Mitchell V. Wisconsin Essay, Research Paper

On June 11, 1993, the United State Supreme Court upheld Wisconsin¹s

penalty enhancement law, which imposes harsher sentences on criminals

who ³intentionally select the person against whom the crime…is

committed..because of the race, religion, color, disability, sexual

orientation, national origin or ancestry of that person.² Chief

Justice Rehnquist deliverd the opinion of the unanimous Court. This

paper argues against the decision, and will attempt to prove the

unconstitutionality of such penalty enhancement laws.

On the evening of October 7, 1989, Mitchell and a group of young

black men attacked and severely beat a lone white boy. The group had

just finished watching the film ³Mississippi Burning², in which a

young black boy was, while praying, beaten by a white man. After the

film, the group moved outside and Mitchell asked if they felt ³hyped

up to move on some white people². When the white boy approached

Mitchell said, ³You all want to fuck somebody up? There goes a white

boy, Go get him.² The boy was left unconscious, and remained in a

coma for four days. Mitchell was convicted of aggravated battery,

which carries a two year maximum sentence. The Wisconsin jury,

however, found that because Mitchell selected his victim based on

race, the penalty enhancement law allowed Mitchell to be sentenced to

up to seven years. The jury sentenced Mitchell to four years, twice

the maximum for the crime he committed without the penalty enhancement

law.

The U.S. Supreme Court¹s ruling was faulty, and defied a number of

precedents. The Wisconsin law is unconstitutional, and is essentially

unenforceable. This paper primarily focuses on the constitutional

arguments against Chief Justice Rehnquist¹s decision and the statute

itself, but will also consider the practical implications of the

Wisconsin law, as well as a similar law passed under the new federal

crime bill (Cacas, 32). The Wisconsin law and the new federal law are

based on a model created by the Anti- Defemation League in response to

a rising tide of hate-related violent crimes (Cacas, 33). Figures

released by the Federal Bureau of Investigation show that 7,684 hate

crimes motivated by race, religion, ethnicity, and sexual orientation

were reported in 1993, up from 6,623 the previous year. Of those

crimes in 1993, 62 percent were racially motivated (Cacas, 32).

Certainly, this is a problem the nation must address. Unfortunately,

the Supreme Court of the United States and both the Wisconsin and

federal governments have chosen to address this problem in a way that

is grossly unconstitutional.

³Congress shall make no law respecting an establishment of religion,

or prohibiting the free exercise therof; or abridging the freedom of

speech, or of the press; or the right of the people to peaceably

assemble, and to petition the government for a redress of grievances.²

The most obvious arguments against the Mitchell decision are those

dealing with the First Amendment. In fact, the Wisconsin Supreme

Court ruled that the state statute was unconstitutional in their

decision, which the U.S. Supreme Court overruled. The Wisconsim

Supreme Court argued that the Wisconsin penalty enhancement statute,

³violates the First Amendment directly by punishing what the

legislature has deemed offensive thought.² The Wisconsin Court also

rejected the state¹s argument ³that the statute punishes only the

?conduct¹ of intentional selection of a victim². The Court¹s

contention was that ³the statute punishes the ?because of¹ aspect of

the defendant¹s selection, the reason the defendant selected the

victim, the motive behind the selection.² The law is in fact a

direct violation of the First Amendment, according to the Wisconsin

Supreme Court, which said ³the Wisconsin legislature cannot

criminalize bigoted thought with which it disagrees.²

³If there is a bedrock principal underlying the First Amendment, it

is that the government may not prohibit the expression of an idea

simply because society finds the idea itself offensive or

disagreeable². The Supreme Court was heard to utter such noble

phrases as recently as 1989, in Texas v. Johnson. Unfortunately these

idealistic principles seem to have been abandoned during Wisconsin v.

Mitchell.

Clearly, Mitchell¹s act of assaulting another human is a punishable

crime, and no one could logiacally argue that the First Amendment

protects this clearly criminal action. However, the state¹s power to

punish the action does not remove the constitutional barrier to

punishing the criminal¹s thoughts (Cacas, 337). The First Amendment

has generally been interpreted to protect the thoughts, as well as the

speech, of an individual (Cacas, 338). According to the Court¹s

majority opinion in Wooley v. Maynard, a 1977 case, ³At the heart of

the First Amendment is the notion that an individual should be free to

believe as he will, and that in a free society one¹s beliefs should be

shaped by his mind and his conscience rather than coerced by the

state.²

Another componet of Mitchell¹s First Amendment argument against the

penalty enhancement law, was that the statute was overbroad, and might

have a ³chilling effect² on free speech. Mitchell contended that with

such a penalty enhancement law, many citizens would be hesitant to

experess their unpopular opinions, for fear that those opinions would

be used against them in the future.

In Abrams v. United States, Justice Holmes, in his dissent, argued

that ³laws which limit or chill thought and expression detract from

the goal of insuring the availability of the broadest possible range

of ideas and expression in the marketplace of ideas².

Chief Justice Rehnquist, however, rejects the notion that the

Wisconsin statute could have a chilling effect on speech. ³We 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 victim¹s protected

status, thus qualifying him for penalty enhancement… This is too

speculative a hypothesis to support Mitchell¹s overbreadth claim.²

However, a legitimate argument certainly exists that the logical next

step would be to examine the conversations, correspondence, and other

expressions of the accused person to determine whether a hate motive

prompted the crime, if a criminal¹s sentence is being considered for

penalty enhancement (Feingold, 16). How can Rehnquist argue that

this will not cause a chilling effect?

Rehnquist denies this chilling effect exists under penalty

enhancement laws such as Wisconsin¹s, but one must consider how

Rehnquist would rule if the penalty enhancement did not cover

something, such as racism, that he finds personally repugnant. The

recent attempt at ³political correctness² differs only slightly from

the Red Scare of the 1950¹s. The anti-communists claimed and the

politically correct ideologists claim to have good intentions (The

Road to Hell…).Unfortunately, these two groups infringed upon the

rights of the minority in their quest to mold the htoughts of others

into ideas similar to their own.

How would Rehnquist rule if the statute called for enhanced penalties

for persons convicted of crimes while expressing Communist ideas? Or

what if the criminal was Mormon, and the majority found those

religious views morally repugnant? Could Rehnquist also justify

suppressing the religious freedoms found in the First Amendment, as

well as its free speech clause, if they were found to be as

reprehensible as racism by the general public? The United States

Supreme Court is granting selective protection of First Amendment

rights, in Mitchell v. Wisoconsin, and is yielding to political

pressure to suppress bigoted views.

Mitchell¹s second constitutional argument is that the statute

violates the Foruteenth Amendment as well as the First. The

Foruteenth Amendment contains the ³equal protection clause², which

states that no state shall ³deny to any person within its jurisdiction

the equal protection of the laws². The Wisconsin statute punishes

offenders more seriously because of the views they express, and

punishes more leniently those whose motives are of an ³acceptable²

nature (Gellman, 379). This seems to be a clear violation of the

Fourteenth Amendment, but again, Rehnquist (and the entire Supreme

Court), sees things quite diiferently.

Rehnquist argues that, ³The First Amendment… does not prohibit the

evidentiary use of speech to establish the elements of a crime and to

prove motive or intent². Motive, however, is used to establish guilt

or innocence, and is not in itself a crime. Undeniably, however,

those that express bigoted views are punished more severely than those

who do not.

Rehnquist, however, never specifically mentions the Fourteenth

Amendmeent because they were not developed by Mitchell and fell

outside of the question on which the Court granted certiorari.

Rehnquist also argues that ³Traditionally, sentencing judges have

considered a wide variety of factors in addition to evidence bearing

on guilt in determining what sentences to impose on a convicted

defendant… The defendant¹s motive for committing the offense is one

important factor.²

This is a compelling argument, but I would argue this practice is

itself of questionable constitutionality, in that it allows the

sentencing judge to exercise excessive discretionary judgement based

on his view as to what constitutes acceptable and unacceptable

motives. However, even if this practice is held to be constitutional,

surpassing the existing maximum penalty with an additional statute

that specifically lists bigotry as an unacceptable motive, certainly

qualifies as being the same as imposing an additional penalty for

unpopular beliefs.

To illuatrate the dangers inherent in laws such as Wisconsin¹s

penalty enhancement statute, we need only examine Texas v. Johnson, a

1989 Supreme Court case. The state¹s flag desecration statute was

ruled unconstitutional by the Court. However, using Rehnquists logic

in Mitchell, the state of Texas could have easily achieved their goal

by prohibiting public burning, a legitimate exercise of their police

power, and enhancing the penalty for those convicted of violating the

statute if they did so in in opposition to the government (Gellman,

380). Therefore, penalty enhancement laws such as Wisconsin¹s give

the government too much power to excessively punish what it deems

unacceptable.

Clearly, when the legislature enacts penalty enhancement laws with

the intent of suppressing unpopular ideas, the state violates both the

First and the Fouteenth Amendments. The state interferes with an

individual¹s right to free speech by suppressing ideas not supported

by the government, and fails to provide equal protection to all its

citizens when it punishes an act more severely when committed by an

individual whose opinions are not shared by the state. Mitchell v.

Wisconsin is a clear example of majority will infringing upon minority

rights, and proves that the BIll of Rights works well, except in the

instances when it is most needed.

There are probably more Supreme Court cases that favor Wisconsin¹s

position than there are that support Mitchell¹s argument. However,

many of these rulings are of questionable constitutionality

themselves. Two cases arguably support Rehnquist¹s position, but the

Supreme Court has traditionally ignored the first of rulings, and the

second has been misinterpreted.

In Chaplinsky v. New Hampshire, Justice Murphy wrote what has become

known as the ³fighting words doctrine². Chaplinsky was a Jehova¹s

Witness in a predominantly Catholic town. He distributed leaflets to

a hostile crowd, and was refused protection by the town¹s marshall.

Chaplinsky then referred to the marshall as a ³god damn racketeer and

a damn fascist², for which he was convicted of breaching the peace.

Justice Murphy¹s opinion argued that certain speech, including that

which is lewd, obscene, profane, or insulting, is not covered by the

First Amendment.

According to Murphy, ³There are certain well-defined and narrowly

limited classes of speech, the prevention and punishment of which has

never been thought to raise any Constitutional problem. These include

the lewd and obscene, the profane, the libelous, and the insulting or

?fighting¹ words- those which by their very utterance inflict injury

or tend to incite an immediate breach of the peace.²

Under Chaplinky, bigoted remarks would probably qualify as ?fighting¹

words. However, the courts have generally been reluctant to uphold

the ?fighting¹words doctrine, and the Supreme Court has never done so

(Gellman 369,370). Even if today¹s Court were to consider Chaplinsky

valid, Mitchell¹s comments, though racial in nature, would be

difficult to classify as bigoted. In fact, Constitutional

considerations aside, the biggest problem with penalty enhancement

laws such as Wisconsin¹s, is classifying and prosecuting an incident

as hate-motivated (Cacas, 33). At what point can we be certain the

victim was selected based on race, religion, or sexual orientation?

Another more pressing problem is police unwillingness to investigate a

crime as hate-motivated (Cacas, 33). Certainly, the difficulting in

determining whether a crime is hate-motivated is one of the reasons

police are hesitant to pursue crimes as hate-motivated, and

illustrates yet another reason why such statutes should not exist.

Consider the following FBI guidelines to help determine whether a

crime is hate-motivated (Cacas, 33):

1. a substantial portion of the community where the crime occurred

perceives that the incident was bias-motivated;

2. the suspect was previously involved in a hate crime; and

3. the incident coincided with a holiday relating to, or a date of

particular significance to, a racial, religious, or ethnic/national

origin group

These guidelines certainly fail to offer any exact or definitive

system with which to classify crimes as hate-motivated.

Another case which is cometimes cited as a precedent to support

rulings such as Wisconsin v. Mitchell, is U.S. v. O¹Brien. O¹Brien

had burnt his draft card to protest the draft and the Vietnam War,

despite a law specifically forbidding the burning of draft cards.

The Supreme Court ruled that the statute did not differentiate between

public and private draft card burnings, and was therefore not a

government attempt to regulate symbolic speech, but a

constitutionality legitimate police power. The Court ruled that there

is no absolutist protection for symbolic speech.

Under O¹Brien, the government may regulate conduct which incidentally

infringes upon First Amendment rights, as long as the government

interest is ³unrelated to the suppression² of belief or expression.

However, when states enact laws such as the Wisconsin statute, the

state is not regulating conduct despite its expressive elements, but

is penalizing conduct because of its expressive elements (Gellman,

376). Therefore, a more accurate interpretation of O¹Brien, would be

that it actually supports an argument against the Court¹s ruling in

WIsconsin, and is not a precedent to support Rehnquist¹s decision.

Possibly more important, and certainly more recent, is the precedent

established in R.A.V. v. St. Paul, a 1992 case. This case involved a

juvenille who was convicted under the St. Paul Bias-Motivated Crime

Ordinance for burning a cross in the yard of a black family that lived

across the street from the petitioner. Justice Scalia delivered the

opinion of a unanimous Court, but the Court was divided in its

opinions for overturning the St. Paul statute.

Scalia argued that the city ordinance was overbroad, because it

punished nearly all controversial characterizations likely to arouse

³resentment² among defined protected groups, and under-inclusive,

because the government must not selectively penalize fighting words

directed at some groups while not prosecuting those addressed to

others, which is where the problem lies in the logic of the Mitchell

decision. Though Rehnquist argued that Wisconsin v. Mitchell did not

overturn R.A.V. v. St. Paul, ³If a hate speech law that enumerated

some categories is invalid because, in Justice Antonin Scalia¹s

opinion in St. Paul, ?government may not regulate use based on

hostility- or favoritism- toward the underlying message involved,¹ how

can a hate crime law be upheld that increases the penalty for crimes

motivated by some hates but not those motivated by other hates?² In

other words, if the St. Paul statute is determined to be

under-inclusive, how can we include every conceivable hate within the

context of any statute.

³To be consistent, legislature¹s must now include other categories,

including sex, physical characteristics, age, party affiliation,

anti-Americanism or position on abortion.²(Feingeld, 16)

More interesting (and Constitutional) than the majority opinion in

R.A.V. v. St. Paul, is the concurring opinion written by Justice

White, with whom Justice Blackmun and Justice O¹Connor join.

White writes, ³Although the ordinance as construed reaches egories of

speech that are constitutionally unprotected, it also criminalizes a

substantial amount of expression that- however repugnant- is shielded

by the First Admendment… Our fighting words cases have made clear,

however, that such generalized reactions are not sufficient to strip

expression of its constitutional protection. The mere fact that

expressive activity causes hurt feelings, offense, or resentment does

not render the expression unprotected… The ordinance is therefore

fatally overbroad and invalid on its face…²

Rehnquist argues that whereas the ³ordinance struck down in R.A.V.

was explicitly directed at expression, the statute in this case is

aimed at conduct unprotected by the First Amendment². Nevertheless,

had Mitchell not stated, ³There goes a white boy; go get him², his

sentence would not have been enhanced, he would have instead received

the maximum sentence of two years in jail for his crime, instead of

four. Therefore, the Wisconsin statute does not only punish conduct,

as Justice Rehnquist suggests, but speech as well.

The Wisconsin v. Mitchell decision cannot simply be viewed as one

that does harm to racists and homophobics. There are much broader

costs to society than the quieted opinions of an ignorant few.

First, laws which chill thought or limit expression ³detract from the

goal of insuring the availability of the broadest possible range of

ideas and expressions in the marketplace of ideas.² Second, the

Mitchell ruling not only affects eveyone¹s free speech rights with a

general constriction of the interpretation of the First Amendment, but

the ruling makes way for further constrictions. Third, penalty

enhancement laws place the legislature in the position of judging and

determining the quality of ideas, and assumes that the government has

the capacity to make such judgements. Fourth, without the expression

of opinions generally deemd unacceptable by society, society tends to

forget why those opinions were deemed unacceptable in the first place.

(More specifically, nothing makes a skinhead seem more stupid than

allowing him to voice his opinion under the scrutiny of a national

television audience.) Finally, when society allows the free

expression of all ideas, regardless of its disdain for those ideas, it

is a sign of strength. So when a society uses all its power to

suppress ideas, it is certainly a sign of that society¹s weakness

(Gellman, (381-385).

The United States Supreme Court¹s unanimous decision in Wisconsin v.

Mitchell is incorrect for a number of reasons. Constitutionally, the

decision fails to comply with the freedom of speech guaranteed in the

First Amendment, and the guarantee to all citizens of equal protection

under the laws, listed in the Fourteenth Amendment. The decision also

arguably overturns R.A.V. v. St. Paul, and suggests that the Court may

be leaning towards a new ?fighting words doctrine¹, where unpopular

speech equals unprotected speech. The decision also damages societ as

a whole in ways that are simply immeasureable in their size, such as

those listed in the preceding paragraph. Wisconsin v. Mitchell is a

terribly flawed Supreme Court decision, which one can only hope will

be overturned in the very near future.

³The freedom to differ is not limited to things that do not matter

much. That would be a mere sahdow of a freedom. The test of its

substance is the right to differ as to things that touch the heart of

the existing order.

³If there is any fixed star in our constitutional constellation, it

is that no official, high or petty, can prescribe what shall be

orthodox in politics, nationalism, religion or other matters of

opinion…² -Justice Jackson in W.V. Board of Education. v.

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