Wisconsin v. Mitchell: The Debate Between Hate Crime Statutes and Freedom of Speech Continues

In *Wisconsin v. Mitchell*,[1] a jury found respondent, Todd Mitchell, guilty of aggravated battery. The trial court enhanced his sentence under Wisconsin's "hate crime" penalty enhancement statute.[2] On October 7, 1989 a group of black males, respondent included, had just finished discussing a racial scene from the film "Mississippi Burning" in which a white man beat a young black boy.[3] When the group went outside Mitchell asked the group "'Do you all feel hyped up to move on some white people?'"[4] A young white boy approached the group from the opposite side of the street and respondent said: "'You all want to f[ ] somebody up? There goes a white boy; go get him.'"[5] The group moved in on the boy, beat him severely and stole his tennis shoes. The boy remained in a coma for several days.[6] A jury tried and convicted Mitchell of aggravated battery, a crime that normally carries a maximum of two years' imprisonment. However, Wisconsin's hate crimes statute increased the maximum sentence to seven years imprisonment.[7] The statute enhances a defendant's maximum sentence whenever the defendant "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . . ."[8] The court sentenced Mitchell to four years imprisonment.[9] Mitchell appealed his conviction and sentence on the ground that Wisconsin's penalty enhancement statute constituted a violation of the

1. 113 S. Ct. 2194 (1993).
2. *Id.* at 2197.
3. *Id.* at 2196.
4. *Id.*
5. *Id.* at 2196-97.
6. *Id.* at 2197.
7. *Id.*
8. *Id.* (citing WIS. STAT. § 939.645(1)(b) (1989-90)).
9. *Id.*

First Amendment.[10] On appeal Mitchell contended that the statute infringed on his right to free speech and was thus overbroad.[11] The Wisconsin Court of Appeals rejected Mitchell's challenge, holding the statute constitutional.[12] The court reasoned that the "hate crimes" statute punished a defendant's conduct, not his words or his thoughts, and the statute did not have the "chilling effect" on free speech that would make it overbroad.[13] The Supreme Court of Wisconsin granted Mitchell's petition for review.[14] The supreme court reversed the appellate court, holding that the statute impermissibly infringed on free speech by punishing what is deemed to be offensive thought and by the "chilling effect" the statute placed on free speech.[15] According to the court, "[t]he statute punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection."[16] The United States Supreme Court granted certiorari[17] due to the importance of the issue and the conflict of authority among the state high courts on whether similar "hate crimes" statutes are constitutional.[18] The Supreme Court, reversing the Wisconsin Supreme Court, held that the Wisconsin penalty enhancement statute did not violate the defendant's First Amendment rights.[19]

In recent years the number of "hate crimes" committed in the United States has risen dramatically. "Hate crimes" are defined as acts of violence motivated by group prejudice.[20] The National Gay and Lesbian Task Force reported a sixty percent increase in bias crimes motivated by sexual orientation during 1985-86.[21] In 1987 the Ameri-

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10. *Id.* (Mitchell also challenged the statute on equal protection and vagueness grounds. The Court of Appeals held that Mitchell waived his equal protection claim and rejected the vagueness claim. 473 N.W.2d 1 (Wis. Ct. App. 1991). The Wisconsin Supreme Court declined to address either claim. 485 N.W.2d 807, 809 n.2 (Wis. 1992). The Supreme Court also declined to address the equal protection and vagueness claims. 113 S. Ct at 2197 n.2.

11. 473 N.W.2d 1, 2 (Wis. Ct. App. 1991).

12. *Id.*

13. *Id.* at 6.

14. 475 N.W.2d 164 (1991).

15. 485 N.W.2d 807 (1992).

16. *Id.* at 812 (emphasis in original).

17. 113 S. Ct. 810 (1992).

18. 113 S. Ct. at 2198.

19. *Id.* at 2202.

20. Joseph M. Fernandez, *Bringing Hate Crimes Into Focus—The Hate Crimes Statistics Act of 1990*, 26 HARV. C.R. - C.L. L. REV. 261, 261 (1991).

21. Joseph E. Starkey, Jr., Note, *R.A.V. v. St. Paul: The Debate Over the Constitutionality of Hate Crime Law Ends; Or Is This Just the Begining?*, 95 W. VA. L. REV. 561, 561 (1992).

can Jewish Congress reported a dramatic increase of the incidence of violence against Jews.[22] The Maryland Commission on Human Relations reported that the number of bias motivated crimes increased from 398 in 1986 to 686 in 1989,[23] and the Los Angeles County Human Relations Commission reported that the number of "hate crimes" has been steadily rising since 1986.[24] In 1990 the United States Congress passed the Hate Crimes Statistic Act of 1990 to determine the prevalence of such crimes in America.[25] The first full report under the Act reported 4,755 hate crimes, sixty-two percent of those being racially motivated.[26] Prior to 1980 only five states had any type of bias crime statutes.[27] Today, the increase of crime and violence committed simply because of a victim's race, religion, gender, or sexual orientation has led at least forty-six states and the District of Columbia to adopt various "hate crime" statutes.[28] These statutes generally take one of two forms: penalty enhancement statutes or ethnic intimidation as a separate crime. The first, penalty enhancement statutes, allow for greater sentences and higher fines when violent crimes are motivated by bias. Penalty enhancement statutes are based on the Anti-Defamation League's (ADL's) model legislation.[29] The second punishes ethnic intimidation as a separate and distinct crime and seeks to control expression by punishing the use of words or symbols the user knows will incite anger in others because of race, religion, gender, sexual orientation or some other immutable characteristic. Bias crime law is, however,

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22. *Id.*

23. Fernandez, *supra* note 20, at 261.

24. *Id.*

25. The Hate Crimes Statistics Act, 28 U.S.C. § 534 (1992). The Act was designed to serve two purposes. First, it will provide empirical data necessary to develop policies to combat hate-motivated violence. Second, it will raise public awareness of the existence of hate crimes.

26. Starkey, *supra* note 21, at 562-63.

27. Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673, 680 (1993).

28. Starkey, *supra* note 21, at 563. The four states that have not enacted some form of hate crimes statutes are Utah, Wyoming, Nebraska, and Alaska. *Id.*

29. The ADL's model intimidation statute reads:

> Intimidation
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> A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section____ of the penal code.
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> B. Intimidation is a __ misdemeanor/felony.

Civil Rights Division, ADL Legal Affairs Department, ADL Law Report: Hate Crimes Statutes: A Response To Anti-Semitism, Vandalism, And Violent Bigotry 1, app. A. (1988 & Supp. 1990).

surrounded by controversy as it appears to be contrary to the principal of free speech found in the First Amendment. It seems impossible to protect victims of bias crimes and at the same time uphold the right to freedom of expression. Opponents of "hate crime" statutes feel the laws come dangerously close to punishing an individual's speech and beliefs.[30] The debate between "hate crime" statutes and the right to freedom of expression has been ongoing. In 1952 the Supreme Court, in *Beauharnais v. Illinois*,[31] upheld a group libel statute typical of those enacted after World War II.[32] The statute prohibited the dissemination of any publication that portrayed "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion."[33] The majority upheld the statute's constitutionality on the ground that the state had a legitimate interest in ensuring "the peace and well-being of the state."[34] Subsequent cases, while not expressly overruling *Beauharnais*, have held similar statutes in violation of the First Amendment. In *Brandenberg v. Ohio*[35] the Court reversed the conviction of a Ku Klux Klan leader who had been charged with advocating reform through violence.[36] The Court held that the First Amendment protected expression that advocated violence unless the action was likely to incite and produce violent actions.[37] The Court first put forth this exception, known as the"fighting words" doctrine, in *Chaplinsky v. New Hampshire*.[38] "Fighting words" were deemed beyond the scope of the First Amendment protections.[39] The problem of ethnic intimidation reached a new peak in 1977 in *Collin v. Smith*,[40] when the National Socialist Party of America (NSPA) attempted to conduct a march in Skokie, Illinois, a predominantly Jewish Chicago suburb.[41] To prevent the march, the town legislature enacted several city ordinances that conditioned the granting of parade permits on a finding that the assembly would not "portray criminality, depravity or lack of virtue in,

30. 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, 334 (1991).
31. 343 U.S. 250 (1952).
32. *Id.* at 266-67.
33. *Id.* at 251 (citing ILL. REV. STAT. ch. 38, para. 471 (1949) (repealed 1961)).
34. 343 U.S. at 258.
35. 395 U.S. 444 (1969) (per curiam).
36. *Id.* at 449.
37. *Id.* at 447.
38. 315 U.S. 568 (1942).
39. *Id.* at 572.
40. 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).
41. 578 F.2d at 1199.

or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation."[42] The ordinances also prohibited the dissemination of any materials that "promote[] and incite[] hatred against persons by reason of their race, national origin, or religion, and is intended to do so."[43] The Seventh Circuit Court of Appeals struck down the ordinances as a violation of the First Amendment.[44] The court found NSPA's values to be "repugnant," but could not uphold the ordinances as they constituted content-based restrictions and failed to qualify under any recognized exception.[45] In more recent years, several penalty enhancement statutes based on the ADL model have been challenged on constitutional grounds. Each court reviewing such a statute has approached the analysis differently.[46] In *State v. Bebe*, an Oregon trial court held Oregon's intimidation statute to be unconstitutional on equal protection grounds.[47] According to the trial court, the statute impermissibly distinguished between victims as it "gives greater protection to a victim who is assaulted because of his race, color, religion or national origin than to another person who is assaulted for some other reason."[48] The court of appeals disagreed, stating that the statute did not offer greater protection to any one class because anyone could be a target of bigotry.[49] The court went on to hold the penalty enhancement permissible as the legislature is entitled to exercise its judgement with respect to determining the severity of a crime committed under various circumstances.[50] The court's only role was "to determine whether the distinction made in the severity of the crime bears a rational relationship to a legitimate legislative purpose."[51] The court concluded that the statute did not violate free speech as it was directed at conduct, not speech.[52] In *People v. Grupe*[53] New York's ADL-type statute also survived constitutional challenges. The trial court judge increased the

42. *Id.* (quoting SKOKIE, ILL., VILLAGE ORD. No. 77-5-N-994, 27-56(c) (May 2, 1977)).
43. *Id.* (quoting SKOKIE, ILL. VILLAGE ORD. NO. 77-5-N-995, 28-43.1 (May 2, 1977)).
44. *Id.* at 1210.
45. *Id.* at 1200.
46. *See* State v. Talley, 1993 WL 340945 (Wash. 1993); Richards v. State, 608 So. 2d 917 (Fla. App. 3d Dist. 1992); Dobbins v. State, 605 So.2d 922 (Fla. App. 5th Dist. 1992); *In re* Joshua H., 61 USLW 2570 (6th Dist. 1993); State v. Ladue, 1993 WL 364863 (Vt. 1993).
47. 680 P.2d 11 (Or. Ct. App. 1984).
48. *Id.* at 13.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. 532 N.Y.S.2d 815 (1988).

defendant's penalty from a maximum of fifteen days to one year under the New York statute due to ethnic slurs that accompanied a physical assault on a Jewish man.[54] The criminal court held the statute only punished violent conduct and that the defendant could have violated the statute "while remaining entirely mute."[55] An Ohio statute that closely resembles the ADL model has been struck down as unconstitutional on two separate occasions in *State v. Van Gundy*[56] and *State v. May*.[57] In *State v. Wyant*[58] the Ohio statute survived a constitutional challenge but only on a much more limited ground than the constitutional challenges raised in the previous cases.[59] In *Van Gundy* the court of appeals found the statute unconstitutionally vague as it provided no objective standard to guide a citizen as to the actions proscribed.[60] The court also held that the statute had a chilling effect on First Amendment freedom of speech as the statute would enhance a penalty based on a defendant's thoughts.[61] In *May* the court of appeals reached the same result based solely on vagueness grounds.[62] In *Wyant* the defendant challenged the statute on both vagueness and equal protection grounds. The court of appeals however, would only consider a facial challenge based on free speech grounds.[63] The court held the statute constitutional under the *Chaplinsky*[64] "fighting words" exception.[65] The Supreme Court of Ohio granted an appeal to resolve the conflict between

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54. *Id.* at 817.
55. *Id.* at 818.
56. 1991 WL 60686 (Oh. App. 1991).
57. 1991 WL 116653 (Oh. App. 1991). The statute states:

> (A) No person shall violate section 2903.21 [aggravated menacing], 2903.22 [menacing], 2909.06 [criminal damaging or endangering], or 2909.07 [criminal mischief], or division (A)(3), (4) or (5) of section 2917.21 [telephone harassment] of the revised code by reason of the race, color, religion, or national origin of another person or group of persons.
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> (B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.
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> OHIO REV. CODE ANN. § 2927.12 (Anderson 1992).

1991 WL 116653, at *2.
58. 1990 WL 200270 (Oh. App. 1990).
59. Wyant challenged the statute on equal protection and vagueness grounds. However, the court would only consider a facial challenge to the statute based on freedom of speech grounds. *Id.* at *1-*2.
60. 1991 WL 60686, at *3.
61. *Id.* at *5.
62. 1991 WL 116653, at *3.
63. 1990 WL 200270, at *2.
64. 315 U.S. 568 (1942).
65. 1990 WL 200270, at *2.

the three cases.[66] In striking down the statute, the court held that the effect of the statute was to create a "thought crime" in violation of the Ohio Constitution as well as the United States Constitution.[67] The Minnesota Supreme Court, in *In re Welfare of R.A.V.*,[68] considered an ethnic intimidation statute and held the City of St. Paul's "hate crime" ordinance to be constitutional as it reached only expressive conduct that amounts to "fighting words."[69] The United States Supreme Court granted certiorari[70] and found the statute unconstitutional.[71] The ordinance prohibited the display of symbols that one should reasonably know would cause anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.[72] R.A.V., a juvenile, challenged the ordinance when he was convicted of burning a cross on the lawn of a black family.[73] The Supreme Court held that the ordinance was unconstitutionally content-based and therefore violated free speech under the First Amendment.[74] The Court recognized that "fighting words" were beyond the protections afforded by the First Amendment, but the state cannot regulate only that speech which it finds to be offensive.[75] By prohibiting only expressions that provoked violence on the basis of "race, color, creed, religion or gender," and not all classes of "fighting words," the ordinance unlawfully infringed on free speech.[76] It was the Court's decision in *R.A.V. v. City of St. Paul* that set the stage for the Supreme Court's decision in *Wisconsin v. Mitchell*.

The Supreme Court, in *Wisconsin v. Mitchell*, upheld Wisconsin's "hate crime" statute as constitutional.[77] Mitchell argued that the enhancement statute punished bigoted thought, not conduct.[78] The Court did

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66. State v. Wyant, 597 N.E.2d 450 (Ohio 1992), *vacated*, 113 S. Ct. 2954 (1993).
67. 597 N.E. at 450.
68. 464 N.W.2d 507 (Minn. 1991).
69. *Id.* at 510. The Ordinance provided that:

> 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.

Id. (quoting SAINT PAUL, MINN. LEG. CODE § 292.02 (1990)).
70. 501 U.S. 1204 (1991).
71. R.A.V. v. City of Saint Paul, 112 S. Ct. 2358, 2550 (1992).
72. *Id.* at 2541.
73. *Id.*
74. *Id.* at 2542.
75. *Id.*
76. *Id.* at 2545-46.
77. 113 S. Ct. 2194 (1993).
78. *Id.* at 2198.

not agree. The Court stated that "our cases reject the 'view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends to thereby express an idea.'"[79] Therefore a physical assault on another person is not expressive conduct protected by the First Amendment.[80] "Violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."[81] Under the Wisconsin statute, the same conduct may be punished more severely if the victim is intentionally selected because of his protected status than if the victim is selected randomly. Thus, the penalty is enhanced for conduct motivated by a discriminatory point of view.[82] Sentencing judges typically consider a large number of factors when determining a sentence. One important factor is the defendant's motive for committing the crime.[83] The more purposeful the crime is, the more seriously it is usually punished.[84] It is true "that a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge."[85] However, this principle does not create a *per se* barrier of evidence relating to a defendant's beliefs and associations, simply because the beliefs are protected by the First Amendment.[86] If such beliefs or associations are directly related to the crime that the defendant has committed, the sentencing judge may permissively consider them.[87] The fact that the Wisconsin Legislature, not a sentencing judge, determined that bias-motivated crimes deserve harsher sentences across the board does not alter the fact that such evidence can be correctly admitted.[88] The Supreme Court found that the statute was not unconstitutional because it punished the defendant's motive or reason for acting.[89] The Court analogized the "hate crimes" statute to anti-discrimination statutes that also look to the actor's motive. Such statutes have passed constitutional scrutiny.[90] Mitchell argued that the Supreme Court's decision in *R.A.V. v. St Paul* compelled the Court

79. *Id.* at 2199 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 2200.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

to find the statute unconstitutional. The Court disagreed. In *R.A.V.* a municipal ordinance prohibited the use of "fighting words" that insult or provoke violence on the basis of race,color, creed, religion or gender.[91] The Court struck down the ordinance because it applied only to "fighting words" deemed particularly offensive by the city. Such a statute violated the rule of content-based discrimination as it was aimed explicitly at expression.[92] The Court distinguished the Wisconsin statute because it was directed only at unprotected conduct, not expression.[93] In addition, the Court felt the statute singled out conduct thought to inflict a great individual and societal harm, thus providing a reason for the statute "over and above mere disagreement with offenders' beliefs or biases."[94] Respondent finally argued the enhancement statute was unconstitutionally overbroad because of the "chilling effect" it had on free speech.[95] The statute would chill free speech because evidence of prior speech may be used to prove the defendant's intentional selection of his victim due to his protected status.[96] The Court again disagreed. The Court found the chilling effect, if any, was far too "attenuated and unlikely" to rule the statute overbroad.[97] The Court could not imagine that a person would curtail his speech in fear that, should he later commit a crime in which he intentionally selected his victim based on his bias thought, his prior words would be used against him.[98] In addition, the Court emphasized the fact that the First Amendment does not prohibit the evidentiary use of speech to establish the needed elements of a crime or to prove motive and intent, as long as the rules of evidence are followed.[99] In summary, the Supreme Court found that the "hate crimes" statute did not violate respondent's First Amendment right to free speech nor was the statute so overbroad as to have a "chilling" effect on free speech.[100]

The decision by the Supreme Court in *Wisconsin v. Mitchell* will by no means end the debate between the need for "hate crimes" statutes and the right to freedom of speech. The Court did not resolve the conflict as it had hoped. In reality the Court made things even more confusing for the state courts. *Mitchell* did not overrule *R.A.V.*, instead the Court

91. *Id.*
92. *Id.* at 2200-01.
93. *Id.* at 2201.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 2202.

found the two cases to involve entirely different issues. The two decisions, decided within one year of each other, seem to directly conflict; however, the cases can be distinguished. In *R.A.V.* the Supreme Court ruled on a statute that punished ethnic intimidation as a separate and distinct crime. The Court in *Mitchell* ruled on a statute that merely increased the penalty for an already existing crime if the jury found ethnic intimidation as the motivation for the crime. The result of the Court's decision is that state legislatures that wish to enact constitutional "hate crimes" statutes will draft statutes that closely resemble the Wisconsin penalty enhancement statute. The decision in *Mitchell* has reduced the question of the constitutionality of "hate crimes" statutes to one of drafting.

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