

Special Feature: Beware the Thought Police

By

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“Something crashed onto the bed behind Winston’s back. The head of a ladder had been thrust through the window and had burst in the frame. Someone was climbing through the window. There was a stampede of boots up the stairs. The room was full of solid men in black uniforms, with iron-shod boots on their feet and truncheons in their hands... It occurred to Winston that for the first time in his life he was looking, with knowledge, at a member of the thought police.”ⁱ

In George Orwell’s terrifying novel, *1984*, Winston and his girlfriend are arrested, beaten, imprisoned, and tortured because their thoughts do not comport with those of the ruling political party. In 1993, the US Supreme Court reversed the ruling of the Supreme Court of Wisconsin in the case of *Wisconsin v. Mitchell*ⁱⁱ. In doing so, the high court legitimized America’s first Thought Crime – hatred of selected personal traits.

THE TEST CASE

During the 1980’s, many states began to pass so-called hate crime legislation, creating new categories of crime or enhancing sentences for persons convicted of committing a crime motivated by hatred of certain selected groups. Mitchell’s case was the first challenge to such a law to reach the U.S. Supreme Court. On the night of October 7, 1989, Todd Mitchell – a black male – and some friends were hanging around outside their apartment complex in Kenosha, discussing their hatred of white people following a viewing of the film *Mississippi Burning*. While standing outside, Mitchell was heard to say to his companions, “You all feel hyped up to move on some white people?” At one point, Gregory Reddick, a white fourteen year-old boy, happened by on the opposite sidewalk. Mitchell said to the others in his group, “You all want to fuck somebody up? There goes a white boy; go get him.” Led by Mitchell, the group proceeded to viciously punch, kick, and stomp on the boy for over five minutes, steal his tennis shoes, and leave him in a coma lasting for four daysⁱⁱⁱ.

At trial, Mitchell was convicted of aggravated battery and received a two-year sentence, plus an additional five years under a statute that provides enhanced sentences for criminals who intentionally select their victim based upon the “race, religion, color, disability, sexual orientation, national origin or ancestry of that person^{iv}.” Mitchell appealed and the Wisconsin Supreme Court subsequently rejected the state’s contention that the law punished only conduct, and vacated the lower court’s sentence, writing in their opinion that the statute “...violates the

First Amendment directly by punishing what the legislature has deemed to be offensive thought” and that the state could not “...criminalize bigoted thought with which it disagrees.”^v

The state of Wisconsin appealed and ultimately prevailed in the case before the U.S. Supreme Court. Mitchell had again challenged the statute on First Amendment grounds, arguing that the law punished him for his thoughts and beliefs and therefore infringed upon his right to free speech. The high court rejected that assertion, and ruled that the law did not punish thought, but merely the act of choosing a victim based on race, and that courts have traditionally taken motives into account when determining sentence.

CRIMINAL INTENT VERSUS THOUGHT CRIME

It is on this point that the court fatally erred and has established the precedent for thought crimes. The court created a false distinction between thoughts and actions; they assert that Mitchell was being punished only for his conduct in choosing a particular victim, when in fact he received the additional sentence for the thoughts and beliefs that precipitated the act. Had Mitchell only wanted to inflict bodily harm on some random person for fun, and young Mr. Reddick had simply been the first person to happen by, and had he not said what he said, the court would only have considered whether or not he committed the attack intentionally and the seriousness of the harm he inflicted. It was only through Mitchell’s constitutionally protected *speech* that he became subjected to the enhanced sentencing provisions of Wisconsin law.

Courts have traditionally considered criminals’ *culpable mental state* – that is to say their intention with regard to the elements of the crime - when determining guilt and punishment; not their opinions and beliefs. The Supreme Court cites several cases in support of their assertion that defendants’ motives are properly taken into account by trial courts when determining guilt and sentencing^{vi}. However, the cases cited involve a consideration of the past criminal conduct of the defendants or the mental state involved in proving a crime – not what motivated their choice of victim. For example, the Court cited *Tison v. Arizona*^{vii} in which they upheld a death sentence for two brothers who aided their father – a convicted murderer - and another prisoner’s escape from prison. The two entered the prison, armed the convicts, facilitated their escape, took part in the kidnapping of a family of four and stood by while their father and the other convict shot them to death. The consideration of the defendants’ *thoughts* extended – as in all such cases – only to a test of whether reasonable people could have anticipated that someone might be killed in the course of the commission of the felony. The trial court did not consider *why* the particular victims were chosen.

The court also cites LeFave and Scott’s *Substantive Criminal Law*^{viii} stating that motives are important to a judge when considering sentencing. However, the defendant’s motives are only the concern of the government insofar as they pertain to the crime itself; that is to say that the State of Wisconsin can only properly consider Mitchell’s motives with respect to the crime of aggravated battery – did he intend to cause serious injury to his victim? Did he act intentionally? It is here that the jurisdiction of the state ends and the privacy of Mitchell’s mind begins.

The Court has confused *motive* with *reason* or *beliefs*. The interchangeable use of the

terms ‘motive’, ‘mental state’, ‘thoughts’, ‘beliefs’, and ‘reason’, confuses the distinction between protected speech and criminal intent. Mitchell’s *motive* in the legal sense was to inflict pain and injury on the Reddick boy; this is the purview of the courts to consider in trial and sentencing. His underlying *reason* for wanting to commit such an act against that particular victim is immaterial and the First Amendment proscribes the government from acting against him because of his personally held beliefs – offensive or not.

Determining whether a person intended to kill or to injure or whether they intended to seriously injure or merely injure, or whether they should have known that a life was going to be placed in danger because of their actions, involve making a determination of the defendant’s guilty mind or *Mens Rea*. The concept of *Mens Rea* derives from English Common Law and generally refers to the notion that a physical criminal act is punishable commensurate with the guilty intent of the actor. For example, the person who deliberately shoots and kills a convenience store clerk to eliminate a witness to his crime, acts *intentionally* and so deserves to be treated more severely than the person who *negligently* shoots a rifle at a target in his backyard and accidentally strikes and kills a pedestrian a block away. The trial court and jury are charged with examining the totality of the circumstances and determining whether the defendant had the culpable mental state required for a particular crime, i.e.: Whether the defendant acted intentionally, knowingly, recklessly, or negligently, or whether his act was intended to bring about the resulting crime for which he is being tried. Such assessments of a defendant’s culpable mental state are far different from an examination of his beliefs or emotions and speculating on his epistemological reasons for selecting a particular victim.

The high court went on to state that hate crimes are “...thought to inflict greater individual and societal harm.” And that this justifies the enhanced sentencing provisions of Wisconsin law, “...over and above mere disagreements with the offenders’ beliefs or biases.” This again is a falsehood. It is unlikely that while Mr. Reddick was emerging from his coma and recovering from his injuries, that he was more traumatized that it was done because he was white than because the group wanted to steal his shoes. Moreover, far from reducing the danger of “...retaliatory crimes...and incite[ing] community unrest” as the Court claims, hate crime laws *make* race the central issue in a criminal case where an objective judiciary should only be considering the conduct of the defendant; thus making retaliatory crimes and community unrest *more* likely.

IMPLICATIONS

While civilized people are rightly repulsed by hatred based solely upon race, sex ethnicity, religion and the like, there is grave danger in criminalizing the thoughts of even such vile individuals. These hate crime laws, no matter how they are justified, are intended to and do in fact criminalize thought – *hate*. Nobody likes hatred or wants to defend it, so we all go along. But suppose the California legislature decides that when a person’s crime is motivated by anger over global warming, then sentences should be *reduced*; so that a string of arsons that kills twelve people is punished only with probation, since the defendant was motivated by a noble desire to stop corporations from contributing to climate change. Perhaps Vermont lawmakers will decide that sentences for crimes induced by “black rage” should be reduced by half; After all, had society not treated the defendant so shabbily, he would not have been pushed to commit

the crimes he did. There is nothing to prevent states from enacting whatever laws they choose either enhancing or reducing criminal sentences based upon whatever thoughts or beliefs the legislative majority supports or rejects.

Hatred is the motive for many violent crimes. The woman who hates her cheating boyfriend; the man who hates his business partner because he thinks he was treated unfairly; Yankees fans who hate Red Socks fans; southerners who hate northerners; kids from one town who hate the kids from the neighboring town. Why are these forms of hatred not subject to additional punishment when they result in criminal acts? Why is there no protection from hatred for construction workers, short people, waitresses, lawyers, teachers, doctors, police officers, obese people, plumbers, CEOs, or women? Which groups of people deserve hate crimes protections?

The Court's ruling in *Mitchell* sets a precedent that allows a future progression for more and more thought crimes – and for more severe penalties. If Mitchell can receive an additional five years for his crime just because he doesn't like white people, then he can get an additional ten years, or twenty, or the death penalty.

Suppose a white man with a long history of domestic violence against his ex-wife and multiple girlfriends beats a black prostitute to death and is later overheard to refer to her as a 'nigger'. The trial court could then find itself in the absurd position of listening to a defendant try to reduce his sentence by arguing that he killed his victim because she was a woman and not because she was black; since hating women is not punishable under the law, but hating African Americans is. It's easy to see how asinine such laws are when you take them to their logical conclusion.

Imagine a white, or black, or Hispanic, or Pashtun, or Hutu, or Armenian, or Magyar defendant punches an Asian person after the Asian verbally accosts him for stealing his parking place. At his trial for a simple violation, evidence is introduced from some past associates of the defendant that at his previous job he had been overheard calling their boss a "chink" and "rice-eater." He is convicted of punching the other man, but instead of receiving the ordinary maximum penalty of fifteen days in jail, he is sentenced to two years in state prison because the assault is ruled a "hate crime." Such consideration of the defendant's alleged bigotry is foolish when the issue at hand is a physical assault on a man over a parking space.

KEEP YOUR LAWS OFF MY MIND

Committing a violent crime against another human being when motivated by bias is no more or less wrong than when motivated by taking pleasure in watching others suffer pain and fear. Mitchell's assault against the teenager in Wisconsin was not any the worse because of his racial animus than if he had beaten his victim because he was from another neighborhood. Mitchell and all his accomplices should have received that seven-year sentence because they intentionally and savagely beat a totally innocent young man to within an inch of his life – not because they hate white people. Unprovoked violence against an innocent person is conduct that should be severely punished – the perpetrator's intentions are material to the case, but his private thoughts and beliefs must remain free from government scrutiny.

While everyone is against hate, and especially against racial and ethnic hatred, there are many other thoughts and emotions people find distasteful. If we can criminalize hate, then other thoughts and emotions can be criminalized as well. If hateful thoughts can be criminalized then so can hateful speech, because it may lead someone to commit the thought crime of hate. Then we must select the arbiter of what constitutes hate speech. Some would characterize this essay as hate speech, because it disparages a set of laws meant largely to protect minorities. Perhaps one day all speech that does not meet the approval of the ruling party will be labeled hate speech. We should beware of creating a world where anything you say can land you in jail if twelve people decide it was hateful or mean.

As of this writing, just across the border in Canada, author and columnist Mark Steyn, along with *Macleans Magazine*, is on trial before the “Human Rights Tribunal” of British Columbia because of something he wrote in a recent book. What was Mr. Steyn’s offense? He quoted a Muslim cleric in the Netherlands who said that the population of European Muslims was “expanding like mosquitoes.”^{ix} At trial, the Canadian Islamic Congress, which made the complaint, are represented by legal counsel free of charge, while Steyn and Macleans must retain counsel at their own expense. There are no rules of evidence, no financial reimbursement to the defendants if they are found not guilty, and the fact that what Steyn wrote was a true and accurate quote from a Muslim is no defense. The complainants need only convince the unaccountable members of the tribunal that what Steyn wrote – true or not – is “likely to expose a [Muslim] person or persons to hatred or contempt.”^x These kangaroo courts have been in existence in Canada since the 1970’s and have NEVER ruled in favor of a defendant. If you think our constitution protects us against such a ghastly system, remember that the Canadian Charter of Rights and Freedoms guarantees all Canadians, “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” If you cling to the hope that hate crime laws aren’t a harbinger of future thought crimes in the United States, remember that the tribunal system in Canada was created with the lofty goal of preventing housing and employment discrimination. Recently, Alan Borovoy, general counsel for the Canadian Civil Liberties Union and a strong advocate for the tribunal system at its inception has said, “It never occurred to us that this instrument, which we intended to deal with discrimination in housing, employment and the provision of goods and services, would be used to muzzle the expression of opinion.”^{xi}

Crimes motivated by racial, ethnic, religious, and other bias-related hatreds are repugnant and should be vigorously investigated by the police and aggressively prosecuted. All so-called ‘hate crimes’ are already illegal; criminals should be punished for their *actions*, taking into account their *intentions*, but for the good of us all, we must not criminalize thoughts or beliefs – because once the door is opened for the government to probe your mind and punish you for beliefs it finds offensive, there is no telling when you or I could wind up like Orwell’s Winston – prostrate and helpless before the thought police.

ⁱ Orwell (1945)

ⁱⁱ 508 U.S. 476 (1993)

ⁱⁱⁱ New York Times (1993)

^{iv} §939.645.1 Wisconsin Statutes

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 that 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.

^v 169 Wis. 2d, at 171, 485 N. W. 2d, at 815.

^{vi} The Court cites *Payne v. Tennessee* 501 U.S. 808 (1991), *Williams v. New York* 337 U.S. 241 (1949), and *United States v. Tucker* 404 U.S. 443 (1972), wherein the Court had ruled that victim impact statements, previous criminal convictions, and probation department reports were held to be legitimately considered by the sentencing judge.

^{vii} 481 U.S. 137, 156 (1987)

^{viii} “Motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives”

^{ix} Steyn, in discussing the demographics of Europe in his book, *America Alone*, quoted Mullah Krekar of Norway: “We're the ones who will change you . . . Just look at the development within Europe, where the number of Muslims is expanding like mosquitoes. Every western woman in the EU is producing an average of 1.4 children. Every Muslim woman in the same countries is producing 3.5 children.” The quote was excerpted in MacLean's magazine, and the Canadian Islamic Congress filed suit with the Canada Human Rights Tribunal.

^x Canadian Human Rights Act R.S., 1985, c. H-6, Part I, Art.13

^{xi} Allan (2008)

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