Extinguishing the Burning Crosses: Washington's Malicious Harassment Statute in Light of the Issues of Overbreadth and Vagueness

*Edward Comitz**

I. INTRODUCTION

Washington enacted a malicious harassment statute[1] in 1989 in response to the growing number of incidents of hate

* B.A. 1990, Creighton University; J.D. Candidate 1993, University of Puget Sound School of Law.

1. WASH. REV. CODE § 9A.36.080 (1989) provides:

(1) A person is guilty of malicious harassment if he maliciously and with the intent to intimidate or harass another person because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical or sensory handicap;

(a) Causes physical injury to another person; or

(b) By words or conduct places another person in reasonable fear of harm to his person or property or harm to the person or property of a third person. Such words or conduct include, but are not limited to, (i) cross burning, (ii) painting, drawing, or depicting symbols or words on the property of the victim when the symbols or words historically or traditionally connote hatred or threats toward the victim, or (iii) written or oral communication designed to intimidate or harass because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap. However, it does not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way unless the context or circumstances surrounding the words or conduct places another person in reasonable fear of harm to his or her person or property or harm the person or property of a third person; or

(c) Causes physical damage to or destruction of the property of another person.

(2) The following constitute per se violations of this section:

(a) Cross burning; or

(b) Defacement to the property of the victim or a third person with symbols or words when the symbols or words historically or traditionally connote hatred or threats toward the victim.

(3) Malicious harassment is a class C felony.

(4) In addition to the criminal penalty provided in subsection (3) of this section, there is hereby created a civil cause of action for malicious harassment. A person may be liable to the victim of malicious harassment for actual damages and punitive damages of up to ten thousand dollars.

crimes[2] occurring within the state. Statutes similar to Washington's have been adopted in a number of other states.[3] The only states that have not enacted some form of hate crime legislation are Arkansas, Nebraska, Utah, and Wyoming.[4]

Many of the states that have enacted hate crime legislation, including Washington, specifically refer to the act of cross burning.[5] Cross burning incidents are currently on the rise in Washington. In fact, the most recent and controversial cases invoking Washington's malicious harassment statute have all involved cross burning.[6]

Because the recent controversy over Washington's malicious harassment statute has centered on cases involving cross burning incidents, the act of cross burning "with the intent to intimidate or harass"[7] will be used as an example of a hate crime throughout this Comment. This is not to say that other hate crimes are of lesser importance than cross burning. It is clear that numerous symbols and words can, because of their historical context, equally communicate the same messages of hatred and violence.[8]

Hate crimes, such as cross burning, are qualitatively differ-

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(5) The penalties provided in this section for malicious harassment do not preclude the victims from seeking any other remedies otherwise available under the law.

2. *See* Daniel Golman, *As Bias Crime Seems to Rise, Scientists Study Roots of Racism*, N.Y. TIMES, May 29, 1990, at C1 (stating that hate crimes have increased since 1988).

3. The following states make cross burning or the burning of other religious symbols subject to criminal sanction: Connecticut, CONN. GEN. STAT. ANN. § 46a-58(c) (West 1986); District of Columbia, D.C. CODE ANN. § 22-3112.2(a) (Supp. 1987); Florida, FLA. STAT. ANN. § 876.17-18 (West 1976); Idaho, IDAHO CODE § 18-7902 (1987); Maryland, MD. ANN. CODE art. 27, § 10A (1988); New Jersey, N.J. STAT. ANN. 2C:33-10 (West 1982); North Carolina, N.C. GEN. STAT. § 14-12.12 (1986); Rhode Island, R.I. GEN. LAWS § 11-53-2 (Supp. 1987); South Carolina, S.C. CODE ANN. § 16-7-120 (Law. Co-op. 1987); and Virginia, VA. CODE ANN. § 18.2-423 (Michie 1982 and Supp. 1987).

4. Rorie Sherman, *Hate Crimes Statutes Abound*, NAT'L L.J., May 21, 1990, at 3.

5. *See* statutes cited *supra* note 3.

6. *See, e.g.*, State v. Stevens, No. 91-8-02530-6 (King County Super. Ct. Oct. 9, 1991), *petition for cert. filed*, No. 58734-5 (Wash. Nov. 20, 1991); State v. Talley, No. 91-1-02001-5 (King County Super. Ct. July 31, 1991), *petition for cert. filed*, No. 58492-3 (Wash. Aug. 29, 1991).

7. WASH. REV. CODE § 9A.36.080(1) (1989). The term "cross burning" will be used throughout this Comment. However, the reader should understand that the Author is at all times referring specifically to cross burnings "with the intent to intimidate or harass." *Id.* This distinction is significant because cross burning "with the intent to intimidate or harass" is the specific type of cross burning that is subject to sanction under Section (1) of Washington's malicious harassment statute.

8. The historical context of certain words (e.g., "nigger," "faggot," "gook") make their utterance in some situations the communication of a threat of violence.

ent from other crimes because the perpetrator's conduct harms not only the direct victim, but other individuals indirectly as well. When a cross is burned in front of an African-American's home, a message is sent both to that individual and to the entire African-American community. The message is understood, based on the history of cross burning, as a threat of future harm.[9]

The Anti-Defamation League of B'nai B'rith has found that cross burning and other hate crimes may

> effectively intimidate other members of the victim's community, leaving them feeling isolated, vulnerable, and unprotected by the law. By making members of minority communities fearful, angry, and suspicious of other groups—and of the power structure that is supposed to protect them—these incidents can damage the fabric of our society and fragment communities.[10]

Despite the damaging effects of hate crimes, some argue that cross burning with the intent to intimidate or harass is nonetheless deserving of First Amendment protection. The argument is that hate speech, as communication, cannot be sanctioned by the government unless a fight or lawless action is imminent.[11] Moreover, even the regulation of unprotected speech, such as fighting words, is deemed impermissible if the regulation is based on the speech's nonproscribable content.[12]

The first section of this Comment will briefly discuss how Washington's malicious harassment statute should be interpreted in light of the recent United States Supreme Court case *R.A.V. v. City of St. Paul*.[13] In that case, the Court held that a City of St. Paul hate crimes ordinance was unconstitutional.[14]

Similarly, the history of swastika drawing can make this particular act threatening to certain individuals.

9. The threat of future violence is but one message communicated through cross burning. If cross burning with the intent to intimidate, harass, or threaten is not legislatively proscribed, the perception is that such behavior is condoned by the government. This makes victims and their communities feel helpless in the system that was meant to protect them. *See generally* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 137-39 (1982).

10. ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIMES: POLICIES AND PROCEDURES FOR LAW ENFORCEMENT AGENCIES 1 (1988) [hereinafter B'NAI B'RITH].

11. FRANKLIN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 97-99 (1981).

12. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543 (1992).

13. *Id.*

14. *Id.* at 2542.

Rather than deciding the case on the obvious issues of overbreadth and vagueness, the Court held that the ordinance was impermissibly content-based.[15]

Under the Court's reasoning, Washington's malicious harassment statute will probably be found unconstitutional.[16] Such a finding, however, will merely lead to the drafting of a content-neutral statute through the use of a catch all phrase.[17] Even with the addition of this phrase, however, the statute will still be subject to attack. Accordingly, the next round of criticisms will focus on the issues of overbreadth and vagueness, issues to which the Supreme Court has not provided guidance.

Because the issues of overbreadth and vagueness are of such imminent importance, an analysis of those issues will form the majority of this Comment. Both issues, as mentioned above, will be discussed in terms of the specific crime of cross burning with the intent to intimidate or harass as proscribed by Section (1) of Washington's malicious harassment statute.[18]

In discussing the issue of overbreadth, a determination must be made as to whether cross burning with the intent to intimidate or harass is even "expressive conduct." This author contends that such acts are not speech, but merely threats of violence that can be freely regulated by the government. Under this interpretation, Section (1) of Washington's statute is not overly broad because it proscribes only *non-speech*.

If cross burning with the intent to intimidate or harass is interpreted as expressive conduct, the constitutional analysis will be different, but the end result is nevertheless that such conduct is sanctionable. This is because cross burning with the intent to intimidate or harass can be construed as encompassing only "fighting words," threatening speech,[19] or low value

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15. *Id.*

16. *See infra* note 19 for an interpretation that avoids the impact of *R.A.V.*

17. *R.A.V.*, 112 S. Ct. at 2553. Ironically, this phrase will merely ensure that the statute covers problems that the legislature has initially determined do not exist.

18. WASH. REV. CODE § 9A.36.080(1) (1991).

19. This Comment will emphasize that cross burning with the intent to intimidate or harass is threatening behavior. Whether threats of violence should be considered unprotected speech or nonspeech has yet to be decided.

In *R.A.V.*, the Supreme Court decided that fighting words were unprotected *speech*, not merely proscribable conduct. As speech, these words could not be made sanctionable based on the particular views the speakers decided to convey. *R.A.V.*, 112 S. Ct. at 2549. The Court, while making a determination with regard to fighting words, did not address the same issue in the context of threats of violence.

If cross burning with the intent to intimidate or harass is a merely a threat (proscribable conduct), then the statute is not overly broad. More importantly, critics

speech, all of which are subject to legitimate criminalization. Under the previous interpretations, Section (1) of Washington's statute survives criticisms of overbreadth because it sanctions only *unprotected speech.*

Issues of overbreadth aside, Section (1) of the statute may be criticized on vagueness grounds. For example, some argue that the wording is unclear as to what extent the perpetrator must be motivated by the victim's ethnicity. This criticism is without merit. The most logical interpretation of the statute is that the victim's ethnicity must have been at least a substantial reason why the perpetrator acted.

Another potential criticism of the statute is that the wording "places another person in reasonable fear of harm . . ." is vague, because neither a subjective nor an objective standard is specifically mentioned. This criticism, however, is easily overcome because Washington uses a mixed standard in such circumstances.

Considering the concrete and real harms minority victims of hate crimes experience, there is a tremendous need for a malicious harassment statute. With this in mind, Washington's statute should be construed, whenever possible, in a way that preserves its constitutionality.

II. THE IMPLICATIONS OF *R.A.V. v. CITY OF ST. PAUL*: UNDERBREADTH

In its June 22, 1992, opinion, the United States Supreme Court held a City of St. Paul hate crimes ordinance[20] unconstitutional.[21] Despite claims of overbreadth and vagueness, the

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of the statute could not make "content-based" arguments, because only non-speech would be proscribed.

The Supreme Court's reasoning wth regard to fighting words, however, could arguably be applied by analogy to the context of threatening behavior. This Author has therefore decided to alternatively discuss actions proscribable under Washington's statute as threatening *speech.* The reader should note, however, that the case law is presently equivocal on this issue. The cases use the word "threat," and do not give any explanation as to whether these threats are communicative or not.

20. The City of St. Paul ordinance provided:

> 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 and shall be guilty of a misdemeanor.

CITY OF ST. PAUL MINN. LEG. CODE § 292.02 (1990).

21. *R.A.V.*, 112 S. Ct. at 2542.

Court never reached these issues. In fact, regarding the issue of overbreadth, the Court simply stated that it was bound by prior Minnesota decisions construing the language "arouses alarm or resentment in others" as referring only to fighting words.[22]

Rather than analyzing the most apparent issues, the Court held that the City of St. Paul's hate crimes ordinance was unconstitutional based on the new doctrine of "underbreadth."[23] The majority, led by Justice Scalia, stated that the ordinance impermissibly sanctioned some fighting words but not others.[24] This selective proscription, argued the Court, was based on the particular views the "speakers" decided to convey, and was therefore an impermissible regulation of ideas.[25]

Although the majority's reasoning in *R.A.V.* has numerous shortfalls,[26] Washington courts are nevertheless bound by the opinion.[27] Challenging Washington's statute as underinclusive, however, does not end the discussion. As Justice White stated in his concurring opinion, the underbreadth problem can easily be cured by adding a catch-all phrase such as "and all other fighting words that may constitutionally be subject to this ordinance."[28]

Even with Washington's malicious harassment statute reworded to conform with *R.A.V.*, constitutional criticisms will nevertheless exist. The statute will still be subject to attack concerning the issues of overbreadth and vagueness. Regard-

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22. *Id.*

23. In Justice White's concurring opinion, he states that the majority has employed the new doctrine of "underbreadth." *Id.* at 2553.

24. *Id.* at 2547. Namely, the ordinance was directed only toward those fighting words based on the victim's race, color, religion, or gender. *Id.*

25. *R.A.V.*, 112 S. Ct. at 2549.

26. Specifically, the majority's analysis failed to realize that the regulation of ideas was neither the aim nor the result of the City of St. Paul ordinance. The wording "race, color, creed, religion or gender" was not used to censor politically incorrect speech. Rather, the ordinance was directed at the peculiar injuries members of minority groups face when confronted with hate speech.

Considering the historical context of many forms of hate speech, such acts are perceived by victims as threats of violence. These threats are pervasive and understood not only by direct victims, but also by their communities. Hate crimes are specifically sanctioned because such acts are qualitatively different from other crimes. Hate crimes do not communicate ideas, but rather, place entire communities in fear of potential violence.

27. *See supra* note 19 for an alternative interpretation that could arguably escape the impact of *R.A.V.*

28. *R.A.V.*, 112 S. Ct. at 2549.

ing both issues, the Supreme Court has yet to provide guidance.

III. ADDRESSING THE REAL ISSUES: OVERBREADTH AND VAGUENESS

Part A of this Comment will focus on the yet to be decided issues of overbreadth and vagueness, with an emphasis on the way they affect Section (1) of Washington's statute. In discussing Section (1), cross burning with the intent to intimidate or harass will continue to be used as an example of a hate crime.

Part B of this Comment will focus on Section (2)(a) of Washington's statute, which also proscribes cross burning. This section, however, makes no reference to the perpetrator's intent and is therefore overly broad. A remedy for this constitutional deficiency will be provided.

A. Analysis of Section (1)

1. Cross Burning with the Intent to Intimidate or Harass as Non-Expressive Conduct

In order to determine whether Washington's malicious harassment statute impermissibly restricts freedom of speech, the first step is to determine whether cross burning with the intent to intimidate or harass is even expressive conduct. The

the Washington Constitution.[31]

Proponents of hate crime legislation obviously disagree with the above analysis. Some have gone as far as to say that *all* cross burnings, regardless of the demonstrator's intent, "have no meaning on their own, but [rather], convey a powerful message to both the user and the recipient of the sign in context."[32]

Section (1) of Washington's malicious harassment statute does not adopt an approach that is so far-reaching. Rather, the statute was enacted to regulate acts, such as cross burning, only when the perpetrator has the intent to intimidate or harass and only when the victim is placed in reasonable fear of harm to person or property. The statute, written this way, does not regulate cross burnings that constitute expressive conduct. For example, burning a cross on a movie set or burning a cross during a demonstration would not invoke the statute. Only when cross burning is used to intimidate or harass (i.e., threaten) does the statute apply.

When cross burning is used to threaten another individual, the message of white supremacy merely has a residual impact on the victim. The victim experiences fear and the threat of further violence long before the message of white supremacy is ever communicated.[33] Cross burning loses its communicative value when the perpetrator intends to intimidate or harass and where the victim is reasonably placed in fear of harm. This particular type of cross burning is meant first and foremost to be a threat. Courts, therefore, should construe such cross burnings as threats, devoid of any real message, and thus sanctionable by the government.

The goal of Washington's malicious harassment statute is to protect minority citizens from hateful intimidation; it is not

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California, 403 U.S. 15 (1971) (words "Fuck the Draft" on individual's jacket not a direct personal insult).

31. *See generally* O'Day v. King County, 109 Wash. 2d 796, 749 P.2d 142 (1988).

32. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2365 (1989).

33. Free speech presumes the presence of rational dialogue. Professor Tribe has noted the difference between words that leave room for reply and words that trigger action or cause harm without the opportunity for response. Only the former is protected communication. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 837 (2d ed. 1988).

Hate crimes, such as certain forms of cross burning, can be seen as "a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow." Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452.

intended to stifle offensive communication.[34] Other states throughout the country have similarly legislated against cross burning with the intent to intimidate or harass[35] primarily because such acts constitute "terroristic threat[s]"[36] and are not an exercise of free speech.[37] For instance, Georgia convicted a cross burner under its hate crimes statute and declared that the perpetrator's action was not constitutionally protected under the First Amendment.[38] In that case, the court stated that while the First Amendment does protect the advocacy of certain ideas, "it does not extend to the threatening of terror, inciting of riots, or placing another's life or property in danger."[39]

Cross burning with the intent to intimidate or harass should be regulated as a threat and should not be considered a form of communication. The need for a malicious harassment statute stems not only from the fact that victims should be protected from these threats, but also from the fact that current statutes do not provide adequate protection.[40]

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34. Washington's malicious harassment statute provides:

> [I]t does not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way unless the context or circumstances surrounding the words or conduct places another person in reasonable fear of harm to his person or property or person or property of a third person.

WASH. REV. CODE § 9A.36.080(1)(b) (1989). Note that the statute requires an intent to intimidate or harass, as well as placing the "reasonable" victim in fear of harm. *Id.*

35. *See* statutes cited *supra* note 3 for states that proscribe cross burning or the burning of other religious symbols.

36. State v. Miller, 629 P.2d 748, 751 (Kan. Ct. App. 1981) (cross burning may fall within purview of terroristic threat statute depending on circumstances).

37. *See* Commonwealth of Pennsylvania v. Koch, 431 A.2d 1052, 1057 (Pa. Super. Ct. 1981).

38. Masson v. Slaton, 320 F. Supp. 699, 672 (N.D. Ga. 1970).

39. *Id.*

40. Those opposed to the criminalization of cross burning argue that other statutes exist which provide adequate protection for victims of hate crimes. For example, victims can be protected under the state's trespass, assault, and harassment statutes. These statutes, however, do not provide protection to victims in particular circumstances. For instance, a cross burning occurring off the property of the victim, yet near her home, will certainly place that victim in tremendous fear; however, a trespass remedy may not be afforded because the incident did not take place on the victim's property. An assault remedy is also unlikely because the harm is not "imminent."

While some argue that malicious harassment statutes impermissibly punish the perpetrator's motive, as well as the underlying crime, this simply is not true. Malicious harassment statutes are needed because this crime is wholly separate from the crime of harassment. While both harassment statutes and malicious harassment statutes, by definition, require direct threats to the victim, the crime of malicious harassment has a threatening effect on the victim's entire community as well. B'NAI B'RITH, *supra* note 10, at 1.

a. Cross Burning and Flag Burning: The Differences

Those who oppose the criminal sanctioning of cross burning with the intent to intimidate or harass argue that it is substantially similar to flag burning, which the United States Supreme Court has held to be expressive conduct under the First Amendment.[41] There are, however, several critical differences between cross burning and flag burning.

Specifically, the flag burning cases dealt with demonstrations that occurred in public.[42] Furthermore, the demonstrations were not directed at particular individuals, but rather, were in opposition to more general concerns.[43] In contrast, cross burnings with the intent to intimidate or harass are not public activities. Such acts generally occur on or near the property of a minority individual or family.[44] Furthermore, the perpetrators usually do not burn crosses to express their general opinions. Their actions are directed at specific individuals and the goal is to intimidate or harass.[45]

The flag burning cases stand for the proposition that public flag burning used as a means to express political views is protected by the First Amendment.[46] The cases do not support the proposition that persons may burn objects with an intent to

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41. Texas v. Johnson, 491 U.S. 397, 418 (1989); Eichman v. United States, 496 U.S. 310, 319 (1990).

42. Texas v. Johnson, 491 U.S. at 399 (American flag burned on steps of Dallas City Hall); *Eichman*, 496 U.S. at 310 (American flags burned on steps of United States Capitol).

43. Texas v. Johnson, 491 U.S. at 399 (flag burned to protest policies of Reagan administration); *Eichman*, 496 U.S. at 312 (flags burned to protest "aspects of the Government's domestic and foreign policy").

44. Cross burnings often occur in situations where the degree of captivity makes it impossible for the victim to avoid exposure. Where cross burning intrudes on the privacy of the home, this act may be subject to governmental regulation. *See* Enznoznick v. City of Jacksonville, 422 U.S. 205, 209 (1975). There is no right to force "speech" into the home of an unwilling listener. Frisby v. Schultz, 487 U.S. 474, 484-85 (1988).

In U.S. v. Lee, 935 F.2d 952 (8th Cir. 1991), a cross was burned outside an apartment complex where a number of African-Americans lived. Though there was no trespass, the residents who viewed the cross felt fearful. *Id.* at 954. The court stated that such acts were not mere advocacy, but rather, overt acts of intimidation, which, because of their historical context, "are often a precursor to or a promise of violence against black people." *Id.* Furthermore, the court noted that such cross burning is an especially intrusive act that invades the privacy interests of its victims. Thus, the court concluded as follows: "[T]o protect the inhabitants of this nation from such an attack on civil rights does *not violate the spirit of the first amendment.*" *Id.* (emphasis added).

45. *See generally*, Matsuda, *supra* note 32.

46. *See* Texas v. Johnson, 491 U.S. at 397; *Eichman*, 496 U.S. at 319.

intimidate, harass, terrorize, or threaten.[47] In fact, acts normally regarded as "expressive conduct"[48] lose their expressive character and become threats when accompanied by an intent to intimidate or harass.[49] Where expressive conduct is solely motivated to threaten, injure or terrorize others, it does not fall within the protection of the First Amendment.[50]

b. Distinguishing the Statutory Language

Washington's malicious harassment statute has been erroneously analogized to a Texas statute that proscribed protected expression.[51] Specifically, the Texas statute forbad a person to "desecrate . . . a state or national flag."[52] The term "desecrate" was defined as meaning to "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 actions."[53] Thus, in order for liability to attach, the violator must have had the intent to *offend*.[54] Washington's statute, in contrast, specifically prohibits burning a cross with the intent to *intimidate* or *harass*.[55]

Offensive actions may have communicative value,[56]

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47. Cross burning on or near the property of a victim is considered an intimidating action that is not worthy of First Amendment protection. *See, e.g., Lee*, 935 F.2d at 954.

48. For example, burning a cross on a movie set or during a demonstration or march.

49. For example, burning a cross during a march communicates notions of white supremacy and intolerance of diversity. However, when a cross is burned on the lawn of an African-American family's home, the family's initial reaction is one of fear—fear of being physically hurt, fear of being run out of the neighborhood, fear of continuing threats, etc. The message of white supremacy and intolerance of diversity is merely secondary to the threat. Fear is experienced long before any other messages are understood. *See generally Lee*, 935 F.2d 952.

50. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

51. TEXAS PENAL CODE ANN. § 42.09 (West 1989) provides in full:

Sec. 42.09 Desecration of Venerated Object

(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 actions.
(c) An offense under this section is a Class A misdemeanor.

52. *Id.* § 42.09(a)(3).

53. *Id.* § 42.09(b).

54. *See* Texas v. Johnson, 491 U.S. 397, 400 (1989).

55. WASH. REV. CODE § 9A.36.080(1) (1991).

56. *See* Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978) (holding ordinance

whereas intimidating or harassing actions do not.[57] For example, in *Collin v. Smith*,[58] despite the fact that many Jewish residents of Skokie, Illinois, were offended by the sight of Nazis marching through town in uniform, the Nazis were nevertheless allowed to proceed.[59] The march was considered protected speech under the First Amendment of the United States Constitution.[60] If the marchers had decided to wield stones at the homes of nearby Jewish residents, yelling anti-Semetic remarks, the marchers' conduct would certainly no longer have been entitled to protection. This is because the line separating offensive speech from threats of violence would have been crossed.

Washington's statute has been tailored such that offensive speech is not sanctionable. The legislature recognized that offensive speech is protected, and the statute specifically provides that merely speaking in a "critical, insulting, or deprecatory way" does not constitute malicious harassment.[61] What the statute prohibits is physical injury, property damage, and words or conduct that would place another in reasonable fear of harm to person or property.[62] Protected expression is therefore not prohibited.

2. The Issue of Overbreadth: Cross Burning with the Intent to Intimidate or Harass as Expressive Conduct

Despite the preceding arguments, cross burning with the intent to intimidate or harass may nevertheless be viewed by some as "expressive conduct." The residual message of white supremacy, which accompanies the threat of violence inherent in many cross burning situations, is argued to be a communication worthy of First Amendment protection. As expressive conduct, cross burning with the intent to intimidate or harass

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unconstitutional as applied to demonstrators wearing uniforms and displaying swastikas in Jewish neighborhood).

57. *See infra* note 33.

58. 578 F.2d 1197 (7th Cir. 1979).

59. *Id.* at 1200. Some may argue that the Jewish residents were intimidated and placed in fear as a result of the march. The line between offensive and intimidating conduct is thus difficult to draw. Despite this, the marchers did not have an intent to intimidate. Instead, their intent was to communicate a message, and perhaps even to offend, but no more. Under Washington's malicious harassment statute, therefore, the marchers' conduct would not be sanctionable. *See* WASH. REV. CODE § 9A.36.080(1) (1989).

60. *See Collin*, 578 F.2d at 1201-02.

61. WASH. REV. CODE § 9A.36.080(1)(b) (1989).

62. *Id.*

can only be criminalized if the substantive evil caused by its communicative impact rises "above public inconvenience, annoyance, or unrest."[63]

As expressive conduct, cross burning with the intent to intimidate or harass generally cannot be criminally sanctioned unless it falls into one of three exceptions: (1) fighting words;[64] (2) clear and present danger of incitement to imminent lawless action;[65] or (3) the *O'Brien* standard, which provides that incidental limitations on speech are permissible if there is an important governmental interest implicated unrelated to the suppression of free speech.[66]

While the previously named exceptions are the most well-known, there are others. For example, threats of violence are also not afforded First Amendment protection.[67] This is because symbolic conduct solely motivated to threaten another individual does not support any of the policies of the First Amendment such as the free exchange of ideas.[68]

Another example of communication that may not be afforded full First Amendment protection is "low value" speech.[69] "Low value" speech generally has little social value in relation to its potential harm, and it is thus more freely regulable by the government.[70]

The following discussion will focus on the doctrine of overbreadth as interpreted by both the federal and Washington State Constitutions. Under either standard, Washington's malicious harassment statute is not overly broad as only unprotected speech is proscribed. This is because the Washington

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63. Edwards v. South Carolina, 372 U.S. 229, 237 (1963).

64. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

65. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969).

66. U.S. v. O'Brien, 391 U.S. 367, 377 (1968).

67. *See, e.g.*, Watts v. United States, 394 U.S. 705, 707 (1969); State v. Miller, 629 P.2d 748 (Kan. Ct. App. 1981).

68. *See* TRIBE, *supra* note 33, § 12-8, at 837.

69. The phrase "low-value speech" was not coined by the United States Supreme Court, but is neverthless used by professors and practitioners to describe those expressions that are not afforded full First Amendment protection. Some examples of low-value speech are obscenity, child pornography, and libel.

70. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (child pornography physiologically, emotionally, and mentally harms children and has no serious literary, artistic, political, or scientific value); Miller v. California, 413 U.S. 15 (1973) (obscenity caters to the prurient interest and is patently offensive without any serious literary, artistic, political, or scientific value); New York Times v. Sullivan, 377 U.S. 254 (1964) (libel injures reputation and does not advance truth).

statute can logically be construed to encompass only fighting words, threatening speech, or low value speech.

a. Federal Overbreadth Analysis

The doctrine of overbreadth is a constitutional safeguard which ensures that laws do not sweep within their condemnation "speech which our Constitution has immunized from government control."[71] The assumption, however, is that the statute in question is constitutional.[72]

Under the First Amendment, statutes regulating conduct cannot be stricken as overbroad "unless the overbreadth is both real and substantial in relation to the ordinance's plainly legitimate sweep."[73] Thus, under the First Amendment, a law should not be voided on its face unless its deterrence of protected activities is *substantial*.[74] The United States Supreme Court stated as follows:

> Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then only as last resort.[75]

Under the First Amendment, a narrowly drafted statute is not vulnerable on its face simply because occasional applications can be imagined to go beyond constitutional bounds.[76] A statute must reach a substantial amount of protected activity when compared to its legitimate sweep in order to be found overly broad.[77]

The United States Supreme Court has stated that potentially overbroad statutes should be narrowly construed if possible.[78] The Court is reluctant to strike down a statute

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71. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969).

72. *See generally Ferber*, 458 U.S. 747.

73. *Id.* at 770.

74. *Id.* at 769. Generally, trespass and breach of the peace statutes are not found overly broad by the Court because these laws are rarely applied to protected speech. Rather, in cases involving trespass or breach of the peace, unprotected behavior is sanctioned far more often than protected expression. TRIBE, *supra* note 33, § 12-8, at 1024-25.

75. *Ferber*, 458 U.S. at 769.

76. *See* Cox v. Louisiana, 379 U.S. 559 (1965).

77. Broadrick v. Oklahoma, 413 U.S. 601, 615-18 (1973).

78. *Ferber*, 458 U.S. at 769.

altogether because of its potential to deter protected expression. In fact, the Court has shown a great willingness to allow state courts to narrow statutes in the application process.[79]

b. Washington's Overbreadth Analysis

Washington's Constitution is less tolerant than the First Amendment and appears to provide a more strict analysis in cases of overbreadth.[80] Under the Washington Constitution, Article 1, Section 5, the "substantial" requirement does not apply.[81] Prior restraints on constitutionally protected expression are prohibited under "any circumstances."[82] The reason why the overbreadth doctrine has been extended in Washington is because overly broad statutes have been found to threaten individuals who are not immediately before the court. That is, others may refrain from engaging in legally protected activities because they fear prosecution under an overly broad statute.[83]

While Washington has effectively done away with the "substantiality" requirement, courts should not construe all statutes that tangentially prohibit protected speech as unconstitutional. Arguably, the "any circumstances" language employed by Washington courts is not meant to be taken literally. If it were, numerous statutes would be found unconstitutional as overly broad. For example, in applying this language literally, a breach of the peace statute would certainly be found unconstitutional because numerous hypothetical situations can be imagined where such a statute would violate an individual's constitutional rights.[84] Similarly, a trespass statute could also be struck down on its face if the "any circumstances" language were taken literally.[85]

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79. *Id.* at 768.

80. O'Day v. King County, 109 Wash. 2d 796, 804, 749 P.2d 142, 147 (1988).

81. *Id.* at 804, 749 P.2d at 147.

82. *Id.*

83. *See generally* Board of Airport Comm'rs of L.A. v. Jews for Jesus, 482 U.S. 569, 574 (1982).

84. For example, a demonstrator may be communicating protected expression while at the same time causing a disturbance that rises to the level of a breach of the peace. Arresting this person will solve the breach of the peace problem. However, the police officer's conduct will also have the collateral effect of preventing that person from communicating what is on her mind. Despite the fact that protected speech is incidentally affected, the breach of the peace statute would most likely not be struck down as overly broad.

85. TRIBE, *supra* note 33, § 12-28, at 1024-25. For example, a group of individuals may be involved in a peaceful demonstration. Part of the demonstration, however,

Washington courts may find statutes overly broad, and thus unconstitutional, in situations where the prohibition of protected conduct is less than substantial. However, the courts may not find statutes unconstitutional simply because there are some incidental limitations of free speech.[86] As of yet, Washington courts have not determined at what point a statute should be deemed overly broad. Considering the merits of the "substantiality" doctrine though, the standard should not stray far from this norm.

c. A Permissible Application of the Overbreadth Doctrine

Statutes that incidentally regulate free speech should not be found invalid. When faced with an overly broad statute, the appropriate course of action is to adopt a narrow construction so that only unprotected speech is regulated.[87] In the recent case, *In the Matter of the Welfare of R.A.V.*,[88] the Supreme Court of Minnesota narrowly construed an ordinance censoring "displays one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias."[89] Specifically, the court ruled that the City of St. Paul's hate crimes ordinance[90] was not overly broad if it were construed to encompass only "fighting words."[91]

The Minnesota Supreme Court compared the case before it with *Texas v. Johnson* and drew the following distinction:

> Unlike the flag desecration statute at issue in *Texas v. Johnson*, the challenged City of St. Paul ordinance does not on its

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may occur on the property of a person who does not wish to have numerous people stomping across her lawn. The demonstrators, who are espousing constitutionally protected speech, are nevertheless trespassing. Although prosecution under the state's trespass statute may have some incidental ramifications on the demonstrators' ability to communicate their concerns, the statute cannot be challenged as overly broad.

86. Otherwise, many statutes would be found unconstitutional, *e.g.*, statutes prohibiting trespass or a breach of the peace.

87. In the Matter of the Welfare of R.A.V., 464 N.W.2d 507, 511 (Minn. 1991).

88. *Id.*

89. *Id.* at 508-09.

90. The City of St. Paul ordinance provided as follows:

> Disorderly Conduct. 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 or religion commits disorderly conduct and shall be guilty of a misdemeanor.

CITY OF ST. PAUL MINN. LEG. CODE § 292.02 (1990).

91. In the Matter of the Welfare of R.A.V., 464 N.W.2d at 509.

> face assume that any cross burning, irrespective of the particular context in which it occurs, is subject to prosecution. Rather the ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias.[92]

Like the City of St. Paul ordinance, Section (1) of Washington's malicious harassment statute does not proscribe all cross burning. The statute prohibits cross burning only where the perpetrator intends to use this conduct as a means to intimidate or harass a particular individual.[93] Furthermore, the perpetrator's words or conduct must also have reasonably placed the victim in fear of harm to his or her person or property.[94]

Washington's malicious harassment statute recognizes that cross burning in some situations is an expression of an antisocial attitude that should be afforded First Amendment protection; racial bigotry, however insidious, is protected speech.[95] However, the statute also recognizes that "[r]esorts to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . ."[96] Washington's malicious harassment statute takes note of this distinction and explicitly states the following:

> [I]t does not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way unless the context or circumstances surrounding the words places another person in reasonable fear of harm to his person or property or harm to the person or property of a third person.[97]

Washington's malicious harassment statute, which proscribes cross burning with the intent to intimidate or harass, is subject to three constructions, all of which preserve the statute's constitutionality.

First, the statute can be construed to apply only to fighting words. Critics argue that this construction is impossible because "the intent to intimidate or harass is the polar opposite

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92. *Id.* at 510.

93. WASH. REV. CODE § 9A.36.080(1) (1989).

94. *Id.* § 9A.36.080(1)(b).

95. United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

96. Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940).

97. WASH. REV. CODE § 9A.36.080(1)(b) (1989).

of the intent to provoke a fight or other disturbance . . . ."[98] The following discussion demonstrates, however, that the fighting words exception specifically contemplates both direct personal insults and words that by their very utterance inflict injury.[99]

Second, the statute can be narrowly construed to sanction only threatening speech. The term "intimidation," though not defined in the statute, should be interpreted in its common legal usage: "putting in fear."[100] "Harassment" is specifically defined in the Revised Code of Washington (RCW) 9A.46.020(1) as "(i) knowingly threatening to cause bodily injury or physical damage and (ii) by words or conduct placing the person threatened in reasonable fear that the threat will be carried out."[101] Based on the plain language of these definitions, Washington's malicious harassment statute can be narrowly interpreted to encompass only threatening speech.

Finally, the conduct proscribed in the statute may be deemed low-value speech. This is because the communicative value of cross burning with the intent to intimidate or harass is de minimis in relation to the harm that such conduct produces.

i. Narrowly Construed to Fit Within the Fighting Words Exception

Of the three well-known exceptions to free speech protection, cross burning with the intent to intimidate or harass arguably fits within only one: fighting words. Fighting words have traditionally been viewed as encompassing a small class of expressive conduct that is "likely to provoke the average person to retaliate and thereby cause a breach of the peace."[102] While fighting words are generally thought of in terms of "an invitation to exchange fisticuffs,"[103] this is only one interpretation. The United States Supreme Court has noted that fighting words encompass words "which by their very utterance *inflict injury* . . . ."[104] Furthermore, the Court has also described

98. State v. Stevens, No. 91-8-02530-6, slip op. at 8 (King County Super. Ct. Oct. 9, 1991), *petition for cert. filed*, No. 58734-5 (Wash. Nov. 20, 1991).

99. *See* Texas v. Johnson, 491 U.S. 397, 409 (1989); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

100. BLACK'S LAW DICTIONARY 821 (6th ed. 1990).

101. WASH. REV. CODE § 9A.46.020(1) (1989).

102. *Chaplinsky*, 315 U.S. at 574.

103. Texas v. Johnson, 491 U.S. at 409 (citations omitted).

104. *Chaplinsky*, 315 U.S. at 572 (emphasis added).

fighting words as including a "*direct personal insult.*"[105]

In any case involving hate crimes, the Court should take a more expansive view of the fighting words doctrine. Currently, the interpretation is male-centered[106] and ill-suited to deal with contexts in which malicious harassment is an issue.[107]

Because racist epithets and symbols have a psychological impact on people who have experienced racial oppression,[108] such "speech" may "*intimidate* the victim rather than provoke him or her to violence."[109] The effect of dehumanizing racist speech is often flight rather than fight, with many victims choosing to avoid racist encounters instead of escalating the conflict.[110]

In many cross burning situations, the directness of the intimidation is so great that the victim will not fight back. A victim's decision to respond through silence and admirable self-restraint should not define the perpetrator's conduct as nonactionable.[111] The perpetrator's intent, not the victim's response, should be the focus of judicial inquiry.

A more expansive approach to the fighting words exception weighs the two competing rights—the right to communicate racist ideas and the right to be free from intimidation—rather than initially favoring the rights of the speaker.[112] Under the new approach, neither right starts with an advantage. Instead, the expansive approach protects racist speech only to the extent that it does not constitute a direct assault on another individual.

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105. Texas v. Johnson, 491 U.S. at 409 (emphasis added).

106. Matsuda, *supra* note 32, at 2355.

107. The current interpretation of fighting words can be criticized as assuming "an encounter between two persons of relatively equal power who have been acculturated to respond to face-to-face insults with violence." Lawrence, *supra* note 33, at 453-54.

108. As explained by the Sixth Circuit, "a black American [is] particularly susceptible to the threat of a cross burning because of the historical connotations of violence associated with the act." United States v. Sayler, 893 F.2d 113, 116 (6th Cir. 1989). Therefore, because the history of violence against African-Americans is symbolized through the burning of a cross, perpetrators use this symbol precisely because it makes victims "most vulnerable to the threat of intimidation." *Id.*

109. Ernest A. Young, *Regulation of Racist Speech: In Re* Welfare of R.A.V., 464 N.W. 2D 507 (Minn. 1991), 14 HARV. J.L. & PUB. POL'Y, 903, 908 (1991) (emphasis addded).

110. Matsuda, *supra* note 32, at 2356.

111. *Id.*

112. This is because requiring the "reasonable person" to retaliate is a high standard for the victim to overcome.

ii. Narrowly Construed to Apply Only to Threatening Speech

Cross burnings, as expressive conduct, may also be denied protection if the "speech" constitutes a threat.[113] A threat exists if a reasonable onlooker would find that the listener believes he or she will be subjected to physical violence.[114]

When a cross is burned in front of an individual's home, a direct threat is communicated to the victim, who may reasonably believe that physical violence is likely to follow. This is because physical violence, including lynchings and arson, have historically accompanied cross burnings.

Threatening speech and coercive statements do not fall within the realm of protected expression.[115] Such actions play no part in furthering the purpose of the First Amendment, which is to allow for uninhibited, wide-open debate of public issues.[116]

In Kansas, a statute prohibiting cross burning in situations where the burning constituted a terroristic threat was not found violative of the First Amendment.[117] The court held that while burning a cross is not a per se terroristic threat, "surrounding facts and the relationship of the parties involved may be such that . . . [cross burning] on the property of another is the communication of a terroristic threat."[118]

Similarly, a Tennessee statute that proscribed the unlawful act of willfully and maliciously burning a cross on the property of another was also found constitutional.[119] The statute required that the perpetrator have the intent to intimidate another. The court stated, "Clearly, it would take a strained construction of this statute to say the doing of this unlawful act would be violative of one's free speech rights under the first amendment."[120]

The First Amendment has never extended protection to

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113. *See* Watts v. United States, 394 U.S. 705, 707 (1969) (holding that intimidation by threat of violence is not protected speech). *See generally* State v. Kepiro, 16 Wash. App. 116, 125, 810 P.2d 19, 24 (1991).

114. United States v. Mitchell, 463 F.2d 187, 191 (8th Cir. 1972).

115. *Watts*, 394 U.S. at 707.

116. *Id.* at 708.

117. *See* State v. Miller, 629 P.2d 748 (Kan. 1981).

118. *Id.* at 751.

119. Tennessee v. Reed, C.C.A. No. 1006 (Ct. Crim. App. Tenn. Apr. 18, 1985) (LEXIS, States library, Tenn. file).

120. *Id.* at *3.

threats of terror.[121] Cross burnings in many situations constitute such threats and, thus, should be freely regulable by the government.

iii. Narrowly Construed to Fit Within the Low-Value Speech Exception

As speech, cross burnings with the intent to intimidate or harass should not be afforded the same value or protection as other forms of speech. The United States Supreme Court has assigned varying degrees of protection to different types of speech depending on the purported social value and potential harm of the speech.[122] For example, obscenity receives no First Amendment protection,[123] while commercial speech,[124] defamation,[125] speech in schools,[126] and speech that inflicts intentional emotional distress[127] receive less than full First Amendment protection.

Cross burning with the intent to intimidate or harass has little political value. The action is perceived by the victim as a threat or promise of future harm rather than as a communication of the principles of white supremacy. In most cross burning situations, there is no dialogue between the victim and the perpetrator. Counter-speech is impossible because of the directness of the intimidation.[128]

Cross burning with the intent to intimidate or harass is easily distinguishable from a political cross burning, which should be afforded full First Amendment protection. An example of the former conduct would be burning a cross on or near a minority victim's property. An example of the latter conduct would be burning a cross during a peaceful demonstration.

The former conduct is so direct and intimidating that the discredited message of white supremacy is not immediately understood by the victim; there is no dialogue between the par-

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121. Masson v. Slaton, 320 F. Supp. 669, 672 (N.D. Ga. 1970).

122. *See* Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 222 (1991).

123. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-61 (1973).

124. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n., 447 U.S. 557, 561-63 (1980).

125. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-46 (1974).

126. *See* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682-83 (1986).

127. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988).

128. J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 421.

ties, and there is a likelihood that the victim will be psychologically harmed by the event.[129] Furthermore, the latter conduct is less forceful and intimidating, with the potential for counter-speech at least existent. The message of white supremacy has a high probability of being communicated by the cross burner, and the viewer's slight uneasiness is outweighed by the communicative value of the message.

Cross burning with the intent to intimidate or harass serves none of the policies of the First Amendment such as the promotion of effective dialogue. The harm experienced by the victim is great when compared with the message that he or she ultimately understands. Therefore, cross burning with the intent to intimidate or harass should be considered low-value speech.

3. Overbreadth Revisited: The Reasonable Fear Standard

Overbreadth is not an issue only with regard to the terms "intimidate" and "harass." Some argue that the wording "reasonable fear" also carries the statute into "constitutionally treacherous waters."[130] Critics of the statute may argue that the reasonable fear standard makes sanctionable some offensive speech based solely on the temperamental timidity of a victim.

The critics' argument would be true if the statute did not mandate that the perpetrator have the intent to intimidate or harass. Because such an intent is mandated, and because it merely accompanies the "reasonable fear" standard, the statute is not overly broad.

For example, the fear experienced by a Holocaust survivor witnessing a group of neo-Nazis peacefully marching in front of his or her house may certainly place that person in reasonable fear. However, because the neo-Nazis' purpose was merely to let their views be known, and perhaps even to offend, the action is not sanctionable. To be sanctionable, the marchers would have to intend to intimidate or harass. By threatening, rather than offending, the marcher's conduct would then be sanctionable.[131]

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129. *See* Delgado, *supra* note 9, at 135-49.

130. State v. Stevens, No. 91-8-02530-6, slip op. at 7 (King County Super. Ct. Oct. 9, 1991), *petititon for cert. filed*, No. 58734-5 (Wash. Nov. 20, 1991).

131. *See generally* Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978).

4. Is Section (1) of the Statute Impermissibly Vague?

Due process provides that citizens be given adequate notice and adequate legal standards to preclude arbitrary enforcement.[132] In light of these rights, the Washington statute has been criticized with regard to the phrase "because of, or in a way that is reasonably related to, associated with, or directed toward . . . that person's race, ..."[133] Critics of the statute argue that the wording is unclear with respect to the extent to which the perpetrator must be motivated by the victim's ethnicity. Does the victim's ethnicity have to be the sole reason for the perpetrator's actions, or is it sufficient for the victim's ethnicity to merely be a contributing reason, or even something less?[134]

The statutory language is clear. The words "because of" contemplate that the perpetrator must be *solely* motivated by the victim's ethnicity in order to be liable. Furthermore, the phrase "in a way that is reasonably related to, associated with, or directed toward" can be logically construed as requiring *substantial* motivation on the part of the perpetrator. Thus, where a racial slur occurs during or after a heated non-racially motivated argument, there is no criminal conduct. The slur in this context is merely offensive and the victim's ethnicity is not a substantial reason why the perpetrator acted.

The language "places another person in reasonable fear of harm" has also been criticized on vagueness grounds.[135] The criticism is that because the legislature did not explicitly state whether an objective or subjective standard was to be used, members of the public will have to guess when their conduct becomes criminally sanctionable.[136]

This criticism is without merit. Washington generally uses an objective standard in conjunction with the victim's particular situation.[137] The fact that a victim believes that he or she is

132. Kolender v. Lawson, 461 U.S. 352, 358 (1983).

133. WASH. REV. CODE § 9A.36.080(1) (1989).

134. *See generally* Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 356 (1991).

135. State v. Stevens, No. 91-8-02530-6, slip op. at 5 (King Cty. Sup. Ct. Oct. 9, 1991), *petitition for cert. filed*, No. 58734-5 (Wash. Nov. 20, 1991).

136. *Id.* at 8-9.

137. *See* State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977). In *Wanrow*, the court used an objective standard, with the victim's sex, age, strength, and perceptions also being taken into account. Thus, a mixed standard was used, with a seeming emphasis on the victim's state of mind.

in fear of harm is not enough. That belief must also be reasonable.[138] Based on the Washington case law, there are no vagueness problems with reference to the "reasonable fear" standard.

A further safeguard used to ensure that a perpetrator will not be left guessing as to whether or not he or she violated the statute is the mens rea requirement. The perpetrator must *intend* to intimidate or harass.[139]

Because Washington uses a mixed objective-subjective standard, and because the perpetrator must intend his or her actions, there can be no doubt that this portion of the statute is clear.

B. Analysis of Section (2)(a)

Section (2)(a) of the malicious harassment statute contains an irrebuttable presumption that makes cross burning a per se violation of the statute.[140] Upon proof of cross burning, a defendant is conclusively presumed to have committed all of the elements of the crime, and the trier of fact must find the defendant guilty of the crime, regardless of the actual facts of the case.[141]

A conclusive irrebuttable presumption, such as the one at issue here, is not constitutionally permissible because it relieves the prosecution of its burden of proof.[142] The conclusive irrebuttable presumption in the Washington statute is not only overbroad because it encompasses a substantial amount of protected conduct,[143] but because it also violates due process.[144]

Section (2)(a) of the statute is not subject to a limiting construction and should be changed by the legislature. Cross burning, for example, may be prima facie evidence that the crime of malicious harassment occurred. Using the cross burning as prima facie evidence would simply shift the burden of proof to the perpetrator. The alleged perpetrator would not,

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138. *Id.*

139. WASH. REV. CODE § 9A.36.080(1) (1989).

140. *Id.* § 9A.36.080(2)(a).

141. *See* Sandstrom v Montana, 442 U.S. 510, 523-24 (1979).

142. *Id.*

143. For example, cross burning in one's own home or during a peaceful march is protected conduct that would be considered violative of the malicious harassment statute if the conclusive presumption were applied.

144. *See generally Sandstrom*, 442 U.S. 510.

therefore, be found to have conclusively violated the statute merely upon a showing that a cross had been burned.

IV. CONCLUSION

Washington's malicious harassment has been, and will continue to be, subject to criticisms concerning overbreadth and vagueness. A definitive stance on both issues should be taken by Washington courts so as to eliminate the present uncertainty.

Regarding the issue of overbreadth, Washington courts will have to determine whether cross burning with the intent to intimidate or harass is expressive conduct. Such conduct, as stated before, should not be construed as "speech." Rather, the perpetrator's actions should be recognized as threats or promises of violence. Under this theory, Section (1) of Washington's malicious harassment statute would clearly survive an overbreadth challenge. This is because only nonspeech would be regulated.

Despite the preceding argument, Washington courts may find that the residual message of white supremacy conveyed during certain cross burning situations is "speech" under the First Amendment. Despite this finding, however, cross burning with the intent to intimidate or harass can nevertheless be regulated as fighting words, threatening speech, or low-value speech. Accordingly, Section (1) of the statute would remain constitutional.

Regarding the vagueness issues, Washington's malicious harassment statute should not run into problems. Perpetrators will not have to guess as to whether or not their actions are sanctionable, because a logical reading of the statute provides that the perpetrator must have been at least substantially motivated to act by the victim's ethnicity. Likewise, the "reasonable fear" language does not pose problems, because Washington has traditionally used a mixed objective-subjective standard in situations where the legislature has not been explicit.

Although constitutional problems do not exist with regard to Section (1) of the statute, Section (2)(a) is unconstitutional because it is overly broad and because it violates the perpetrator's right to due process. Section (2)(a) needs to be either deleted or limited. For example, by changing the wording of

the section from "per se" to "prima facie evidence," the legislature would eliminate the constitutional deficiencies.

There is a tremendous need for a malicious harassment statute in Washington.[145] The majority of Washington's statute is constitutional as written, and the unconstitutional portions can be easily remedied. Hopefully, with meritorious criticisms being taken into account, Washington's malicious harassment statute can continue to lend protection to victims of hateful intimidation and harassment.

145. "The failure of the legal system to redress the harms of racism, and of racial insults, conveys to all the lesson that egalitarianism is not a fundamental principle; the law, through inaction, implicitly teaches that respect for individuals is of little importance." Delgado, *supra* note 9, at 141.