State v. Mitchell
169 Wis. 2d 153 (1992)

This case illustrates legislative action against bigotry and the possible conflict between such laws and the free speech guarantees of the federal and state constitutions. In an opinion authored by Chief Justice Nathan S. Heffernan, the Wisconsin Supreme Court reversed a decision of the Court of Appeals by a 5-2 vote. Justices Shirley S. Abrahamson and William A. Bablitch wrote separate, dissenting opinions. The U. S. Supreme Court reviewed the case and reversed the majority opinion.[*] The case originated in Kenosha County.

In this case, the Wisconsin Supreme Court declared unconstitutional a state statute which enhanced the penalty a defendant could receive if the victim was selected on the basis of race, religion, color, disability, sexual orientation, national origin or ancestry.[**] The U.S. Supreme Court reversed that decision.

Here are the facts of the case: On October 7, 1989, Todd Mitchell, who was 19, was socializing with friends at an apartment complex in Kenosha. The men were discussing a scene from the movie "Mississippi Burning" in which a white man beats a young black boy who is praying. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, a 14-year-old white boy walked by the apartment complex. Mitchell counted to three and pointed at the victim. The group beat him severely and stole his tennis shoes. He spent four days in a coma and possibly suffered permanent brain damage.

Mitchell was convicted of aggravated battery, party to a crime. Because the jury found that he had selected the victim on the basis of race, the hate crimes statute kicked in and the maximum sentence jumped from two years to seven. Mitchell received a four-year sentence.

Mitchell appealed, focusing on the constitutionality of the hate crimes statute. The Court of Appeals affirmed the trial court, finding the hate crimes statute to be neither overly broad nor vague.

At the state Supreme Court, Chief Justice Heffernan wrote for the majority:

> The hate crimes statute violates the First Amendment[***] directly by punishing what the legislature has deemed to be offensive thought and violates the First Amendment indirectly by chilling free speech…A statute specifically designed to punish personal prejudice impermissibly infringes upon an individual's First Amendment rights, no matter how carefully or cleverly one words the statute…Punishment of one's thought, however repugnant the thought, is unconstitutional.

In her dissent, Justice Abrahamson (who became chief justice of the Court in 1996) noted that the case presented a difficult question in that it brought together three competing societal values: freedom of speech, equal rights and protection against crime.

Abrahamson disagreed that the statute punished abstract beliefs or speech, writing: "Bigots are free to think and express themselves as they wish, except that they may not engage in criminal conduct in furtherance of their beliefs." She also wrote:

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[*] *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)
[**] Wis. Stat. sec. 939.645 (1989-1990)
[***] U.S. Constitution, First Amendment: "Congress shall make no law…abridging the freedom of speech…" (The Wisconsin Constitution contains a similar provision in Article I, Section 3: "Every person may freely speak, write and publish his sentiments on all subjects…"

> The state's interest in punishing bias-related criminal conduct relates only to the protection of equal rights and the prevention of crime, not to the suppression of free expression. The enhanced punishment justly reflects the crime's enhanced negative consequences on society. Thus interpreted the statute prohibits intentional conduct, not belief or expression. The only chilling effect is on lawless conduct.

In his dissent, Justice Bablitch called the hate crimes statute "a law against discrimination – discrimination in the selection of a crime victim." Bablitch pointed out that numerous state and federal laws exist which prohibit discrimination in the selection of, for example, who is to be hired, fired or promoted. "Yet," he wrote, "the majority says one is constitutional, one is not. I submit it is pure sophistry to distinguish the two. In its effort to protect speech, the majority's constitutional pen gets too close to the trees and fails to see the forest."

Writing for the U.S. Supreme Court, Chief Justice William Rehnquist agreed with both Abrahamson's and Bablitch's reasoning. He noted that the U.S. Supreme Court previously rejected First Amendment-based arguments against such legislation as Title VII of the Civil Rights Act of 1964, which "makes it unlawful for an employer to discriminate against an employee 'because of such individual's race, color, religion, sex, or national origin.'"

He further wrote that:

> To be sure, our cases reject the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea…Thus a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.