defendants attacked the victims "because of" their ethnicity, to mean that animus towards the victims' ethnicity was a "substantial factor" in the selection of the victims. Defendants had urged that they could not be convicted unless the state could prove that they would not have attacked the victims "but for" the victims' ethnicity. (People v. Superior Court (Aishman), supra, 10 Cal.4th at 741.)

7/(...continued)
constitutionality of Penal Code section 422.75.

In In re M.S., supra, 10 Cal.4th 698, the California Supreme Court held that Penal Code section 422.6 as well as section 422.7 are constitutional. M.S. and A.G., two minor females, participated with two adult male skinhead accomplices in a vicious assault of several gay men in the Castro district of San Francisco. The two minor females were convicted of violating Penal Code sections 422.6 and 422.7.

The California Supreme Court upheld the constitutionality of both of these Penal Code sections from a variety of challenges. Initially, the court held that Penal Code section 422.6 is not overbroad for several reasons. First, this section proscribes only "true threats" to an individual or a specific group of individuals, not abstract groups or protected classes. Second, the court held that both sections 422.6 and 422.7 require proof of a specific intent to invade the victim's legally protected rights, by means of threats of violence, because of the victim's protected characteristic. The court noted that, "Violence and threats of violence fall outside the protection of the First Amendment because they coerce by unlawful conduct, rather than persuade by expression, and thus play no part in the 'marketplace of ideas.'" (In re M.S., supra, 10 Cal.4th at 714.) Third, the court interpreted section 422.6 to require the prosecution, in order to obtain a conviction based on speech alone, to prove the speech itself threatened violence and that the defendant had the "apparent ability" to carry out the threat. With this interpretation, the section is not overbroad.

Next, the Supreme Court held that both sections 422.6 and 422.7 are sufficiently clear in their causation language to meet due process requirements. Both sections require that the prosecution prove that the defendant committed his or her crime "because of" bias motivation. The "because of" language indicates that an event (the charged crime) was caused in fact by something (the accused's prohibited bias). Where there are multiple concurrent causes for the crime, the prosecution must show that the prohibited bias was a substantial factor in the commission of the crime.

The Supreme Court also held that the "because of" language is not unconstitutionally vague: it is a term in common usage, connoting a causal link between the victim's characteristic and the offender's conduct, and resembles language held constitutional in other civil rights and antidiscrimination statutes. The conduct punished by sections 422.6 and 422.7 is objectively clear and its discriminatory motivation is an element that must be proved beyond a reasonable doubt.

The Court distinguished section 422.6 from the unconstitutional R.A.V. statute and held that section 422.6 is not impermissibly content based but rather falls under one of the R.A.V. exceptions -- "'fighting words' [here, threats] that are directed at certain persons or groups." (In re M.S., supra, 10 Cal.4th at 722, quoting R.A.V., supra, 112 S.Ct. at p. 2548.) "Section 422.6 punishes the discriminatory threat of violence, not the thought behind it." (In re M.S., supra, 10 Cal.4th at 723.)

Similarly, the Court held that section 422.7, is constitutional for the same reason as the Wisconsin statute in Mitchell: it does not impinge on freedom of expression, but rather, increases punishment for misdemeanors committed because of prohibited bias motivation. Thus section 422.7 is also not overbroad.

The Court overturned the Court of Appeals' holding that section 422.6 has been implicitly exempted from Penal Code section 654 which prohibits punishment under more than one statute if the criminal act or omission is made punishable in different ways by different provisions of the Penal Code. The Court thus remanded the minor A.G.'s case to juvenile court to make this determination.

Finally, in the latest case, People v. Steven S., supra, 25 Cal.App.4th 598, the First District Court of Appeal, Division 3, upheld the constitutionality of a cross burning statute, Penal Code section 11411, subdivision (c). Stephen S., a white juvenile, burned a cross on the property of a mixed-race couple. Stephen S. was charged with a violation of section 11411, subdivision (c), which makes it a crime to burn a cross on the private property of another for the purpose of terrorizing the owner or occupant or in reckless disregard of that risk.

The appellate court upheld the statute, concluding that it is neither overbroad nor vague, it is not an impermissible content-based prohibition on speech and it does not violate equal protection. The court also found that all three of the exceptions to content-based discrimination articulated in R.A.V. v. St. Paul, supra, 505 U.S. at pp. 387-88 [112 S.Ct. at p. 2545] applied.

The Stephen S. court distinguished California's cross burning statute from the Minnesota ordinance held to be unconstitutional in R.A.V. v. St. Paul, supra, 505 U.S. 377 [112 S.Ct. 2538]. Under California's statute, only cross burning on the private property of another is prohibited, whereas the Minnesota ordinance covered public or private property. The California Court of Appeal held that a cross burning on the private property of another inflicts immediate injury by subjecting the victim to fear and intimidation and conveys a threat of future physical harm. In contrast, a cross burning at a public rally is constitutionally protected because it is not directed at any individual. (People v. Stephen S., supra, 31 Cal.Rptr.2d 644 at 648-9, citing R.A.V. v. St. Paul, supra, 505 U.S. at pp. 431, 435 [112 S.Ct. at pp. 2569, 2571].) The California Supreme Court denied review in this case.

California's hate crimes statutes have been well crafted to avoid the constitutional problems of the St. Paul, Minnesota ordinance. California's statutes generally prohibit conduct, not speech. To the extent that speech alone is enjoined, it is specifically limited to "true threats" where the defendant makes a threat against a specific person or group of persons and has the apparent ability to carry out the threat. California appellate courts have recognized this in upholding all of the major California hate crimes statutes.