Marquette Law Review

Volume 77 | Issue 2 Article 8

Hate Crimes - New Limits on the Scope of First Amendment Protection? Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993)

Brian Resler

NOTE

HATE CRIMES—New Limits on the Scope of First Amendment Protection? *Wisconsin v. Mitchell,* 113 S. Ct. 2194 (1993).

I. INTRODUCTION

On June 11, 1993, the United States Supreme Court delivered a unanimous decision upholding the constitutionality of "hate crime" penalty-enhancement statutes in *Wisconsin v. Mitchell.*[1] While such legislation has been applauded for addressing the increasing number of bias-motivated crimes,[2] it has also received sharp criticism. Detractors argue that such statutes violate the First Amendment by effectively punishing pure thought, and by being overbroad, having the effect of "chilling" free thought and speech.[3]

This Note provides a synopsis of the facts and procedural holdings of this case and earlier cases forming the groundwork for the Court's decision. An evaluation and analysis of the decision follows, commenting on the wisdom of the ruling, the impact on similar present and future statutes, and the appropriateness of such statutes in responding to bias-motivated crime.

II. STATEMENT OF THE CASE

Respondent Todd Mitchell was convicted of aggravated battery for his part in a group attack on a young boy.[4] Because the jury determined that Mitchell had intentionally selected his victim on the basis of the

---

1. 113 S. Ct. 2194 (1993), *rev'g* 169 Wis. 2d 153, 485 N.W.2d 807 (1992).

2. State v. Mitchell, 169 Wis. 2d 153, 161, 485 N.W.2d 807, 810 (1992), *rev'd*, 113 S. Ct. 2194 (1993) (citing Joseph M. Fernandez, *Bringing Hate Crime Into Focus—The Hate Crime Statistics Act of 1990*, 26 HARV. C.R.-C.L. L. REV. 261 (1991); Tanya Kateri Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of Racially Motivated Violence*, 99 YALE L.J. 845, 845-46 (1990)).

3. *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).

4. *Mitchell*, 169 Wis. 2d at 157, 485 N.W.2d at 809. Mitchell and others, all African-Americans, were discussing a scene from the movie *Mississippi Burning*, in which an African-American child is beaten by a white man. Apparently inspired, Mitchell asked the group, "Do you all feel hyped up to move on some white people?" and directed the group to attack a young white boy who happened to pass on the other side of the street. *Id.* at 158-59, 485 N.W.2d at 809.

boy's race, Mitchell's sentence was increased pursuant to the Wisconsin hate crime penalty-enhancement statute.[5]

Failing to receive post-conviction relief in the circuit court, Mitchell appealed, challenging the First Amendment constitutionality of his conviction and sentence and claiming that the statute was overbroad.[6] Mitchell also argued that the statute was vague and violated his equal protection rights under the Fourteenth Amendment.[7] The court of appeals rejected these challenges and found that Mitchell had waived any equal protection claim.[8] The Wisconsin Supreme Court reversed, holding that "[t]he statute is directed solely at the subjective motivation of the actor—his or her prejudice. Punishment of one's thought, however repugnant the thought, is unconstitutional."[9]

The United States Supreme Court granted certiorari, citing the importance of the issue as well as the conflict of opinion among state courts.[10] The Court determined that the statute was a constitutionally legitimate objective for the state legislature and was neither overbroad nor inconsistent with the Court's earlier decisions regarding First Amendment protection.[11]

III. BACKGROUND OF THE LAW

Most state hate crime laws, including Wisconsin's,[12] follow a penalty-

---

5. *Id.* at 159, 485 N.W.2d at 809. The relevant parts of the statute are as follows:

939.645 Penalty; crimes committed against certain people or property.

(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) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct. . . .

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry or proof of any person's perception or belief regarding another's race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

WIS. STAT. § 939.645 (1991-92).

6. *Mitchell*, 169 Wis. 2d at 159-60, 485 N.W.2d at 809-10.

7. *Id.*

8. *Id.* at 160, 485 N.W.2d at 810.

9. *Id.* at 170, 485 N.W.2d at 814.

10. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2198 (1993).

11. *Id.* at 2202.

12. *Mitchell*, 169 Wis. 2d at 165, 485 N.W.2d at 812.

enhancement model drafted by the Anti-Defamation League of B'nai B'rith.[13] However, until the Court granted certiorari in *Mitchell*, no ruling by the Court addressed the constitutionality of hate crime penalty-enhancement statutes.[14] As a result, much of the background law is found in related areas of First Amendment protection.

The Supreme Court has long held that while one's expressions of personal opinion are protected by the First Amendment, exceptions may exist when such viewpoints motivate criminal conduct. Almost fifty years ago, the Court ruled on the admissibility of a defendant's personal views for the offense of treason in *Haupt v. United States*.[15] Haupt was convicted for harboring his son, a German spy, and obtaining an automobile and employment for him.[16] The Court ruled that Haupt's prior statements of allegiance to Germany could be weighed by the jury in determining whether Haupt's actions were those of a father simply aiding his son or those of furthering a spy's mission.[17]

More recently, the Court permitted the consideration of a person's views during sentencing in *Barclay v. Florida*.[18] Whereas *Haupt* concerned the constitutional permissibility of using evidence of a defendant's motivation in order to prove a crime had been committed,[19] the Court in *Barclay* upheld a trial judge's determination to impose the death penalty because of the defendant's racial biases when committing

---

13. Gellman, *supra* note 3, at 335. The full text of the revised model statute is as follows:

Intimidation

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 [insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or any other appropriate statutorily proscribed criminal conduct].

B. Intimidation is a — misdemeanor/felony [the degree of criminal liability should be made contingent upon the severity of the injury incurred or the property lost or damaged].

CIVIL RIGHTS DIV., ADL LEGAL AFFAIRS DEP'T, ADL LAW REPORT: HATE CRIMES STATUTES: A RESPONSE TO ANTI-SEMITISM, VANDALISM, AND VIOLENT BIGOTRY 1, app. (1988 & Supp. 1990).

14. *See supra* note 10 and accompanying text.

15. 330 U.S. 631 (1946). The standard of evidence for treason is found in Article III, § 3 of the Constitution: "the Testimony of two Witnesses to the same overt Act." *Id.* at 636.

16. *Id.* at 634.

17. *Id.* at 641-42. The Court noted further that such testimony must be "scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our own government or quite proper appreciation of the land of birth." *Id.* at 642.

18. 463 U.S. 939 (1983).

19. *Haupt*, 330 U.S. at 641-42.

the crime.[20] Despite a Florida statute expressly forbidding the consideration of a defendant's viewpoints as an aggravating circumstance, the Court determined that there was nothing constitutionally wrong in doing so.[21] The Court stated that "[w]hat is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."[22]

However, the Court has imposed limits on when a defendant's personal viewpoints may be considered in sentencing. In *Dawson v. Delaware*,[23] the Court declared unconstitutional the admittance of evidence that the defendant was a member of the Aryan Brotherhood, when the crime the defendant committed could not be shown to have been racially motivated.[24] The Court ruled that allowing evidence of a defendant's "abstract beliefs" in sentencing directly violated the First Amendment when those beliefs had no relevance to the issue being tried.[25]

Additionally, the Court has generally rejected attempts to criminalize behavior that would be acceptable if it were not for the defendant's motivation for engaging in a specific activity. In *R.A.V. v. City of St. Paul*,[26] the Court struck down a city ordinance that made it a misdemeanor to display a symbol "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."[27] The City of St. Paul argued that the statute was aimed at "fighting words" that may be constitutionally proscribed

---

20. *Barclay*, 463 U.S. at 949. Barclay, an African-American, was convicted in the murder of a white hitchhiker. Evidence revealed that Barclay was a member of the Black Liberation Army and intended to start a "race war." *Id.* at 942 (citation omitted).

21. *Id.* at 956. The Court justified this apparent disregard for state law by stating that "mere errors of state law are not the concern of this Court unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." *Id.* at 957-58 (citation omitted). The dissent in this case pointedly observed that the decision to sentence a person to death based on evidence impermissible under state law is "constitutional error that cannot be harmless." *Id.* at 984 (Marshall, J., dissenting).

22. *Id.* at 958 (citing Zant v. Stephens, 462 U.S. 862, 879 (1983)).

23. 112 S. Ct. 1093 (1992). Dawson, a white male, was convicted in the murder of a white woman after escaping from prison. *Id.* at 1095.

24. *Id.* at 1097. The Aryan Brotherhood was defined in the proceedings as "a white racist prison gang that began . . . in response to other gangs of racial minorities." *Id.* at 1096.

25. *Id.* at 1098. The Court held that membership in the Aryan Brotherhood "cannot be viewed as relevant 'bad' character evidence in its own right." *Id.* at 1099. This is in contrast to *Barclay*, where such evidence was permitted even though it was against state law. *See supra* notes 20-21 and accompanying text. As the dissent in *Dawson* points out, Delaware law expressly *permits* all relevant evidence relating to the character of the defendant once a statutory aggravating factor is found. *Dawson*, 112 S. Ct. at 1100 (Thomas, J., dissenting).

26. 112 S. Ct. 2538 (1992).

27. *Id.* at 2541 (citing ST. PAUL BIAS-MOTIVATED CRIME ORDINANCE, ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)).

under the First Amendment.[28] Nevertheless, because the statute in question proscribed only certain kinds of bias-motivated conduct, the Court found that the ordinance violated the rule against content discrimination.[29] Therefore, while cognizant of the intent of the ordinance, the Court held it unconstitutional because "[a]n ordinance not limited to the favored topics . . . would have precisely the same beneficial effect."[30]

Antidiscrimination laws, however, are an exception to the general rule that legal activity cannot be criminalized on the basis of personal viewpoints protected under the First Amendment.[31] In *Roberts v. United States Jaycees*,[32] the Court upheld a Minnesota statute that forbade the denial of full and equal use of public accommodations "because of race, color, creed, religion, disability, national origin or sex."[33] The Court determined that such statutes are a legitimate means for the state to protect its citizens from "serious social and personal harms."[34] Therefore, the Court found that the statute addressed legitimate concerns of

---

28. *Id.* at 2542. "Fighting words" were defined by the Supreme Court as those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). The Court noted that the reason "fighting words" are excluded from First Amendment protection is "not [because] their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *R.A.V.*, 112 S. Ct. at 2548-49.

29. *R.A.V.*, 112 S. Ct. at 2550. An example of content-discrimination was given by the Court: "[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 2543. The Court elaborates that the prohibition of content discrimination avoids raising "the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 2545 (citations omitted).

30. *Id.* at 2550.

31. *See* Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200 (1993). Whether antidiscrimination statutes actually punish motive, as the U.S. Supreme Court has held, or conduct remains a contentious issue. The majority opinion by the Wisconsin Supreme Court held that "[u]nder antidiscrimination statutes, it is the discriminatory act which is prohibited. Under the hate crimes statute, the 'selection' which is punished is not an act, it is a mental process." State v. Mitchell, 169 Wis. 2d 153, 176, 485 N.W.2d 807, 816 (1992), *rev'd*, 113 S. Ct. 2194 (1993).

32. 468 U.S. 609 (1984).

33. *Id.* at 615 (citing MINN. STAT. § 363.03(3) (1982)). The statute was challenged by the United States Jaycees in response to the Minneapolis and St. Paul chapters of the Jaycees who had been admitting women as members in violation of the Jaycees' bylaws. *Id.* at 614.

34. *Id.* at 625. The Court noted that:

> [D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

Id.

the state and abridged protected speech no more than necessary to meet that state's goals.[35] Finally, the Court concluded that discrimination, "like *violence* or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . [is] entitled to no constitutional protection."[36]

IV. Evaluation of the Case

Chief Justice Rehnquist's opinion in *Wisconsin v. Mitchell* is brief in its reversal of the Wisconsin Supreme Court decision. The opinion focused on three challenges made to the Wisconsin statute: (1) by punishing merely what the legislature has found to be offensive thought, the statute violates the First Amendment; (2) by requiring evidence of a defendant's speech prior to the offense, the statute would have a "chilling effect" on free speech, making the statute unconstitutionally overbroad; and (3) by punishing the subjective selection of a victim based on his or her protected status rather than an objective act of discrimination, the statute differs from antidiscrimination laws.[37]

The Court first determined that it was not bound by the Wisconsin Supreme Court's conclusion that the statute punishes a defendant's thought rather than conduct.[38] Conceding that the Court is bound by a state court's construction of a state statute, the Court nonetheless found that the statute had not been construed in terms of defining a particular word or phrase. Instead, "[the Wisconsin Supreme Court] merely characterized the 'practical effect' of the statute for First Amendment purposes."[39] Therefore, the Court concluded that it could form its own

35. *Id.* at 628.

36. *Id.* (emphasis added).

37. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2197-98 (1993). The Court declined to address the Fourteenth Amendment challenges made by Mitchell (i.e., the statute is vague and violates equal protection) because the challenges were "not developed below and plainly fall outside of the question on which we granted certiorari." *Id.* at 2197 n.2. However, the opening statement of the opinion declared to resolve "whether this penalty enhancement [statute] is prohibited by the First *and* Fourteenth Amendments. We hold that it is not." *Id.* at 2196 (emphasis added). Furthermore, the Court stated that it granted certiorari "because of the importance of the question presented and the existence of a conflict of authority among state high courts on the constitutionality of statutes similar to Wisconsin's penalty-enhancement provision." *Id.* at 2198. Therefore, it appears that although the Fourteenth Amendment challenges were not addressed by the Court, they are not seen to pose a serious threat to the statute's constitutionality.

38. *Id.* at 2198-99.

39. *Id.* at 2198. The Wisconsin Supreme Court had stated:

> Merely because the statute refers in a literal sense to the intentional "conduct" of selecting, does not mean the Court must turn a blind eye to the intent and practical effect

assessment of the statute's operative consequences, namely that the statute literally punishes only conduct.[40] Nevertheless, because the statute carries increased penalties for crimes motivated by a defendant's discriminatory viewpoint, the Court decided to refine and elaborate on the kind of coverage ascribed to the First Amendment.[41]

The Court observed that its prior holdings attest that "[t]he First Amendment does not protect violence."[42] Additionally, the Court noted that judges consider numerous factors, including motive,[43] when sentencing a defendant, and that many states consider the commission of a capital offense for pecuniary gain to be a separate statutory aggravating circumstance.[44] Therefore, although evidence may not be admitted merely to prove a defendant's unpopular or offensive viewpoints, "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."[45]

The Court used this line of reasoning to distinguish its decision in *Barclay*, which permitted evidence of racial animus to be used in sentencing,[46] from the decision in *Dawson*, where the defendant's beliefs (although repugnant) were held to be unrelated to the crime.[47] While neither case dealt with a specific penalty-enhancement provision, the Court argued that defendants who receive the death penalty because of their racial prejudice surely receive "the most severe 'enhancement' of all."[48] Concluding, the Court declared that state legislatures have the

---

of the law - punishment of offensive motive or thought. The conduct of "selecting" is not akin to the conduct of assaulting, burglarizing, murdering and other criminal conduct. It cannot be objectively established. Rather, an examination of the intentional "selection" of a victim necessarily requires a subjective examination of the actor's motive or reason for singling out the particular person against whom he or she commits a crime.

State v. Mitchell, 169 Wis. 2d 153, 166-68, 485 N.W.2d 807, 813 (1992) (footnote omitted), *rev'd*, 113 S. Ct. 2194 (1993).

40. Wisconsin v. Mitchell, 113 S. Ct. at 2199. It would appear that the U.S. Supreme Court ignored the Wisconsin Supreme Court majority's reasoning. However, two justices from the Wisconsin court also found that the statute simply punished discriminatory conduct and not mere thought. *Mitchell*, 169 Wis. 2d at 181, 485 N.W.2d at 819 (Abrahamson, J., dissenting); *Id.* at 184, 485 N.W.2d at 820 (Bablitch, J., dissenting).

41. *See Mitchell*, 113 S. Ct. at 2199.

42. *Id.* (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)).

43. *Id.*

44. *Id.*

45. *Id.* at 2200 (citing Dawson v. Delaware, 112 S. Ct. 1093, 1094 (1992)).

46. *See supra* notes 20-21 and accompanying text.

47. *See supra* notes 23-25 and accompanying text.

48. *Mitchell*, 113 S. Ct. at 2200. While the analogy may ring true, there still remains the

primary responsibility for fixing criminal penalties.[49]

The Court rejected the argument that the statute is unconstitutionally overbroad because of its "chilling effect" on free speech.[50] The Court found that the chill conceived here is "far more attenuated and unlikely" than typical overbreadth cases.[51] Dismissing the possibility that a person would ever be charged under the statute for minor misdemeanor offenses,[52] the Court was left with "the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property."[53] This, the Court determined, was simply too speculative to merit consideration.[54]

Finally, the Court held that there was no real difference between the Wisconsin statute and federal and state antidiscrimination laws. The Court compared Title VII, which makes it unlawful for an employer to discriminate against an employee "*because of* such individual's race, color, religion, sex, or national origin,"[55] with the Wisconsin statute.[56] The Court then distinguished *R.A.V.* as concerning an impermissible ordinance because it was directed only at particular symbols that the city found offensive.[57]

The Court concluded that the Wisconsin statute punishes bias-moti-

---

fact that *Mitchell* dealt with an *actual* penalty enhancement provision for hate crimes, while *Dawson* and *Barclay* did not. The Court acknowledges this, but insists the analogy is sufficient. *Id.*

49. *Id.* In addition, "the fact that the Wisconsin Legislature has decided, as a general matter, that bias-motivated offenses warrant greater maximum penalties across the board does not alter the result here." *Id.*

50. *Id.* at 2201.

51. *Id.*

52. *Id.*

53. *Id.* The majority opinion of the Wisconsin Supreme Court raises the point that a person may commit a misdemeanor yet end up convicted of a felony by merely adding a racial insult: "Obviously, the state would respond that the speech is merely an indication that [the person] intentionally selected [the victim] because of his particular race or ethnicity, but the fact remains that the necessity to use speech to prove this intentional selection threatens to chill free speech." State v. Mitchell, 169 Wis. 2d 153, 174, 485 N.W.2d 807, 816 (1992), *rev'd*, 113 S. Ct. 2194 (1993). It has also been suggested that "[a]nyone charged with one of the underlying offenses could be charged with ethnic intimidation as well, and face the possibility of public scrutiny of a lifetime of everything from ethnic jokes to serious intellectual inquiry. Awareness of this possibility could lead to habitual self-censorship . . . ." Gellman, *supra* note 3, at 360.

54. *Mitchell*, 113 S. Ct. at 2201.

55. *Id.* at 2200 (citing 42 U.S.C. § 2000e-2(a)(1)).

56. *See supra* note 5 ("*because of* the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin, or ancestry" (emphasis added)).

57. *Mitchell*, 113 S. Ct. at 2200-01; *see also supra* notes 28-29.

vated crimes more severely because those crimes are more likely to cause greater societal and individual harm.[58] This "provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."[59]

V. ANALYSIS

The decision in *Wisconsin v. Mitchell* should be followed. Although the Court's reasoning was not always clear, the decision flowed naturally from established precedent and, despite appearances, was not a step closer to legitimizing the punishment of "thought crimes." While the decision will have broad effects on similar state statutes, the effect on bias-motivated crime may be negligible.

Initially, the Court's opinion failed to find solid ground upon which it could base its reasoning. While declaring that it is not bound by the Wisconsin Supreme Court's interpretation that the statute punishes motive, the Court acknowledged that the statute may indirectly punish motive as well as conduct.[60]

The Court then attempted to compare *Mitchell*, a case concerning the constitutionality of a penalty-enhancement provision, with *Barclay* and *Dawson*, both of which pertain to the consideration of a defendant's personal biases relevant to the crime during sentencing.[61] The Court analogized *Mitchell* to *Barclay* and *Dawson* by stating that using a defendant's personal views as a reason to sentence him or her to death is the greatest "enhancement" of all.[62] However, the Court did not explain how having the *option* to give a defendant a greater penalty based on his or her personal views is the same as being *required* to do so by state law (provided the jury convicts the defendant under the penalty-enhancement statute). Perhaps realizing that the analogy is not precise, the Court deferred to state legislatures the decision of whether to assign stricter penalties to bias-motivated crimes.[63]

---

58. *Mitchell*, 113 S. Ct. at 2201. The Court related that bias-related crimes are "more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." *Id.* (citations omitted); *see also* Gellman, *supra* note 3, at 341 ("Minority group children are particularly vulnerable, exhibiting self-hatred early and coming to question their own intelligence, competence, and worth.").

59. *Mitchell*, 113 S. Ct. at 2201.

60. *See supra* notes 38-41 and accompanying text.

61. *See supra* notes 20-21, 23-25 and accompanying text.

62. *See supra* note 48 and accompanying text.

63. *See supra* note 49 and accompanying text.

Up to this point, the Court's reasoning lacked direction. The strongest part of the opinion, and the part that most closely follows precedent, was the Court's comparison of hate crime penalty-enhancement statutes with antidiscrimination laws. The Court stated that "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge."[64]

This comparison not only gave the Court solid precedent, but also allowed it to bypass some of the pitfalls of acknowledging that the statute may punish motive to some degree. The Court has previously held that violent acts, like discrimination, are not entitled to constitutional protection merely because they may have some expressive content.[65] Further, both bias-motivated crimes and discrimination are "thought to inflict greater individual and societal harm,"[66] giving the state adequate justification for attempting to redress these crimes.[67]

This comparison also avoided inferences that the statute punishes "thought crimes" by punishing merely bigoted thought, or that the statute is overbroad and chills free speech. By focusing on the discriminatory act (whether it is in denying a person certain rights or selecting a victim for a crime based on personal bias) rather than the viewpoint itself, the statute punishes personal viewpoints only indirectly, that is, when they motivate illegal conduct.[68] Furthermore, because most people presumably do not commit violent crimes, but do engage in activities (such as employment) subject to antidiscrimination laws, penalty-enhancement statutes would arguably appear to have less of a chilling effect on free speech than antidiscrimination laws.

The opinion proposed to resolve conflicts among state authorities over whether hate crime penalty-enhancement statutes similar to Wisconsin's are constitutional. Therefore, it is expected that most present and future statutes based on the Anti-Defamation League's model will

---

64. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200 (1993).

65. Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984); *see also supra* notes 31-36 and accompanying text.

66. *See supra* note 58.

67. *See supra* note 59 and accompanying text.

68. One of the dissenting justices in the Wisconsin Supreme Court decision agreed, noting: "These are laws against discrimination, pure and simple. . . . What the statute does punish is acting upon those thoughts. It punishes the act of discriminatory selection plus criminal conduct, not the thought or expression of bigotry." State v. Mitchell, 169 Wis. 2d 153, 183-84, 485 N.W.2d 807, 820 (1992) (Bablitch, J., dissenting), *rev'd*, 113 S. Ct. 2194 (1993).

be upheld against a First Amendment challenge.[69] Constitutional barriers will arise only if the statutes punish otherwise legal acts for bias-motivation (which do not fall under antidiscrimination laws) or if the statute is in some way content-discriminatory,[70] perhaps by punishing only specific crimes more severely or protecting only certain classes of people. In contrast, under the Wisconsin statute, presumably anyone could be a victim.

Realistically, the statute may not be very effective in eradicating bias-related crimes. While antidiscrimination laws may not eliminate bigotry, at least such laws offer potential victims reasonable protection from the denial of their rights. In contrast, hate crime penalty-enhancement statutes do little for the victim, other than perhaps affording him or her a greater sense of justice.[71] Additionally, while people may be reluctant to subject themselves to penalties for discriminating while engaged in otherwise legal activity, it does not seem likely that a person will be deterred from bias-motivated violent crime simply by the presence of a penalty-enhancement statute.[72]

Certainly, a more positive and productive route to eliminating bigotry would be through education. By having hate crime penalty-enhancement statutes in place, however, there is at least the symbolic reassurance that hate crimes will not be tolerated in this country.[73]

VI. CONCLUSION

The increasing number of bias-motivated crimes clearly presents a problem of national significance. The United States Supreme Court attempted to address this issue in *Wisconsin v. Mitchell*. By focusing on the similarity between antidiscrimination laws and hate crime statutes, the Court was able to uphold the constitutionality of hate crime laws based on precedent while avoiding the pitfalls of appearing to legitimize crimes based purely on a person's thoughts or beliefs. Rather than ex-

---

69. *See supra* notes 12-13 and accompanying text. The Court also hints that the statute would withstand Fourteenth Amendment attacks as well. *See supra* note 37.

70. *See supra* note 29.

71. In *Mitchell*, the boy who was beaten suffered extensive injuries, remaining in a coma for four days and possibly suffering permanent brain damage. *Mitchell*, 169 Wis. 2d at 159, 485 N.W.2d at 809.

72. One author noted that "[t]here has been no showing of a decrease or slowed increase in bigotry or bigotry-related crime in jurisdictions where such laws exist." Gellman, *supra* note 3, at 388.

73. *Id.* at 368-69.

pand upon or create new limits on First Amendment protection, the Court has only drawn the lines a little more clearly.

BRIAN RESLER