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Bigots Beware: Wisconsin v. Mitchell and the Legalization of Penalty Enhancement

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Intolerance is alive and well in America. This is manifested in the prevalence of "hate crimes." Hate crimes are those crimes committed to person or property specifically due to the person or owner's race, religion, color, disability, sexual orientation, national origin, or ancestry. With the growth of hate crimes, many states have instituted hate crime legislation. In Wisconsin, this legislation comes in the form of penalty enhancement. According to Wisconsin law, sec. 939.645, Stats., a perpetrator may receive an extended sentence if it can be proven that the perpetrator intentionally selected the victim because of the victim's race, religion, color, disability, sexual orientation, national origin, or ancestry (508 U.S. 481).

A particular perpetrator, Todd Mitchell, challenged the constitutionality of this statute. The Supreme Court ultimately decided against Mitchell and thus gave States the permission to draft hate crime legislation.

On the evening of October 7, 1989, nineteen-year-old Todd Mitchell was among approximately ten black young men discussing the film Mississippi Burning outside an apartment complex. Mitchell began instigating the crowd by asking, "Do you all feel hyped up to move on some white people?" Fourteen-year-old Gregory Reddick appeared
moments later on the other side of the street. Mitchell then further provoked the crowd by asking, "You all want to f**k somebody up?" He then said, "There goes a white boy, go get him," after which he counted to three and pointed at Reddick. The group ran to Reddick and knocked him down. For up to five minutes, the group kicked, punched, and stomped on Reddick, leaving him unconscious and stealing his British Knights athletic shoes. Reddick remained in a coma for four days. The injuries sustained could have resulted in permanent brain damage and would have been fatal if he had not received medical treatment. Subsequently, Mitchell was convicted by a court in Kenosha, Wisconsin of aggravated battery, party to a crime; intentionally selecting battery victim due to race; and theft, party to a crime. Under Wisconsin law, Mitchell's sentence could be extended since he intentionally selected Reddick on account of Reddick's race. Consequently, instead of the maximum two year sentence, Mitchell received a four year sentence (485 N.W.2d 807).

Mitchell appealed to the Wisconsin Court of Appeals seeking post-conviction relief and claimed the Wisconsin statute unconstitutional on First Amendment grounds. First, Mitchell claimed the statute was too vague. Mitchell secondly claimed the statute was too broad. It intruded upon a substantial amount of constitutionally protected activity. This created a "chilling effect" and thereby limited free speech. The Court of Appeals rejected his allegations. Usually, the burden of proving a statute unconstitutional rests on the defendant, however, in First Amendment cases the burden of proof rests on the plaintiff. In contrast, the court decided the burden of proof belonged to Mitchell.

In the opinion of the court, Judge Richard S. Brown first considered Mitchell's vagueness claim. To be considered ambiguous, the law must be written such that:

One bent on obedience may not discern when the region of proscribed conduct is near or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards proscribed in the statute or rule. (473 N.W.2d 4)

Mitchell claimed the phrase "intentionally selects" and the term "race" were vague. Citing Wisconsin law sec. 939.25(3) Stats. and Webster's New Collegiate Dictionary Brown defined "intentionally selects" as "to purposefully pick out" (Ibid.). In addition, Brown declared neither race nor color were ambiguous. In the crime committed, both race and color were covered. Mitchell is black and Reddick is white; using either criteria, race or color, the law was violated. Additionally, Mitchell claimed the phrase "intentionally selects" was ambiguous in application because the statute does not define how to determine intentional selection of a victim. For instance, a perpetrator may use racial epithets when committing assault, yet, this does not prove the perpetrator intentionally selected his victim. Brown answered this challenge with his interpretation of the phrase "because of." The statute did not punish the selection of the victim; it punished the crime if the intentional selection was based on the victim's race. Thus, Brown concluded the statute was not vague.

Next, the court examined Mitchell's claim of overbreadth. Brown found this claim hard to follow (Ibid.,
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Mitchell supported his claim of overbreadth with an example of racial epithets. Since the First Amendment protected racial epithets as general speech, they should also be legal while committing a crime. However, the Wisconsin statute aimed at selection not speech. The statute punished conduct and proscribed certain conduct where words may be used as circumstantial evidence. Accordingly, the statute did not limit free speech. On these grounds, the Wisconsin Court of Appeals affirmed Mitchell's sentence.

Mitchell then petitioned the Wisconsin Supreme Court. This time, Mitchell renewed his First Amendment challenge and appealed on Fourteenth Amendment grounds as well, perhaps this worked to his advantage because the Wisconsin Supreme Court ruled in Mitchell's favor. Chief Justice Hefferman wrote the majority opinion. Hefferman and his court found the statute unconstitutional on First Amendment grounds, and subsequently did not discuss Mitchell's Fourteenth Amendment challenge.

Contrary to the Wisconsin Court of Appeals, the Wisconsin Supreme Court put the burden to prove constitutionality on the State. The State failed to prove constitutionality and therefore, Hefferman found the statute in violation of the First Amendment. The statute punished thought, "it aim[ed] at the bigoted bias of the actor" (485 N.W.2d 813). The statute punished offensive motive or thought because "selecting" cannot be objectively established. The selection process must involve a subjective examination of the motive, the evidence used in this case showed a racial bias. The reason the court held the selection process unconstitutional was because the motive was equated with prejudice, a constitutionally protected entity. Further, the statute is overstated in its interpretation because by "sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms [and creates] the so-called chilling effect" (Ibid., at 815). The chilling effect was an implicit restraint on constitutionally protected speech. Hefferman did not believe penalty enhancements rest on the same point of law as antidiscrimination laws, already held to be constitutional. Anti-discrimination laws punish the act of refusing to hire a person based on status. Penalty enhancements, on the other hand, punish the selection process, or a mental act. On vagueness and overbreadth grounds, the Wisconsin Supreme Court found that penalty enhancements were unconstitutional.

Two justices, on the other hand, filed a dissenting opinion. First, Justice Shirley S. Abrahamson maintained the statute punished conduct only. The statute did not punish bigoted thought; it must prove that the bigoted remarks figured in directly with the crime. In Mitchell's case, his racist remarks were directly responsible for the crime. The statute in this instance prohibited conduct, not thought. Justice William A. Bablitch also filed a dissenting opinion. In his opinion, Bablitch argued the First Amendment was not implicated. According to Bablitch, the statute punished purposeful selection. Using words as circumstantial evidence did not chill free speech. He argued that penalty enhancement laws were no different than antidiscrimination laws. Anti-discrimination laws do not punish failure to hire as a crime, rather they punished the failure to hire due to race, national origin, gender, etc. Similarly, sec. 939.645 Stats. did
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not evaluate why a victim was chosen, but rather it limited its influence to cases where the presence of race was a substantial factor in the decision process. "The victim's status must be a substantial factor in the selection decision to the extent that in the absence of that status the perpetrator would not have selected the victim (Ibid., at 827). The constitution protected bigoted thought, but not acts upon those thoughts. For those reasons, both Justice Abrahamson and Justice Bablitch filed dissents.

The State then appealed Wisconsin v. Mitchell to the United States Supreme Court. James E. Doyle, Attorney General of Wisconsin, argued on behalf of the petitioner. Lynn S. Adelman argued the cause for the respondent. Michael R. Dreeben argued the cause for the United States with an amicus curiae urging for a reversal of the Wisconsin Supreme Court's decision. The case was argued on April 21, 1993. On June 11, 1993, the Court unanimously reversed and remanded the Wisconsin Supreme Court's decision. Chief Justice Rehnquist delivered the comparatively short opinion for the Court. Before considering the question of the case, he addressed the issue of jurisdiction. Mitchell correctly asserted the United States Supreme Court was bound by the Wisconsin Supreme Court's interpretation of the statute. However, the State Supreme Court only characterized a practical effect, it did not construe the instant statute to define a particular phrase. As such, the U.S. Supreme Court offered its own opinion. Although Mitchell renewed his Fourteenth Amendment challenge, the U.S. Supreme Court did not consider it because the Wisconsin Supreme Court had not. Accordingly, the U.S. Supreme Court addressed the question of whether the First Amendment prohibited penalty enhancement.

The Court did not find the Wisconsin statute to have a chilling effect on free speech. "To think one would suppress bigoted ideas for fear of penalty enhancement was too speculative a hypothesis to support Mitchell's overbreadth claim" (508 U.S. 489). In addition, though speech can include conduct if expressed as an idea, the Constitution does not protect physical assault. Also, the court system can not punish thoughts, but sentencing judges can use motives to ensure the penalty fits the crime. The Court referred to statements made in an earlier case, Delaware v. Dawson, "The Constitution does not erect a per se barrier against admission of evidence concerning one's beliefs and associations at sentencing" (508 U.S. 477). The sentencing judge may consider motive but not belief. Considering is valid, "motive plays the same role under the Wisconsin statute as it does under federal and state anti-discrimination laws" (Ibid., at 488). With this opinion, the Supreme Court ruled penalty enhancement laws not a violation of the First Amendment and thus constitutional.

With this ruling, the Supreme Court allowed hate crime legislature to stand. In a previous term, the Court ruled a St. Paul, Minnesota statute unconstitutional that punished "fighting words" which provoked violence on the basis of race, color, creed, religion, or gender. In R.A.V. v. St. Paul, the Supreme Court ruled that the ordinance was explicitly directed at expression and violated the First Amendment. The ruling in R.A.V. made punishing biased speech illegal. As a result, some anti-discrimination laws would appear to be
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The ruling in Wisconsin v. Mitchell clarified anti-discrimination legislature, but also created ambiguity. The Court failed to differentiate between speech and conduct. Under the terms of law, to determine conduct one must, “ask whether the intent is to convey a particular message,” and if “[the] likelihood is great that the message will be understood by those who view it” (Recent 1994, 240). Under these terms, racially motivated physical assault was constitutionally protected. In addition, the failure to address the applicability of penalty enhancement to prohibited speech offenses motivated by prejudices created loopholes in the law (Bader 1994, 256).

Even after the Mitchell ruling, legislatures can still punish speech by construing speech as conduct. Penalty enhancement for speech based offenses is still invalid, but courts can define conduct in speech crimes as the selection of the victim. Thus, the courts can circumvent the R.A.V. decision and impose burdens on disfavored speech. Finally, the Court fails to clarify bias-inspired crimes that mix elements of speech and nonexpressive conduct and thus, leaves another area of law without specific guidelines. Hence, the Supreme Court’s ruling allows states to take yet another step in eradicating the trend of hate crimes, but fails to clarify Mitchell’s limits in interpreting conduct and speech under the First Amendment.

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