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THE FIRST AMENDMENT IN ITS THIRD CENTURY: THREE WISCONSIN PIECES TO THE CONSTITUTIONAL PUZZLE

PETER K. ROFES*

Several months back, my colleague Gordon Hylton—an historian through and through—was explaining to me how the idea for this symposium began as something of an excuse for historians to gather in celebration of Wisconsin's sesquicentennial. As Professor Hylton recounted the story that day, it was clear that something had gone terribly wrong, as the original idea for the event somehow unraveled into one that encouraged participation from those of us who lack the credentials to call ourselves historians. Given that original conception of this colloquium, it is hardly surprising that my distinguished co-presenters have important insights to share about both the legal and constitutional history of Wisconsin throughout the second half of the nineteenth and the first half of the twentieth centuries and the impact of that history on our nation's legal culture and institutions.

I have no such insights. Instead, my lens will be focused on more recent developments, developments of the past decade that reflect the enduring role Wisconsin and a variety of communities throughout Wisconsin continue to play in the evolution of the law of the First Amendment to the Constitution of the United States and in the wider political and social struggles that shape, and are shaped by, First Amendment law. In particular, my focus will be on contributions Wisconsin has made to our ongoing national conversation about the extent to which states are free to punish crimes of hate, universities are free to deter harassment on their campuses, and municipalities are free to depict their religious heritages on municipal seals.

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I. COMBATting CRIMES OF HATE THROUGH ENHANCED PENALTIES

In the mid-eighties, several highly-publicized incidents of vandalism unfolded in the Milwaukee metropolitan area. An African-American family about to settle in Brown Deer had its home painted with racist comments.¹ A new synagogue in Mequon had its building defaced with Nazi symbols and slogans.² The local Jewish Community Center experienced a similar fate.³ Each of these acts of intimidation constituted a crime against property under Wisconsin law. Nevertheless, because the damage caused by these acts in monetary terms was modest, the crimes were treated as minor misdemeanors worthy only of minor punishment.

In response to these and similar acts of intimidation around the state, a coalition of organizations petitioned the Legislature to amend the Wisconsin Statutes. In 1987, that effort culminated in the enactment of section 939.645.⁴ Stripped to the basics, the new law provided enhanced maximum penalties for individuals who commit any of a wide variety of crimes against person or property if such individuals are found to have intentionally selected the person against whom the crime is committed or the property damaged by the crime "because of" the race, religion, color, disability, sexual orientation, national origin, or ancestry of the person or owner/occupant of the property.⁵ Put more colloquially, the Wisconsin Legislature authorized judges to apply a more stringent punishment to

1. See Gregory D. Stanford, *Racial Slurs Greet Black in Brown Deer*, MILWAUKEE J., Aug. 3, 1987, at B1. The comments scrawled include the phrases "Leave Niggers" and "White Mans [sic] Territory!!" *Id.*

2. See Linda Steiner, *Swastikas at Temple Stir Angry Reaction*, MILWAUKEE J., June 18, 1984, at B1. Three-foot high swastikas were found painted in red on a wall and the name sign of Congregation Beth El Ner Tamid less than a month after the synagogue opened. *Id.*

3. See Alicia Armstrong, *Vandals Strike at Jewish Center*, MILWAUKEE J., July 27, 1985, at A1. Nine swastikas, again painted in red, were found spray-painted on the outside of the downtown Milwaukee Jewish Community Center the same day the words "Dirty Jews" were found painted on the outside of a nearby restaurant owned and operated by a prominent member of Milwaukee's Jewish community.

4. See 1987 Wis. Laws 1233 (codified at WIS. STAT. § 939.645 (1987-1988)).

5. As originally enacted, the central portion of the statute provided as follows:

(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

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

WIS. STAT. § 939.645.

convicted criminals who select the targets of their crimes on the basis of race, religion, or any of the other specifically enumerated categories. The Legislature justified its decision with the cluster of reasons traditionally put forward to justify criminal punishment,⁶ as well as with a few reasons distinctive to the particular act of selecting people or property as targets of crime for reasons of race, religion, and the like. Among the latter was the contention that such crimes represent a greater threat to a peaceful and secure society because they perpetuate a climate of hate and fear among society's identifiable groups and incite retaliatory crimes of a similar nature.⁷ On the surface, the legislative decision seemed eminently reasonable and uncontroversial, deeming worthy of more stringent punishment conduct deemed more harmful to a safe and ordered society.

Two years later, in the autumn of 1989, an episode unfolded outside a Kenosha apartment complex that would land this new statute in our nation's highest court and make it one of the most closely watched cases of the Supreme Court's 1992-1993 term.⁸ A group of African-American teenage males was discussing a scene from the movie "Mississippi Burning," a scene in which a white man beats up an African-American youngster who had been praying. Nineteen-year-old Todd Mitchell inquired of his companions: "Do you all feel hyped up to move on some white people?" Shortly thereafter, Gregory Reddick, a fourteen-year-old white male, approached the apartment complex, walking on the opposite side of the street from the group. Observing Reddick, Mitchell said to

6. For example, in its unsuccessful defense of the statute before the Wisconsin Supreme Court, the State argued that a principal interest served by the enhancer was "prevention of crime and preservation of order." Brief of Plaintiff-Respondent at 27, *State v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992) (No. 90-2474-CR).

7. A consistent theme running through governmental efforts to combat hate crimes in Wisconsin and elsewhere is the quasi-empirical contention that each such crime serves to destabilize communities more than the garden variety crime by poisoning the culture among groups and triggering the next such hate crime. The State made such an argument both to the Wisconsin Supreme Court—*see id.* at 36 (Such crimes constitute "a greater threat to the peace and security . . . because they promote an atmosphere of hate and fear between identifiable categories of persons in our society. Not only might a particular discrimination crime escalate to a larger conflict, but each such crime fosters generalized fear and suspicion.")—and to the Supreme Court of the United States—Brief of Petitioner at 24, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (No. 92-515) (Such crimes "are more likely than other crimes to provoke further crime in the form of retaliatory crime or copycat crimes . . . They invite imitation and retaliation because they are directed not only toward the victim, but toward the victim's entire group.").

8. The facts set forth in this paragraph are taken from Chief Justice Heffernan's opinion for the majority in the Wisconsin Supreme Court as well as the Wisconsin Court of Appeals opinion. *See State v. Mitchell*, 169 Wis. 2d 153, 158-59, 485 N.W.2d 807, 809 (1992); *State v. Mitchell*, 163 Wis. 2d 652, 658, 473 N.W.2d 1, 3 (Ct. App. 1991).

the group "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell then counted to three and pointed his peers in Reddick's direction. The group ran toward Reddick, beat him into a coma, and stole his (British Knights) tennis shoes. One of the attackers testified that when the group dispersed he thought Reddick was dead.

Todd Mitchell's role in the beating earned him, among other things, a conviction for party to the crime of aggravated battery, a crime that carried a maximum sentence of two years.⁹ Nevertheless, because the jury separately found that Mitchell had selected victim Reddick because of Reddick's race, Circuit Court Judge Breitenbach sentenced Mitchell to four years (out of a possible seven) for the aggravated battery.¹⁰ Following unsuccessful efforts to obtain post-conviction relief in the trial court and the invalidation of the statute on constitutional grounds in the court of appeals, the case landed in the Wisconsin Supreme Court.¹¹

Arm-chair quarterbacks in our competitive culture often remark that the measure of an athlete is how well he or she plays in the "big" games. Something along the same lines can be said about judges. Todd Mitchell's case was a "big" case, and it elicited big-game performances from the three members of the court who wrote opinions.

Chief Justice Heffernan wrote for the five-member majority that invalidated the penalty-enhancer statute and overturned the portion of Mitchell's sentence that had been grounded in the statute. The nub of the Chief Justice's constitutional analysis—an analysis that closely tracked the argument contained in a recent law review article written by a Wisconsin native and cited repeatedly by the Chief Justice throughout his majority opinion¹²—was essentially as follows: Because each of the crimes included under the new penalty enhancer provision was already punishable *prior to* the enactment of the enhancer, including the aggravated battery for which Todd Mitchell was punished, all that the new penalty enhancer law really punishes is evil *thoughts*, hateful *thoughts*, the intellectual, emotional, and psychological prejudice that prompted Todd Mitchell to choose Gregory Reddick as his victim.¹³ Accordingly, Chief Justice Heffernan concluded, the new law is invalid for that very reason; as he

9. See *id.* at 159, 485 N.W.2d at 809; WIS. STAT. §§ 939.05, 940.19(1m) (1987).

10. See *Mitchell*, 169 Wis.2d at 159, 485 N.W.2d at 809.

11. See *id.* at 159-60, 485 N.W.2d at 809-10.

12. See 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 (1991). At important moments in the majority opinion, Chief Justice Heffernan offers extensive selections from the Gellman article. See *Mitchell*, 169 Wis. 2d at 167 n.11, 485 N.W.2d at 813 n.11; *id.* at 174-75, 485 N.W.2d at 816.

13. See *id.* at 164-70, 485 N.W.2d at 811-14.

put it, “[p]unishment of one’s thought, however repugnant the thought, is unconstitutional.”¹⁴

But there was a second arrow in Chief Justice Heffernan’s constitutional quiver. The majority opinion also concluded that because the new statute encourages the prosecution to introduce into evidence defendant’s hateful speech in an effort to demonstrate that the defendant intentionally selected his victim on the basis of one of the protected categories—precisely as the prosecution introduced Todd Mitchell’s “There goes a white boy; go get him” remark—the statute serves to unconstitutionally chill the expression of hateful but nevertheless protected expression.¹⁵

Justices Abrahamson and Bablitch each dissented from the majority’s conclusion that the penalty enhancer clashed with First Amendment principles. In a surprising role reversal, however, the dissent of Justice Abrahamson was brief (occupying fewer than four pages in the Wisconsin Reports)¹⁶ while that of Justice Bablitch represented one of the most extensive and impassioned of his judicial career.¹⁷

Justice Abrahamson challenged the majority’s contention that Todd Mitchell was being punished for hateful *thoughts* or impolitic *speech*. She maintained instead that Judge Breitenbach’s sentence punished Mitchell for precisely the kind of *conduct* that the Legislature deemed worthy of enhanced punishment: the act of selecting Gregory Reddick as the victim of crime on the basis of Reddick’s race. As she put it, “this statute is a prohibition on conduct, not on belief or expression. The statute does nothing more than assign consequences to invidiously discriminatory acts The enhanced punishment justly reflects the crime’s enhanced negative consequences on society The only chilling effect is on lawless conduct.”¹⁸

Justice Bablitch elaborated more fully on Justice Abrahamson’s point that the statute punished neither thought nor speech.¹⁹ But the bulk of his dissent was spent demonstrating how the majority’s analysis of the penalty enhancer, taken at face value, would wipe out, on First Amendment grounds, Title VII of the Civil Rights Act of 1964 and much of the rest of American anti-discrimination law.²⁰ For if the First Amendment does not permit Wisconsin to punish an individual who

14. *Id.* at 170, 485 N.W.2d at 814. Interestingly, Chief Justice Heffernan neglected to cite any law that directly supported this important judicial ipse dixit.

15. *See id.* at 172-76, 485 N.W.2d at 814-17.

16. *See id.* at 178-82, 485 N.W.2d at 818-19 (Abrahamson, J., dissenting).

17. *See id.* at 182-210, 485 N.W.2d at 819-31 (Bablitch, J., dissenting).

18. *Id.* at 181, 485 N.W.2d at 819 (Abrahamson, J., dissenting).

19. *See id.* at 183, 187-89, 485 N.W.2d at 819-20, 821-22.

20. *See id.* at 189-95, 485 N.W.2d at 822-25.

selects his crime victim "because of" the victim's race, Justice Bablitch observed, the conclusion is inescapable that Congress is not permitted to punish an employer who refuses to hire or promote an employee "because of" the employee's race.²¹

The disagreement about the First Amendment implications of Wisconsin's new penalty enhancer ultimately was not to be resolved by the spirited conversation among Justices Heffernan, Abrahamson, and Bablitch. Six months later, the nation's highest court announced that the issues implicated by Todd Mitchell's case were sufficiently important to devote its scarce resources to it.²²

And important it was. By this time, a range of other states had amended their criminal codes to add penalty enhancer provisions similar to that of Wisconsin.²³ The federal government sought to enact such a law but, at this juncture, its efforts had fallen short in the Senate.²⁴ Instead, Congress enacted a law requiring the Attorney General to compile data "'about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity.'"²⁵ Amicus briefs came pouring in—from the Crown Heights Coalition to the City of Atlanta to the National Asian Pacific American Legal Consortium—most of which urged the Supreme Court to set aside Chief Justice Heffernan's handiwork and uphold the constitutionality of the Wisconsin statute.²⁶ The United States government entered the case on behalf of Wisconsin, also urging the Court to reject Mitchell's constitutional challenge and reverse the decision of Wisconsin's highest court.²⁷ For his representation in the Supreme Court, Mitchell turned to a distinguished member of the Wisconsin State Legislature—so distinguished that earlier this year he became the newest member of the Wisconsin delegation of federal judges—who in turn brought on for assistance in writing the brief the Wisconsin native who had authored the law review article that had so captured the imagination of Chief Justice Heffernan.²⁸

21. *See id.* at 190-91, 485 N.W.2d at 823.

22. *See Wisconsin v. Mitchell*, 506 U.S. 1033 (1992).

23. Writing for the Supreme Court in reversing the Wisconsin Supreme Court, Chief Justice Rehnquist cites California, Florida, Montana, and Vermont as states that opted to follow the Wisconsin approach of penalty enhancement. *See Wisconsin v. Mitchell*, 508 U.S. 476, 483 n.4 (1993).

24. *See id.*

25. *Id.* (quoting the Hate Crimes Statistics Act, 28 U.S.C. § 534 (Supp. III 1988)).

26. *See id.*

27. *See id.* at 477.

28. *See Brief of Respondent, Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (No. 92-515).

At oral argument, Justices Scalia and Kennedy peppered Todd Mitchell's lawyer with much the same concern that had been voiced in dissent by Justice Bablitch: Why is the Wisconsin penalty enhancer constitutionally different from a generation of anti-discrimination laws beginning with Title VII?²⁹ Seven weeks later it became clear that the Justices did not believe an adequate reply had been forthcoming.

In a brief and (to some prognosticators surprisingly) unanimous opinion delivered by Chief Justice Rehnquist, the Court held that nothing in the First Amendment prevents state or federal governments from enhancing the punishment they dole out to convicted criminals who select the objects of their crime on the basis of a protected status.³⁰ Overall, the tone and construction of the Supreme Court's decision revealed that the nine Justices in Washington thought the case simpler and the statute less troublesome than the seven justices in Wisconsin. Picking up on Justice Bablitch's point, Chief Justice Rehnquist noted the similarities between the new penalty enhancer and Title VII³¹ and noted further that the Court had rejected the argument that Title VII unconstitutionally infringed on the First Amendment rights of employers.³² Picking up on Justice Abrahamson's point, Chief Justice Rehnquist observed that at bottom the statute punishes the act of discriminatory selection, not some abstract thought or belief.³³ As to Chief Justice Heffernan's point that the penalty enhancer will chill the expression of bigoted but protected speech, Chief Justice Rehnquist expressed serious doubts that a citizen of Wisconsin would go through life suppressing his bigoted opinions out of fear that should he ever commit a crime covered by the statute the opinions will come in at trial to establish that he intentionally selected his victim on the basis of the victim's protected status.³⁴ In short, the

29. *Arguments Before the Court*, 61 U.S.L.W. 3725, 3726 (Apr. 27, 1993).

30. *See Mitchell*, 508 U.S. at 490. Including footnotes and case history, Chief Justice Rehnquist's opinion for the Court runs fewer than twelve pages in the United States Reports. *See id.* at 479-90.

31. *See id.* at 487.

32. *See id.* (citing *Hishon v. King & Spalding*, 467 U.S. 69 (1984)).

33. *See Mitchell*, 508 U.S. at 487-88 ("[T]he statute in this case is aimed at conduct unprotected by the First Amendment. Moreover, [the statute is directed at conduct] thought to inflict greater individual and societal harm.").

34. As Chief Justice Rehnquist observed:

We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty enhancement. . . . This is simply too speculative a hypothesis to support Mitchell's overbreadth claim.

Id. at 488-89.

Supreme Court's opinion reflects a Court that viewed Todd Mitchell's case through the prism of federalism rather than through the prism of the First Amendment, with its principal theme being that states have enormous authority to fix (through their legislatures) and impose (through their courts) criminal punishment. Indeed, Chief Justice Rehnquist reached all the way back to Blackstone's *Commentaries* to support the conclusion, observing that "'it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.'"³⁵

II. STRUGGLING WITH DISCRIMINATORY HARASSMENT ON CAMPUS

At approximately the same time in 1987 that the Wisconsin Legislature triggered the events that would culminate in Todd Mitchell's landmark case, events unfolding elsewhere in the state would thrust Wisconsin into the forefront of yet another hot-button First Amendment controversy. This time, the First Amendment flag would be waved *not* on behalf of convicted criminal defendants who claimed they had the constitutional freedom to select their victims on the basis of race, but instead on behalf of undergraduate students at public institutions who claimed they had the constitutional freedom to harass their peers with racist, sexist, and homophobic expression.

The past decade has posed unprecedented challenges for those who govern and administer our nation's campuses. Demographic realities, a culture that encourages individual and group self-consciousness, and pressure from constituencies on and off campus combine to create a student population that is more genuinely diverse, and in more ways, than ever before. But this increasing diversity, despite the unmistakable benefits it brings to a campus, increases the prospects for intimidation, mean-spiritedness, and cruelty.

On a campus in Connecticut, a student posts a sign outside her dormitory door that reads "homos [will be] shot on sight."³⁶ At a California law school, an African-American student returns to her dormitory room; posted on the door of her room is an insulting caricature of a person of her racial heritage with a red line slashed through the picture.³⁷ On an Alabama campus, students greet the crowning of an African-American homecoming queen by booing and waving confederate

35. *Id.* at 488 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *16).

36. Robert A. Frahm, *UConn Decides to Retain Ban Against 'Fighting Words' in Student Code*, HARTFORD COURANT, June 15, 1991, at B1.

37. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2320 n.2 (1989). A series of incidents along this line is reported to have taken place on law school campuses in California. See *id.*

flags.³⁸ In Rhode Island, a student in the midst of celebrating his twenty-first birthday stands in a dormitory courtyard and shouts offensive characterizations of African-Americans, gays, and Jews; as he finishes his alcohol-induced tirade, he turns to an African-American woman and boasts “[m]y parents own you people.”³⁹ Late one night on the campus of a prestigious Pennsylvania university, a group of African-American women are making noise outside a dormitory; a white student opens his dormitory window and yells down at the women: “Shut up, you water buffalo.”⁴⁰

Similar events were unfolding on and around campuses throughout the University of Wisconsin System, especially in Madison.⁴¹ One fraternity sponsored a “Fiji Island” party for which it erected a fifteen-foot high caricature of a dark-skinned man with a bone through his nose; fraternity members in black-face paraded around in what one observer called “tropical garb.”⁴² Shortly thereafter, members of the same fraternity crashed another fraternity’s party, triggering fisticuffs and an exchange of racial and religious slurs.⁴³ A year later, the fraternity whose party had been crashed sponsored an off-campus “slave auction” fund-raiser at which pledges in black-face and donned with Afro wigs performed skits impersonating African-American entertainers.⁴⁴ On yet another occasion, a fraternity held a party featuring a “Harlem Room” in which it served fried chicken and watermelon punch, and members again painted in black-face.⁴⁵

These incidents represent only a smattering of a boundless number like them that erupted on campuses over the past decade. The incidents, here in Wisconsin and elsewhere, served to anger and isolate minority students, exacerbate tensions among students and student groups, and call

38. See 200 Protest Racism at University of Ala., ATLANTA J.-CONST., Dec. 1, 1989, at A4.

39. Kenneth J. Cooper, *Speech Code at Issue in Brown Case; University's Move to Expel Student Raises Legal Questions*, WASH. POST, Feb. 13, 1991, at A4.

40. Linda Seebach, *Nominee Hackney Ducks Tough Calls*, HARRISBURG PATRIOT, June 30, 1993, at A9.

41. For a useful account of the evolution of the University of Wisconsin's anti-harassment policy, see Patricia B. Hodulik, *Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First-Amendment and University Interests*, 16 J.C. & U.L. 573, 574-75 (1990). Richard Delgado has described in admirable detail the incidents summarized in this paragraph, incidents that fueled the momentum that led to the UW Rule. See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 355-58 (1991).

42. Delgado, *supra* note 41, at 355.

43. See *id.* at 356.

44. See *id.* at 357.

45. See Hodulik, *supra* note 41, at 574.

into question the willingness and capacity of American universities to control their communities and fulfill their educational missions.⁴⁶ As a result, a strikingly similar pattern of response unfolded on campus after campus around the nation. Time and again, on campus after campus, administrators, faculty, and students put their heads together and concluded that a good deal needed to be done to make the particular campus a safer, more secure place. Time and again, on campus after campus, a committee with representatives from all the appropriate campus constituencies was appointed and charged with coming up with solutions for what ailed the campus. Time and again, on campus after campus, the committee did so, recommending a laundry list of actions the university needed to undertake if it hoped to improve the atmosphere on campus, especially if it wanted to continue to attract and retain qualified minority students. And time and again, on campus after campus, the course of its discussions led the committee to take a probing look at the rules and regulations that govern student conduct.

What universities all across the nation discovered was that some truly reprehensible student conduct was going unregulated, falling between the cracks. In short, on campus after campus, those who govern and administer were told that their institutions had not responded effectively to acts of harassment (some egregious, some not) in part because there were no rules in place to prohibit such harassment or to empower the university to do much of anything in response to it. Plagiarism, cheating on examinations, stealing property—plenty of rules and regulations governed these breaches of the educational community. But an entire range of student conduct equally or more harmful to the community was being left unchecked. In particular, the kind of racial, sexual, and religious harassment that Congress forbids in the workplace under Title VII of the Civil Rights Act simply was not regulated on campus.

Here in Wisconsin, the Board of Regents and the Madison campus of the University of Wisconsin took the lead in working through these issues for the University of Wisconsin System.⁴⁷ Among other things, the Board of Regents requested each campus in the University of Wisconsin System to craft policies that would address discriminatory harassment by students, faculty, and staff.⁴⁸ At approximately the same time, the Madison committee came forward with its proposal to amend the student conduct rules to forbid discriminatory harassment.⁴⁹ Over the next several months, and with the assistance of some talented law

46. See Delgado, *supra* note 41; Hodulik, *supra* note 41. Each describes the tempestuous consequences ignited by the Madison events.

47. See Hodulik, *supra* note 41, at 575.

48. See *id.*

49. See *id.*

professors from the University of Wisconsin Law School, the Board of Regents developed, refined, and adopted the following amendment to Chapter 17 of the Wisconsin Administrative Code:

UWS 17.06 Offenses defined. The university may discipline a student in nouacademic matters in the following situations.

. . . .

(2)(a) For racist or discriminatory comments, epithets or other expressive behavior directed at a individual or ou separate occasions at different individnals, or for physical conduct, if such comments, epithets, other expressive behavior or physical conduct inteutionally:

1. Demcau the race, sex, religion, color, creed, disability, sexual orientation, natioual origin, ancestry or age of the individual or individuals; and

2. Create an intimidating, hostile or demeaning euvironment for education, university-related work, or other university-authorized activity.

(b) Whether the intent required under par. (a) is present shall be determined by consideration of all relevant circnmstauces.⁵⁰

The Rule took effect on University of Wisconsin campuses across the state in September 1989, just a few weeks prior to the events outside the Kenosha apartment building that thrust Wisconsin into one political and constitutional debate that spanned the nation. And the Rule would put the State in the crossfire of an even more intensive cultural and constitutional conversation. The terms of the conversation would come to be controlled not by the university administrators whose campuses gave rise to it and who had experienced it up close and personal, but instead by those who wished to speak about everything *except* the realities of student-on-student harassment on campus in late twentieth-century America. Indeed, the national conversation took on all the earmarks of a book club meeting in which those who spoke loudest and most vigorously and issued the most

50. WIS. ADMIN. CODE § UWS 17.06 (Aug. 1992).

scathing reviews of the book turn out not to have bothered to read it at all.

In early 1990, six months after the regulation took effect, a group of students filed a lawsuit in federal district court in Milwaukee seeking a declaratory judgment that the regulation was inconsistent with (among other things) the First Amendment's guarantee of freedom of speech.⁵¹ By this time, the regulation had begun to be enforced on some UW campuses around the state. At UW-Eau Claire, for instance, a student had sent an electronic mail message that stated "Death to all Arabs!! Die Islamic scumbags!" to an Iranian faculty member.⁵² The university reprimanded the student and placed him on probation for the remainder of a semester.⁵³ By the time Judge Warren issued his decision a year and a half later, however, the University of Wisconsin would be told that the First Amendment disabled it from doing essentially anything at all about this or a wide variety of other acts of discriminatory harassment on its campuses.

In Judge Warren's court, the Board of Regents made three principal arguments in its effort to defend the constitutionality of the Rule.

First, it contended that expression outlawed by the Rule constituted unprotected speech, fell into a category of unprotected speech referred to for half a century as "fighting words."⁵⁴ Judge Warren rejected the argument, and for a fascinating reason. He observed—correctly—that, as the fighting words doctrine has evolved, a central element of it has been that the expression must tend to provoke a breach of the peace, a violent reaction, in the individual to whom the speech is addressed.⁵⁵ Nevertheless, he proceeded to conclude that because not all students throughout the University of Wisconsin System victimized by racist or sexist harassment would be undisciplined enough to respond with fisticuffs, the harassment itself must be constitutionally protected.⁵⁶ In

51. See *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163, 1164 (E.D. Wis. 1991).

52. See *id.* at 1168.

53. See *id.*

54. See Defendant's Combined Brief in Support of Its Motion for Summary Judgment and in Response to Plaintiffs' Motion for Summary Judgment at 4, *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991) (No. 90-C-328) [hereinafter Defendant's Combined Brief] ("[T]he rule's constitutionality flows logically and naturally from the fact that, as formulated and applied, it simply does not venture beyond the safe harbor of the *Chaplinsky* fighting words doctrine.").

55. See *UWM Post*, 774 F. Supp. at 1170-72.

56. Judge Warren noted:

It is unlikely that all or nearly all demeaning, discriminatory comments, epithets or other expressive behavior which creates an intimidating, hostile or demeaning environment tends to provoke a violent response. Since the UW

short, the speculative maturity and discipline of those who would be subject to racist and sexist harassment was used by Judge Warren as an argument that the harassment itself must be constitutionally protected. Strike One for the UW Rule.

Second, the Board of Regents contended that the category of expression outlawed by the Rule—discriminatory harassment such as the Eau Claire student's e-mail to the Iranian professor—fit nicely alongside the host of other unprotected categories of speech established by the Supreme Court as unprotected, such as fighting words, obscenity, false statements about public officials made with malice, and the like.⁵⁷ To this Judge Warren delivered a classic "It's Not My Job" reply, declaring that he—a mere federal district judge out of Milwaukee—had no authority to tinker with First Amendment law.⁵⁸ That, he suggested, was a job for the nine justices in Washington, and for them alone. Strike Two for the UW Rule.

Third, the Board of Regents argued that the UW Rule *must* be consistent with the First Amendment because the category of expression outlawed under the Rule is essentially outlawed in the employment setting under Title VII, and no one had seriously maintained that the First Amendment should be construed to invalidate Title VII.⁵⁹ Well, said Judge Warren, the employment setting is not the educational setting.⁶⁰ And besides, he added, agency law can make employers liable for the actions of their employees but universities are not liable for actions of their students.⁶¹ Strike Three for the UW Rule.

Unlike Todd Mitchell's case, this one went no further—no appeal to the Seventh Circuit, no journey to the nation's highest court in Washington. Yet in many respects the events that unfolded in Wisconsin concerning the UW anti-harassment rule have had as substantial an impact on a contentious First Amendment issue as did Todd Mitchell's decision from the nation's highest court. Universities—public *and* private, those

Rule covers a substantial number of situations where no breach of the peace is likely to result, the rule fails to meet the requirements of the fighting words doctrine.

Id. at 1173.

57. See Defendant's Combined Brief at 21-27, *UWM Post* (No. 90-C-328).

58. See *UWM Post*, 774 F. Supp. at 1173 ("[T]he *Chaplinsky* Court did not state that lower courts should employ a balancing approach to identify additional categories of speech undeserving of protection.").

59. See Defendant's Combined Brief at 47-48, *UWM Post* (No. 90-C-328).

60. See *UWM Post*, 774 F. Supp. at 1177 ("Title VII addresses employment, not educational, settings.").

61. See *id.* at 1177 ("[A]gency theory would generally not hold a school liable for its students' actions since students normally are not agents of the school.").

subject to First Amendment constraints and those not⁶²—find themselves trapped in a whipsaw, on the one hand pressured to take a strong stand against harassment on their campuses while on the other mocked mercilessly and threatened to be dragged into court each time they exercise the courage to do so. Distorted rhetoric from cultural icons ranging from George Will and William F. Buckley to Arthur Schlesinger, Jr. and Nat Hentoff has put universities on the defensive and helped transform the cowards and hate-mongers on campus into appealing rogues, late twentieth-century equivalents of Bonnie & Clyde or Butch Cassidy & Sundance.⁶³ Judge Warren's decision, along with one from a federal court in Michigan,⁶⁴ continue to serve as evidentiary exhibits in a national trial taking place from one coast to the other, introduced into evidence in conversation after conversation, newspaper article after newspaper article. For now, the nation's universities seem to be losing that national trial.

The reason they are losing is not because their position is weak, either on the facts unfolding on campuses around the nation or on the law of the First Amendment. Instead, the reason universities are losing is that they have failed in the most fundamental of lawyering skills: they have failed in their effort to frame the issue. The question in this national trial has turned out to be *not* whether many of the acts of harassment taking place on the nation's campuses are reprehensible and worthy of discipline, and *not* whether universities have the institutional obligation to make their communities safe for all their students. Were the national conversation framed in these terms universities would likely prevail. Instead, the question posed increasingly has turned out to be whether the folks in

62. In California, for instance, a provision in the state education code that has come to be called the "Leonard Law" cviscerates the difference between public and private universities by imposing constitutional constraints on otherwise private post-secondary educational institutions. As a result, a California state court has held that Stanford University may not enforce its anti-harassment policy. See Michael S. Greve, *Forcing Free Speech*, 27 REASON 56, 56 (1995).

63. See, e.g., William F. Buckley, *Sorting Out College 'Rights,'* SAN DIEGO UNION-TRIB., Mar. 17, 1991, at C2; Nat Hentoff, *Chilling Codes*, WASH. POST, Mar. 25, 1995, at A19; William H. Honan, *Schlesinger Sees Free Speech in Peril*, N.Y. TIMES, May 27, 1994, at B1 (reporting historian Arthur Schlesinger Jr.'s valedictory to City College of New York in which the historian lambasted campus anti-harassment efforts as "the agitation for censorship in the name of multiculturalism"); George Will, *A Dangerous Argument for Conformity*, ST. LOUIS POST-DISPATCH, Oct. 29, 1993, at 7B (criticizing feminist academic Catherine MacKinnon for leading "the most radical assault on free speech in American history" by opposing pornography and advocating curbs on sexist speech on campus).

64. See *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (invalidating principally on vagueness grounds the University of Michigan anti-harassment rule).

charge of our nation's campuses have sometimes gone too far in their efforts, sometimes allowed their zeal for justice to be misconstrued as a conspiracy to repress unpopular ideas. On that issue the jury of our peers has come back with a guilty verdict. As a result, thanks in no small part to Judge Warren's decision, many continue to read the First Amendment to require that the bathwater of anti-harassment provisions be tossed out. With that bathwater goes some of the baby of safety, security, and support that universities are obligated to provide their students.

III. GRAPPLING WITH RELIGIOUS INSIGNIA ON MUNICIPAL SEALS

The final episode in this First Amendment trilogy unfolds in a suburb west of Milwaukee by the name of Wauwatosa. This final episode serves to remind us of the awesome power of the First Amendment to unsettle long-standing traditions within our nation's communities.

One day in 1990 a fellow by the name of Rob Sherman from Buffalo Grove, Illinois dropped in to visit with Wauwatosa's City Attorney.⁶⁵ It quickly became apparent that the visit had been prompted less by social niceties than by professional concerns. Sherman happened to be the Midwest Regional Director of an organization called American Atheists, Inc. It turns out that Sherman's brief visit with the City Attorney would catapult this quiet, conservative, Republican⁶⁶ community with a substantial Catholic population into a First Amendment frenzy from which it has not yet fully recovered.

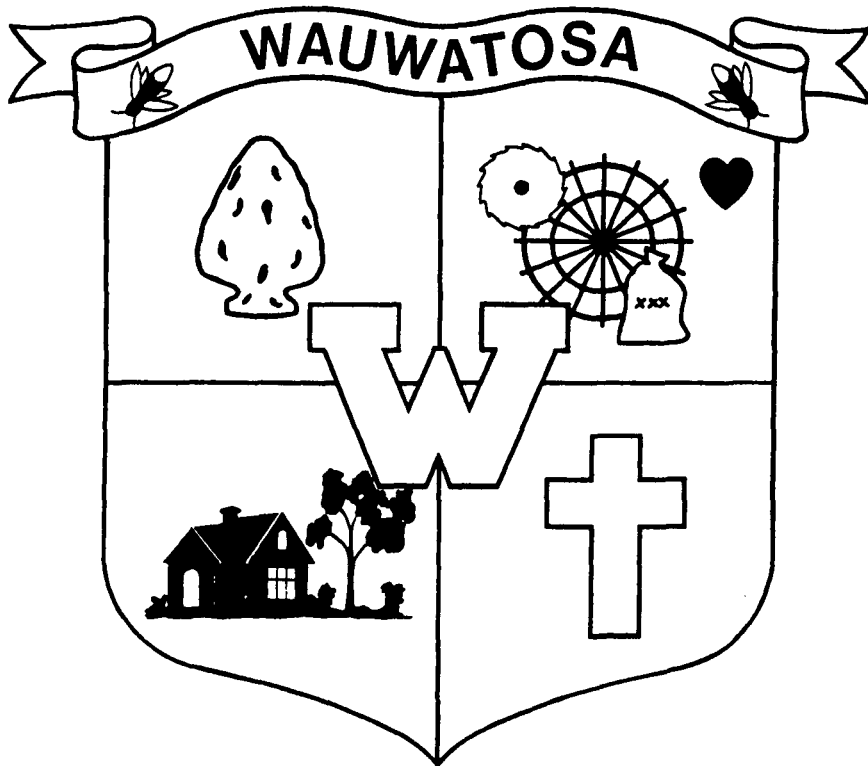
Back in 1956, Wauwatosa's Suburban Women's Club sponsored an art contest for the purpose of designing a municipal emblem and flag for the community.⁶⁷ The Club selected as the winning entry the submission of a nine-year-old girl by the name of Suzanne Vallier. The following year the Common Council—the City's governing body—officially adopted the artwork as its municipal emblem and flag. The purpose of Rob

65. See Harold D. Gehrke, *Summary of the Creation and History of the City's Logo* (undated, unpaginated memorandum on file with author) [hereinafter Gehrke Memorandum]. Most of the factual information recounted in the following pages has been pieced together from the public sources cited throughout these pages. In addition, my research concerning the Wauwatosa episode has benefitted substantially from the kind assistance of Harold Gehrke, the recently retired Wauwatosa City Attorney. Mr. Gehrke has made his materials available to me and the students in my Advanced Issues in the First Amendment seminar.

66. In 1992 and again in 1996, while the nation was going for Clinton/Gore, Wauwatosa went for Bush/Quayle and Dole/Kemp. WISCONSIN LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 1993-1994, at 944 (1993); WISCONSIN LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 1997-1998, at 929 (1997).

67. See Gehrke Memorandum, *supra* note 65.

Sherman's visit to Wauwatosa City Hall thirty-four years later was to inform Wauwatosa officials that this municipal seal—which the City had been using on its street signs, stationery, police vehicles, and assorted other municipal paraphernalia since 1957—was illegal. In particular, Sherman informed the City that the presence of a Latin cross in the lower right quadrant of the emblem violated the First Amendment's anti-establishment guarantee.⁶⁸ He demanded that the City promptly remove the cross from the logo and suggested that he would drag the City into court should it refuse to comply with his demand.



68. *See id.*

Sherman's march through Wauwatosa that day was no isolated event. At the same time, two communities in Illinois—Zion and Rolling Meadows—already were embroiled in litigation with Sherman and his organization over their municipal seals. Because of these pending cases, Wauwatosa's elected officials decided to defer action for awhile and await the rulings of a federal appellate court in Chicago before deciding how to respond to Sherman's demand. Two years later, in early 1992, the United States Court of Appeals for the Seventh Circuit told these municipalities that the First Amendment's anti-establishment guarantee rendered their emblems unconstitutional.⁶⁹ The Supreme Court of the United States declined to review the cases, and several months later denied the municipalities' request to reconsider the earlier denial in light of an intervening decision by the Fifth Circuit that came to the opposite conclusion in a case concerning the emblem of the city of Austin, Texas.⁷⁰ As a result, Sherman returned to Wauwatosa in the spring of 1992 to increase the pressure.

Wauwatosa's City Attorney responded by preparing a legal opinion for the Mayor and Common Council. That opinion reluctantly concluded that Wauwatosa's seal could not withstand attack in the Seventh Circuit so long as the High Court's controversial *Lemon* test remained the law of the First Amendment.⁷¹ In addition, the City Attorney stated publicly that his ethical obligations as a lawyer—including the obligation under Chapter 20 of the Wisconsin Supreme Court Rules to refrain from filing frivolous pleadings and the similar demands of Rule 11 of the Federal Rules of Civil Procedure—prevented him from defending the constitutionality of the seal because doing so could threaten his license to practice law and subject him to financial sanctions.⁷² Not surprisingly,

69. See *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991). In particular, a divided panel of the Seventh Circuit held that the Rolling Meadows seal failed the second prong of *Lemon* by having the effect of endorsing Christianity, while the Zion seal, emblem, and logo posed even more substantial *Lemon* problems under both the purpose and effect prongs. See *id.* at 1411-15.

70. See *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991). In *Murray*, a divided panel of the Fifth Circuit—explicitly distinguishing its situation from that of Zion and Rolling Meadows—rejected the argument that what it dubbed a “Christian cross” on the municipal insignia of Austin clashed with federal constitutional principles. See *id.* at 150-57.

71. See Memorandum from Harold D. Gehrke, City Attorney, to Maricolette Walsh, Mayor, *Constitutionality of the Cross on the City Logo* (Sept. 29, 1992) (on file with author).

72. See Tyler Chin, *Officials Decline Offer for Help on Emblem*, MILWAUKEE J., Nov. 14, 1992, at A22 (“We would certainly lose and we would be ordered to pay attorney fees” for the other side, Gehrke said. “As an attorney, ethically, it would be inappropriate to enter a frivolous defense.”).

these statements prompted religious organizations from around the nation to inform Wauwatosa that they would be delighted to undertake defending the seal if the City Attorney chose to opt out.⁷³ As the collective blood pressure of Wauwatosans continued to rise, the issue was placed on the agenda for a November 1992 public hearing and a Common Council meeting several weeks later.⁷⁴

The public hearing attracted a sizable number of residents. Most who attended expressed outrage that an outsider had come into their community and set in motion a chain of events that threatened to force a change in the City's official seal.⁷⁵ Nonetheless, the Common Council's Public and Municipal Affairs Committee voted to recommend that, given the state of First Amendment law, the logo be re-designed and the cross deleted from the new design.⁷⁶ A week later the full Common Council agreed.⁷⁷ In each instance members cited their duties to uphold the state and federal constitutions and the tensions that spring from the clash of those oaths with the wishes of what appeared to be the vast majority of Wauwatosa residents. As something of a compromise gesture and a symbol of constitutional civil disobedience, the Common Council also recommended that the portion of the emblem previously occupied by the cross be replaced with a plain red square, preserving the option of returning the cross to the logo should the First Amendment law governing municipal insignia change.⁷⁸

But the story does not end here. Wauwatosa residents were displeased with this resolution.⁷⁹ Over the next few months petitions sped around the City; by early 1993 more than 7500 impassioned Wauwatosans were urging the Common Council to submit the matter to

73. One such volunteer was Liberties Counsel, an organization based in Orlando, Florida that described itself as "a non-profit religious civil liberties education and legal defense organization." *Id.* Mathew Staver, president of Liberties Counsel, extended the offer to have his organization represent Wauwatosa free of charge. *See id.*

74. *See* John Diedrich, *Hundreds Swamp Meeting in Tosa to Support Cross*, MILWAUKEE SENTINEL, Nov. 25, 1992, at 4A.

75. *See id.*

76. *See* Bill Meyer, *Committee Votes to Alter Seal*, 6-2, WAUWATOSA NEWS-TIMES, Dec. 10, 1992, at 1.

77. *See* Betsy Thatcher, *At Cross Purposes: Atheist Won Battle, Not Hearts, in Tosa*, MILWAUKEE SENTINEL, Dec. 17, 1992, at 8A (noting that the full Common Council voted 10-5 to remove the cross from the logo).

78. *See* Gehrke Memorandum, *supra* note 65, observing that: "This was intentionally done so that the cross could be returned to the emblem if, in the future, the U.S. Supreme Court should change the interpretation so as to allow religious symbolism to exist on municipal emblems."

79. *See* Lawrence Sussman, *Group to Start Drive to Restore Tosa Cross*, MILWAUKEE J., Apr. 30, 1993, at B5.

voters in a referendum.⁸⁰ Thus, in April 1994, Wauwatosa voters faced two ballot questions. Question One was whether the City shall reinstate the cross on the emblem.⁸¹ Question Two was whether the City shall defend any legal challenge to the reinstatement of the cross of the emblem regardless of the cost to taxpayers.⁸² Voters answered each question in the affirmative,⁸³ surprising public officials who had predicted that, when push came to shove, taxpayers would not opt to put their money where their mouths were.

Again, however, the plot thickened. On the advice of the City Attorney, the Common Council chose to treat the referendum as advisory rather than decisional.⁸⁴ Accordingly, it concluded that it was not legally bound by the results of the referendum. Several months of haggling and parliamentary shenanigans followed. The Cross Committee insisted that the cross be returned to the logo, citing both the results of the referendum and a recent decision from a federal judge in Oklahoma holding that religious insignia on municipal seals did not offend the First Amendment.⁸⁵ Rob Sherman and his organization threatened to haul the City into court.⁸⁶ The Mayor, seeking to accommodate her constituents while respecting the Constitution, proposed a compromise in which the cross would be returned to the emblem and the emblem officially retired,

80. See Sandy Schurter, *Signatures Secured, Cross Issue Sent to City*, WAUWATOSA NEWS-TIMES, June 17, 1993, at 1 (noting that nearly three times the number of signatures necessary to trigger a referendum initiative had been obtained by the Wauwatosa Cross Committee).

81. See Tyler Chin, *Wauwatosa Puts Cross Issue to Public Vote*, MILWAUKEE J., Aug. 4, 1993, at B3.

82. See *id.*

83. On Question One the vote was 9100 in favor and 3344 opposed. On Question Two the vote was 7113 in favor and 5156 opposed. See David Thome, *Voters Want Cross Back on Tosa Seal*, MILWAUKEE J., Apr. 6, 1994, at B1.

84. As City Attorney Gehrke explained in a letter to Mayor Walsh, neither a decision of a federal appellate court—in this case the controlling Seventh Circuit decision, see *supra* note 69—nor a resolution of the Common Council can be overturned or repealed by “direct legislation,” that is to say, by referendum. See Letter from Harold D. Gehrke, City Attorney, to Maricolette Walsh, Mayor (May 21, 1993) (on file with author).

85. A federal court in Oklahoma upheld the power of the Oklahoma City suburb of Edmond to display a Latin cross in one quadrant of the city’s emblem. See *Robinson v. City of Edmond*, No. CIV-93-153-R (W.D. Okla. 1994). But the United States Court of Appeals for the Tenth Circuit reversed on appeal. *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1702 (1996).

86. Speaking from Wauwatosa City Hall on the evening of the vote, Sherman stated: “The civil rights of atheists are not for sale If the National Civil Rights Foundation has to go to court over this issue, we will make it so expensive for Wauwatosa that the residents will be paying for it the rest of their lives.” Joe Williams & Jay Erickson, *Tosa Voters Want Cross on Emblem; Paying for Fight Gets Less Support*, MILWAUKEE SENTINEL, Apr. 6, 1994, at 1A.

to hang prominently in Wauwatosa's municipal hall.⁸⁷ The proposal garnered little support.

When the dust settled, the Common Council cut a deal with Rob Sherman and American Atheists:⁸⁸ The City agreed to remove the cross from the logo featured just about everywhere, *except* on the 4,800 blue street signs throughout the City, most of which were relatively new and would cost a good deal to replace. In a final twist, the Common Council chose to place the familiar words "In God We Trust" in the lower right quadrant of the newly designed logo, both as a substitute for the cross and as a way of preserving the notion that Wauwatosa was, and remains, a community of religious people, the notion that the City continues to have what one alderman referred to as a "spiritual base."⁸⁹ The Common Council's choice of the words "In God We Trust" was no accident: It figured that if the First Amendment does not prohibit those words from being placed on our currency it does not prohibit them from being placed on a municipal logo.

But bitterness and resentment lingered. A year and a half later, in early 1996, the once extremely popular Mayor came within 184 votes of losing her re-election bid to a candidate whose two principal initiatives were the return of the cross to the logo and the offer of free doughnuts and coffee to anyone stopping by his office on Thursdays.⁹⁰ And in July 1997, Rob Sherman and American Atheists rode into Oconto County to deliver a message to the Oconto County Board. The message was that he would file a lawsuit against the Board should it approve the recent proposal of the Christian Family Association that the Ten Commandments be hung in the courthouse, part of the Association's initiative to get the

87. See Joe Williams, *Mayor Wants Cross Temporarily Put on Emblem*, MILWAUKEE SENTINEL, May 28, 1994, at 8A. Milwaukee's largest daily newspaper put its editorial weight behind Mayor Walsh's proposal. See *A Smart Compromise on Tosa Cross*, MILWAUKEE J., June 1, 1994, at 10.

88. See Tyler L. Chin, *'In God We Trust' Approved for Disputed Tosa Emblem; Council Reaches Compromise in Debate to Restore Cross on Symbol*, MILWAUKEE J., June 8, 1994, at 1.

89. Jamaal Abdul-Alim, *Tosa Council Rejects Cross; Votes to Add Phrase to Emblem*, MILWAUKEE SENTINEL, June 8, 1994, at 1A.

90. Mayor Walsh—calling the campaign "one of the most unsavory campaigns in my memory"—attributed the closeness of the vote to opposition from the Cross Committee. *Municipalities: Bell Easily Elected West Allis Mayor; Wauwatosa's Walsh, South Milwaukee's Kieck Re-elected to Posts*, MILWAUKEE J. SENTINEL, Mar. 20, 1996, at 4 (noting that Mayor Walsh "narrowly survived" against a candidate she outspent by a margin of three to one).

commandments displayed in all 72 county courthouses throughout the state.⁹¹

IV. CONCLUSION

On the surface, it would appear that no neat and seamless thread binds together these three First Amendment episodes. In one, the nation's highest court turns back a challenge to efforts by states to punish more severely criminal conduct that the states have deemed especially destructive. In another, a federal trial court in Milwaukee informs the nation's public universities that a central element of their efforts to discourage discriminatory harassment on campus cannot square with current understandings of the breadth of free speech. In the third, a community learns that a time-honored emblem from which many of its residents derived a sense of pride and distinctiveness must be redesigned to take account of the latest developments in the jurisprudence of the anti-establishment guarantee.

Yet, beneath the surface, the episodes remind us of the powerful impact Wisconsin and its communities continue to have on the evolution and practical meaning of the law of the First Amendment. Todd Mitchell's case out of Kenosha is likely to be cited for generations as the case that liberated those who make and enforce state and federal criminal laws from the contention that a criminal has the constitutional freedom to select his or her victim because of the color of the victim's skin. The University of Wisconsin's unsuccessful defense of its anti-harassment rule has played a pivotal role in placing our nation's universities on the defensive in their efforts to prevent hate from polluting the American campus. Wauwatosa's effort to preserve a municipal logo against the charge that it impermissibly endorsed Christianity underscores the significance the First Amendment can have on the deeply rooted traditions of a community. Regardless of the competing perspectives individual Wisconsinites bring to each of these constitutional experiences, together we can take pride in the contributions our state has made, and continues to make,⁹² to the development of First Amendment law.

91. See Meg Jones, *Illinois Atheist Threatens Suit; He Appears Before Oconto County Board over Ten Commandments*, MILWAUKEE J. SENTINEL, July 18, 1997, at 1; *Atheist Threatens Lawsuit—Ten Commandments Effort Opposed*, WIS. ST. J., July 19, 1997, at 5B.

92. The constitutionality of religious school choice is the most prominent example of the central role Wisconsin continues to play in the evolution of First Amendment law. Shortly before this Article went to press, the Wisconsin Supreme Court handed down a much-awaited decision in which the court's four-person majority held that the amended Milwaukee Parental Choice Program—which allows otherwise eligible families to use state

funds to send their children to religious schools—does not clash with state or federal constitutional protections for religious liberty. *See* *Jackson v. Benson*, No. 97-0270 (Wis. June 10, 1998).