

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: WISCONSIN v. TODD MITCHELL

CASE NO: 92-515

PLACE: Washington, D.C.

DATE: Wednesday, April 21, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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WISCONSIN, :
Petitioner :
v. : No. 92-515
TODD MITCHELL :
- - - - - x

Washington, D.C.
Wednesday, April 21, 1993

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:08 a.m.

APPEARANCES:

JAMES E. DOYLE, ESQ., Attorney General of Wisconsin,
Madison, Wisconsin; on behalf of the Petitioner.
MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;
United States, as amicus curiae, supporting
Petitioner.
LYNN S. ADELMAN, ESQ., Milwaukee, Wisconsin; on behalf of
the Respondent.

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On behalf of the Petitioner	
MICHAEL R. DREEBEN, ESQ.	
United States, as amicus	
curiae, supporting Petitioner	
LYNN S. ADELMAN, ESQ.	
On behalf of the Respondent	
REBUTTAL ARGUMENT OF	
JAMES E. DOYLE, ESQ.	
On behalf of the Petitioner	

1 P R O C E E D I N G S

2 (10:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 92-515, Wisconsin v. Todd
5 Mitchell.

6 General Doyle.

7 ORAL ARGUMENT OF JAMES E. DOYLE

8 ON BEHALF OF THE PETITIONER

9 GEN. DOYLE: Mr. Chief Justice, and may it
10 please the Court:

11 The Wisconsin penalty enhancement statute quite
12 simply does not punish thought and it does not punish the
13 expression of any idea or belief. It punishes criminal
14 conduct. Mr. Mitchell was and is free to think any
15 thought he wants to think. He was and is free to express
16 that thought in any legitimate manner. But when he
17 violates the Wisconsin criminal code he subjects himself
18 to the punishment of the State of Wisconsin, and it is
19 perfectly appropriate for the State of Wisconsin through
20 its legislature and courts to consider his reason for
21 committing the crime in determining what the appropriate
22 sentence should be.

23 On the face of this statute there is no reason
24 to suggest that Wisconsin is involved in some sinister
25 motive to control thought. The statute is in our brief at

1 page 3, and we believe that it quite clearly serves two
2 very legitimate state interests. It punishes criminal
3 conduct and assesses the appropriate penalty range for a
4 particular type of crime, and it addresses the harmful
5 effects of discriminatory conduct.

6 Nobody suggests that Wisconsin's interest in
7 dealing with the harmful effects of discriminatory
8 criminal conduct are not substantial. 45 other states in
9 this country have adopted laws of some sort attempting to
10 deal with this problem.

11 QUESTION: General Doyle, your state supreme
12 court was of the opposite view. I mean your state supreme
13 court said that in fact this, or in law, I don't know
14 which, this statute does control thought. Now, are we
15 bound by -- it's after all their statute. It's not ours.
16 Are we bound by their determination as to what it is
17 directed at?

18 GEN. DOYLE: It is our view that the Supreme
19 Court of Wisconsin decided in law that the Wisconsin
20 statute punished thought. They did not go through any
21 kind of statutory construction, there was no issue about
22 the meaning of a particular word, there was no discussion
23 of legislative history, there was no ambiguity in the
24 statute. They came to a conclusion in which they declared
25 that the statute punishes thought. That is a, in my

1 judgment a conclusory constitutional statement. In fact
2 that's the same as saying it violates the First Amendment.

3 QUESTION: But if some other state supreme court
4 came to the same disposition that your state supreme court
5 but used legislative history and decided as a factual
6 matter that it had been intended to punish thought, then
7 we would have to come out differently in your view?

8 GEN. DOYLE: It very much depends on what the
9 analysis was. If it turns on the meaning of a phrase, if
10 it turns on the meaning of what particular language means,
11 I think you would have to respect the decisions of the
12 state supreme court with respect to what the language is
13 on the statute. But when you are dealing with what the
14 practical effect in First Amendment terms is of a
15 particular kind of statute, and balanced against First
16 Amendment standards, then I think that you may, that
17 that's a First Amendment question that this Court may
18 consider.

19 QUESTION: You, in other words you're saying
20 that their comments were directed to the First Amendment
21 consequences of this statute?

22 GEN. DOYLE: Yes, Your Honor. And in fact in
23 reading that opinion it's quite clear that they not only
24 looked at the Wisconsin statute, they in fact declared
25 what hate crime, as they declared it, hate crime statutes

1 in general what the First Amendment consequences were.
2 They looked at the model ADL statute for example and
3 declared what these kinds of, what these kinds of laws
4 mean in First Amendment terms.

5 QUESTION: Yes. That's on page A8 and A9 of the
6 Appendix. The discussion of the model statute is right
7 after the comment that Justice Scalia has in mind, I
8 think, because the state court does say without doubt the
9 hate crime statute punishes bigoted thought. And the
10 state asserts the statute punishes only conduct. We
11 disagree. That does sound like a state law conclusion
12 that's binding on us. It's certainly questionable.

13 GEN. DOYLE: Your Honor, I believe that that is
14 their conclusion, that they then lead into their reasons.
15 They then go to the ADL statute and then at page 37 of the
16 Appendix, the Joint Appendix and their opinion, they say
17 that the Wisconsin statute, based on the history of these
18 anti-biased statutes, plural, looking at anti-biased
19 statutes in general punish bigoted bias. So I believe
20 that the Wisconsin Supreme Court was taking a very broad
21 look at what it, at a genre of laws that it labeled hate
22 crimes.

23 QUESTION: Well, ordinarily we decide what a
24 statute is directed at by the terms of the statute itself,
25 I take it, don't we?

1 GEN. DOYLE: Well, that's correct, Your Honor.
2 I believe what the Wisconsin Supreme Court has not put
3 into its opinion and that I would ask this Court to look
4 at directly are the terms of the Wisconsin statute. The
5 terms of the Wisconsin statute, for example with respect
6 to what is punished, states very clearly that the
7 penalties for the underlying crime will be enhanced. It
8 is the punishment for the underlying crime that is being
9 enhanced by this.

10 So on the face of the Wisconsin statute we have
11 a statute that is punishing the criminal conduct of Todd
12 Mitchell, not some abstract thought that he may have
13 engaged in.

14 QUESTION: I take it you make no distinction
15 between, or do you, a statute which simply enhances a
16 sentence for this kind of conduct and a hypothetical
17 statute say in another state which makes this a
18 substantive crime of, in a free-standing statute. I take
19 it there would be no difference, or would there?

20 GEN. DOYLE: I believe there is no
21 constitutional difference, although let me add I think the
22 Wisconsin case is even cleaner than the second one that
23 you gave, that because in order to get into the enhanced
24 punishment -- we have not tried to create any type of new
25 crime. You have to violate the generally applicable laws

1 of the State of Wisconsin in order to even be eligible for
2 the penalty enhancement. So we don't run into some of the
3 problems that some other attempts at this, some other
4 states may have attempted of trying to define some new
5 kind of offense. We have dealt with this strictly as a
6 sentencing matter.

7 Let me say that I believe that the state's
8 interest in dealing with these problems is evidenced by
9 the facts of this case itself. Todd Mitchell participated
10 in the brutal beating of a 14-year old boy walking down
11 the street of his home town in Kenosha, and the facts of
12 this case are very clear that that young 14-year old boy
13 would never have been beaten except for his race.

14 This case, Wisconsin's statute was in place,
15 fortunately, which quite directly dealt with that kind of
16 criminal conduct. It assessed the, the Wisconsin
17 legislature assessed the kind of, had determined the
18 appropriate sentencing range and the judge assessed the
19 proper sentence for the criminal conduct that was involved
20 in this case.

21 QUESTION: I would guess in most cases you're
22 not going to get nearly as clear of an evidentiary finding
23 as you did in this as to the motive for the crime?

24 GEN. DOYLE: It is likely you would not find one
25 so clear. This is obviously a very clear case. But let

1 me say Wisconsin is, again has afforded the defendant an
2 added protection that I don't think even Dawson would
3 require, for example, which is the factual basis that he
4 intentionally selected the victim because of the victim's
5 race must be there and it must be proven by the prosecutor
6 beyond a reasonable doubt.

7 So the defendant in this case, this is not
8 simply a judge saying that I have heard the evidence and I
9 believe based on the evidence that there was a motive that
10 I am going to impose a higher sentence than I would
11 normally impose. This is a finding by a jury, proven by
12 the prosecutor beyond a reasonable doubt that the victim
13 was selected because of the victim's race.

14 QUESTION: Is that submitted to the jury at the
15 same time that the substantive criminal offense is tried?

16 GEN. DOYLE: Yes, it is. The jury is given a
17 special verdict under the Wisconsin penalty enhancement
18 statute and it is, they return two verdicts, guilt or
19 innocence on the charge and as well as the question on
20 whether or not the defendant intentionally selected the
21 victim because of the victim's race, or whatever the
22 particular status may be in the case.

23 And it is that point, I believe, that is
24 extremely important in this case. What the Wisconsin
25 statute does is look at the intentional selection of the

1 victim. There is a lot of talk about biased thought, hate
2 thought, and so on. The Wisconsin statute does not go
3 after biased thought or hate thought. We don't know
4 whether Mr. Mitchell had racial bias or not. It's likely
5 he did given the facts of the case, but we don't know.
6 And to a large measure in Wisconsin we don't care.

7 For example, Mr. Mitchell might have selected
8 that victim because of his race simply to show off to the
9 group of young men that was around him about how tough he
10 was or some other reason. We don't know. Mr. Mitchell
11 may have the benignest thoughts about race relations as
12 are possible, and yet he would be guilty under the
13 Wisconsin law because he intentionally selected the victim
14 because of the victim's race.

15 QUESTION: Is there any limit on the reasons for
16 selection that the state can specify for higher
17 punishment? I mean, could it say if you select a victim
18 on the basis of whether or not he believes in the hole in
19 the ozone layer? Could you do that? Or whether he
20 believes that the earth revolves around the sun rather
21 than vice-versa?

22 GEN. DOYLE: I believe that in view of the state
23 if the particular category serves a legitimate state
24 interest and meets equal protection tests and meets
25 vagueness -- some of the examples you have given, Justice

1 Scalia, I think would be difficult obviously to put into a
2 statute that would meet the vagueness test. But if it
3 meets those, that --

4 QUESTION: It has to serve a legitimate state
5 interest?

6 GEN. DOYLE: I believe that --

7 QUESTION: So one has to judge whether being
8 against flat earth people is less important than being
9 against people who don't like particular religions, for
10 example?

11 GEN. DOYLE: No, that would not be the
12 legitimate state interest. The legitimate state interest
13 is if, for example, you have had a problem in your state,
14 there is a large debate going on about flat or round earth
15 and there have been a great number of fights that have
16 gone on in your state for a period of time and the state
17 legislature decides that the violence attached to this
18 debate is one that needs to be addressed and that people
19 who are acting out of, who are selecting victims because
20 of that reason present a particular danger to the
21 community, then I think the state could act.

22 QUESTION: Okay. So it isn't the goodness or
23 badness of the idea that you're talking about, it's
24 whether attacks on the basis of that idea are a particular
25 problem?

1 GEN. DOYLE: That's right, whether they present,
2 in a traditional criminal context that they present a
3 significant law enforcement problem to the State of
4 Wisconsin.

5 QUESTION: So therefore, going back to your
6 prior argument, it wouldn't make any difference whether
7 the reason in this case in fact was the expression of the
8 bigotry?

9 GEN. DOYLE: I think that in my judgment it
10 would not, and I believe in Dawson, if in fact the statute
11 was strictly limited to racial motives, which the
12 Wisconsin statute isn't, if it were that Dawson would
13 suggest that that would be appropriate. But I do want to
14 point out the Wisconsin statute is one step removed from
15 that. Wisconsin was very careful in drafting this
16 statute. It used language that is found very clearly
17 patterned and found in hundreds of anti-discrimination and
18 civil rights laws, some of them civil, many of them
19 criminal, contrary to the assertion of the Wisconsin
20 Supreme Court, in which people are prosecuted for conduct
21 that is carried out on the basis of race, religion, and
22 other types of motives along those lines.

23 QUESTION: General Doyle, going back to this
24 line of inquiry and looking back at the days of the
25 Vietnam conflict, do you suppose it would have been all

1 right then for the state to enhance the penalty for draft
2 card burning if it's done because of opposition to
3 Government policies, for example?

4 GEN. DOYLE: I believe there are some categories
5 that should very clearly raise a concern in the court, in
6 courts on whether or not there is suppression of ideas
7 that are afoot. And I believe certainly a category that
8 mentioned opposition to a Government policy would be such
9 a category. And I think that the court then should look
10 to see --

11 QUESTION: I don't see how that's very different
12 from what you have here necessarily.

13 GEN. DOYLE: I think the --

14 QUESTION: I mean, we want to suppress the
15 notion of racial bias.

16 GEN. DOYLE: Wisconsin, while I think we would
17 all like to do away with the notion of racial bias,
18 Wisconsin by this law and by the face of this law is not
19 seeking to suppress racial bias or the notion of racial
20 bias. It is seeking to address the harmful effects that
21 result when somebody engages in criminal conduct in which
22 they have selected the victim because of that, the
23 victim's race. This is not a statute where we have
24 attempted to outlaw cross burning or other kinds of
25 expressive communicative conduct.

1 QUESTION: Is it a question of proximity, how
2 proximate is the conduct to the thought?

3 GEN. DOYLE: Yes, I think certainly it is. I
4 think for example if you had a statute that said all drunk
5 drivers who are racist will receive an extra year in
6 prison, I think under Dawson quite clearly that would be a
7 violation of the First Amendment. And again Wisconsin
8 statute has been drafted very carefully to create that
9 nexus with the term because of. Not only is the nexus
10 there, but in Wisconsin it has to be proven beyond a
11 reasonable doubt in order for the enhancer to apply.

12 QUESTION: Does the difference between the draft
13 card burning enhancement and the enhancement here rest on
14 the fact that no one burns draft cards except as, in
15 effect as political statements, whereas people do commit
16 assaults for different reasons? So that there is no
17 justification in, as it were, in an increased deterrence
18 in the draft card case, and therefore the only purpose
19 that's being served by the draft card enhancement is
20 simply kind of an extra punishment of the thought?

21 GEN. DOYLE: I believe that that is correct in
22 the draft card, particularly when you're dealing with the
23 motive being opposition to a Government policy. I think
24 in that case the court should consider whether there is
25 Government suppression of ideas afoot and should consider

1 whether there's a legitimate state interest in the
2 enhancement. And I think it would be very difficult to
3 articulate a legitimate state interest in choosing one
4 side of the debate.

5 The better analogy to the Wisconsin --

6 QUESTION: But, excuse me, I thought we were
7 presenting from that whether the objectives are good or
8 bad, but you say the objectives have to be a legitimate
9 state interest? See, I thought from your initial answer
10 to Justice Souter that you would have said, or I gathered
11 from Justice Souter's question that it's a different case
12 if you say you get an enhanced penalty for assault if the
13 reason for your assault is that the person you assault
14 favors the Vietnam war. You would say that's bad too,
15 wouldn't you?

16 GEN. DOYLE: I would say that that would, it's
17 far removed from the Wisconsin example, but I think that
18 it would present to the court a legitimate concern that
19 the Government is attempting to suppress ideas of the
20 Government.

21 The analogy that is closer to the Wisconsin is
22 if you say there is an assault and the reason for the
23 assault is because of beliefs about the war, without
24 choosing one side or the other, would serve the state
25 purpose that because of increased criminal activity that

1 may come, without any suggestion that the state is taking
2 one side or another in a particular political debate.

3 Let me, if I might follow up on that, I want to
4 be clear that in my judgment I do not believe the state is
5 taking sides in this. This is much of what goes on in
6 this kind of, in this debate. We are -- if there were an
7 example in which the judge had a 7-year range of sentences
8 at the beginning and the judge said I would normally give
9 1 year in this case but I'm going to give 2 more because
10 based on the evidence I have seen I see that you were, you
11 moved only because of the victim and I think you present a
12 greater danger to the community because of that, I think
13 that that would be perfectly appropriate. In this case --

14 QUESTION: What if in the draft card case the
15 statute said that your penalty would be enhanced if you
16 did it because of disagreement with the person's views
17 about the Vietnam war, whether they were pro or con?

18 GEN. DOYLE: In my view that would, assuming
19 that there is in fact, as there was, a real disruption, I
20 think that that would be constitutional.

21 I would like, if there are no further questions
22 I would like to reserve.

23 QUESTION: Very well, General Doyle.

24 Mr. Dreeben.

25 ORAL ARGUMENT OF MICHAEL R. DREEBEN

1 UNITED STATES, AS AMICUS CURIAE SUPPORTING PETITIONER

2 MR. DREEBEN: Thank you, Mr. Chief Justice, and
3 may it please the Court:

4 Wisconsin's sentence enhancement provision is
5 valid under two lines of this Court's cases. First,
6 Government may combat discrimination in crime just as it
7 combats discrimination in other contexts by punishing the
8 conduct that is motivated by the race, religion, or other
9 status of the victim. It is settled that such anti-
10 discrimination provisions do not infringe First Amendment
11 rights.

12 Secondly --

13 QUESTION: You have to be an equal opportunity
14 criminal? Is that it? You're punishing the person for
15 not being indiscriminantly violent?

16 MR. DREEBEN: No, Justice Scalia. What's being
17 punished by a race-motivated crime or a crime that's
18 motivated by the status of the victim are the particular
19 harms that flow to victims as a result of that kind of
20 crime. Race-motivated crimes this Court has recognized is
21 degrading to the victim, it tends to intimidate the victim
22 in the victim's exercise of his civic and civil rights,
23 and it touches all other members of the class to which the
24 victim belongs and intimidates those members of the class
25 in the exercise of their rights.

1 And it is those additional harms that are
2 inflicted by status-based crime that justify the
3 legislature, as Wisconsin has done and as the Federal
4 Government has done, in targeting that kind of crime for
5 increased sanction and increased deterrence.

6 QUESTION: So what we have is a crime that
7 itself presents a substantive evil that the state can
8 prevent quite without regard to the thoughts and beliefs
9 of the actor?

10 MR. DREEBEN: That's exactly right, Justice
11 Kennedy. And I think that the key inquiry that the court
12 has to make when confronted with a law like this and
13 there's an allegation that the state is in some sense
14 punishing motive or thought is whether the law is
15 justified by reasons that relate to free expression and
16 free thought or whether it's justified by purposes that
17 the state does have a legitimate interest in suppressing,
18 wholly apart from punishing belief.

19 And the Court has made that inquiry in many
20 different contexts whenever it confronts a law that
21 regulates on its face conduct and there's a claim that
22 there's some sort of expressive component underlying it.
23 The inquiry has to be made by looking at the text, the
24 history, the application of the law by the state, and the
25 interests that are asserted by the state.

1 QUESTION: What do you mean by suppressing, it
2 has an interest in suppressing? The state cannot suppress
3 hatred of certain religions or certain races, can it? I
4 mean, it can't throw somebody in jail for that.

5 MR. DREEBEN: That's correct, Justice Scalia.

6 QUESTION: What the state can do is to foster
7 the opposite, to show its disapproval of that attitude.
8 It's entitled to do that, right, in statements by the
9 President, in pronouncements by the Congress? Correct?

10 MR. DREEBEN: Well, those --

11 QUESTION: But it can do that for patriotism as
12 well, couldn't it?

13 MR. DREEBEN: That's correct. Those are --

14 QUESTION: So can you punish a crime more
15 severely if the crime demonstrates a lack of patriotism?

16 MR. DREEBEN: No. I think the entire point that
17 I'm trying to make in this area is that if the interest of
18 the Government is to regulate conduct, regulate thought
19 and speech per se for its own sake, then that is not a
20 legitimate interest. That's exactly what the Court was
21 speaking of in Dawson v. Delaware when it held that the
22 Government may not punish in the abstract the holding of a
23 particular belief or the holding of a particular idea.
24 What it may do is address the harms that flow from the
25 conduct that is bound up with status-motivated crime.

1 QUESTION: I thought you acknowledged that
2 there's some limit on that, that even in doing that the
3 state can seem to be trying to suppress an idea, and then
4 it would be bad. That's what I thought you were
5 acknowledging.

6 MR. DREEBEN: I acknowledge that if the court
7 determined that the law's purpose and effect is really to
8 get at thought and not to get at the conduct that is
9 manifesting the harms in question, then you have a
10 different case. And that is exactly the kind of inquiry
11 that the Court undertook in the Barnes v. Glen Theatre
12 case to determine whether a law against public nudity was
13 really aimed at expression.

14 QUESTION: But if a state is concerned that a
15 wave of intolerance is causing injury it can act both
16 because it disapproves of that intolerance and of the
17 injury. I take it a state, if there were a rash of
18 burnings and defacement of churches, could pass a statute
19 making it a crime to burn or deface a church. Or would
20 you agree with that?

21 MR. DREEBEN: I would agree with that. That's
22 entirely within the power of the state to deal with. The
23 kind of problems that flow from conduct like that are
24 objective and they relate to the protection of citizens,
25 and this law very clearly relates to the protection of

1 citizens. There can be no doubt that in this country
2 there is a genuine problem with status-motivated crime
3 that affects the injuries to victims and the intimidation
4 in the exercise of rights that Federal law has long
5 reached out in an attempt to regulate.

6 QUESTION: What if a state which had no history
7 whatsoever of any race-motivated crimes, there simply had
8 never been any in that state, what if that state were to
9 pass a statute like Wisconsin's? Would it be subject to
10 any additional scrutiny than Wisconsin's is?

11 MR. DREEBEN: In the particular area that this
12 law deals with I don't think there would be any additional
13 scrutiny because the nation has experienced such problems
14 in this area that it cannot be, there can be no doubt
15 whatsoever that the state's motivation in enacting such a
16 law is real and legitimate.

17 QUESTION: Disability? Have we had a rash of
18 people going around beating up on the handicapped? I'm
19 not aware that that's -- I mean, I can understand the
20 other things, religion, race, yes, sexual orientation,
21 national origin or ancestry, but not disability.

22 MR. DREEBEN: Well, I think of all the
23 categories that are in the list the category of disability
24 is one that is most easy to understand, that the disabled
25 status of a victim may make that victim more vulnerable to

1 crime and the state clearly has a heightened interest in
2 protecting that --

3 QUESTION: But is there any evidence that
4 disabled people have been beaten up because they are
5 disabled?

6 MR. DREEBEN: I don't know that there is any
7 evidence in this record. There is clearly evidence in
8 Federal policy reflected in the anti-discrimination laws.

9 QUESTION: Yes, but I thought your argument was
10 that, in response to Justice Kennedy's question, if there
11 are a rash of church burnings, sure, the state, the
12 Federal Government can come in and legislate about that.
13 But here we're talking about a situation where there
14 hasn't been a rash of anything so far as anybody knows, so
15 far as attacks on the disabled because they are disabled.

16 MR. DREEBEN: It may be evidenced in a
17 particular case that there is no real-life problem that
18 the state is attempting to regulate, that the state has
19 some other goal in mind. I don't think there is any
20 suggestion in this case that Wisconsin added disability to
21 the list of prohibited status-based crimes in order to
22 suppress views about disability.

23 But it would be a relevant inquiry for the court
24 to make when confronted with a law that reached beyond
25 these very core problems that have affected our society

1 and dealt with something more remote like opposition to
2 Government policy or opposition to war or views on the
3 flat earth issue. Those things would raise greater
4 questions just on the face of the statute about whether
5 the state had in mind the regulation of thought or speech
6 as opposed to the goals that we say are furthered by this
7 law.

8 The theory of the Wisconsin Supreme Court that
9 simply because the underlying crime is already punished
10 the enhancement must be directed at thought is a theory
11 that if accepted is broad enough to invalidate this
12 nation's anti-discrimination laws. All of the Federal
13 laws that deal with anti-discrimination look to the motive
14 of the actor in assessing whether the conduct is in fact
15 the sort of discrimination that's meant to be prohibited.

16 This Court noted that as recently as yesterday's
17 opinion in the Hazen Paper Company case, that it is the
18 motive of the actor that is the focus of the law and
19 without an impermissible motive the conduct in question is
20 not regulated. But the Court has also recognized in
21 upholding the constitutionality of those laws that simply
22 because motive is an element does not mean that it is
23 Government's goal to target thought for its own sake.

24 What Government has done in these laws is
25 attempt to reach the evils that occur as a result of

1 discrimination. And in the context of race-motivated
2 crime I think those evils are very apparent, very
3 worthwhile for Government to take efforts to suppress, and
4 there is no indication whatsoever that the underlying goal
5 here of the Wisconsin legislature is somehow to punish
6 speech or thought for itself.

7 Unlike the law that this Court had before it in
8 R.A.V., Wisconsin is not regulating speech in any form or
9 expressing disapproval of disfavored ideas for its own
10 sake. The citizens of Wisconsin are entirely free to hold
11 bigoted beliefs and to express bigoted ideas. What they
12 may not do under the mantle of the First Amendment is to
13 claim immunity for the added harms inflicted by their
14 status-based crimes.

15 Thank you.

16 QUESTION: Thank you, Mr. Dreeben.

17 Mr. Adelman, we'll hear from you.

18 ORAL ARGUMENT OF LYNN S. ADELMAN

19 ON BEHALF OF THE RESPONDENT

20 MR. ADELMAN: Mr. Chief Justice, and may it
21 please the Court:

22 This statute punishes thought, thought which the
23 Government disapproves. Todd Mitchell got 2 years for
24 aggravated battery and he got 2 more years on top of that
25 because he was biased against white people. This bias is

1 a crude and ugly one, but it was nonetheless a viewpoint.
2 And if we punish Todd Mitchell's viewpoint we have to be
3 prepared to condone punishment of any viewpoint.

4 QUESTION: It seems to me he was punished
5 because, not because of his bias but because his bias led
6 him to pick out a victim because of the victim's race.
7 There are many forms of thought that are not punishable
8 but that become punishable when translated into action.
9 It seems to me that's all that happened here.

10 MR. ADELMAN: He was punished for the conduct by
11 the battery statute. The enhancer that is at issue in
12 this case punished him solely because of his biased
13 motive. All the conduct that he committed was already
14 separately punished.

15 QUESTION: But I have just indicated that there
16 are many sorts of thoughts that you have that are
17 protected as such but that cannot be put into action, and
18 I don't see how this case is really a very remarkable
19 deviation from that simple proposition.

20 MR. ADELMAN: Your Honor, the state can't ever
21 punish a viewpoint. The proper position of the state with
22 respect to beliefs and ideas is one of epistemological
23 humility. The state can't separately and additionally
24 single out a racial bias or a religious bias or a bias
25 against homosexuals or a bias against people who have some

1 particular view on the abortion issue and punish those
2 biases.

3 QUESTION: What about title VII? I mean, I can
4 fire somebody because I don't like the way he combs his
5 hair. I'm entitled to do that as far as Federal law is
6 concerned. But I can't fire that same person because of
7 his race, religion, and so forth. Are those laws bad?

8 MR. ADELMAN: No. Title VII and the other anti-
9 discrimination laws are distinguishable. Those laws
10 punish effects. They're not interested in bigotry.
11 They're interested in discrimination.

12 QUESTION: But they don't punish effects. I
13 could produce the same effect firing this individual.
14 It's only because I have this motive in firing him that I
15 am held liable.

16 MR. ADELMAN: They do -- Your Honor, I believe
17 that this Court said in Griggs that you could prove a
18 title VII violation for example on a disparate impact
19 theory. If you can prove a violation of the law on a
20 theory that doesn't involve motive -- motive, even if
21 motive is used in title VII it's inextricably intertwined
22 with the conduct that is punishable. The difference
23 between title VII and the enhancer laws is that you can't
24 get at the discriminatory conduct without also implicating
25 the motive. This --

1 QUESTION: This is inextricably intertwined.
2 The person is not punished unless he has committed the
3 crime, the substantive assault or whatever it is. Would
4 your objection be eliminated if it were not an enhancer,
5 if there were let's say no law against assault unless you
6 assault because of the person's race? That would be okay
7 by analogy to title VII?

8 MR. ADELMAN: No, Your Honor. That, that law
9 would be in many respects irrational. But the point with
10 this case is that the conduct is already completely
11 punished. The State of Wisconsin has chosen on top of
12 that to impose a separate and additional punishment solely
13 because of these particular beliefs. It's not --

14 QUESTION: Do you want us to pretend that the
15 anti-discrimination clause that protects minorities in
16 employment is not motivated at least in substantial part
17 by our concern with racial intolerance?

18 MR. ADELMAN: Your Honor, the interest that's
19 served by title VII is that of providing equal
20 opportunity, equal opportunity to people who have been
21 historically discriminated against. Equal opportunity is
22 very different than bigotry. There's no interest of
23 equality or equal opportunity involved in this particular
24 statute. There's no equal opportunity to battery. So the
25 statutes are very different in that respect. They serve

1 different interests. One targets bigotry, one seeks to
2 promote equal opportunity.

3 This statute says nothing about harms or
4 effects. It speaks only of certain prohibited biases.
5 The statute punishes some biases, for example a racial
6 bias, but it doesn't punish other biases, for example a
7 gender bias.

8 QUESTION: Could you give me an example of how
9 it might speak in terms of harms and effects in a way that
10 would legitimize it?

11 MR. ADELMAN: Yes, Your Honor. There are
12 numerous content-neutral alternatives which would serve
13 the state's asserted interests equally well, if not
14 better. One content-neutral alternative is present
15 sentencing practice where judges every day of the year --

16 QUESTION: Wait a minute, I thought you were
17 objecting to the statute, statute rather, in its terms. So
18 what would be the difference in the terms of the statutes
19 couched in terms of effects that would legitimize it?

20 MR. ADELMAN: This statute is directed at
21 motive. An enhancer, if you wanted to have an enhancer
22 you could have an enhancer based on, follow the Federal
23 Sentencing Guidelines which has a model enhancing
24 penalties where there is a vulnerable victim. Or if you
25 want to get at terror or emotional --

1 QUESTION: You don't object then to the statute
2 insofar as it refers to disabilities, victims with
3 disabilities? It's simply the mental connection between
4 the act and the disability of the victim that taints it?

5 MR. ADELMAN: The because of is the problem with
6 this statute. The Wisconsin statute --

7 QUESTION: Well, if you didn't couch the statute
8 in terms of because of wouldn't your sentencing in effect
9 be a potentially random act? If the statute did not
10 describe a sentencing criterion in terms of the motive for
11 the act you would seem to allow the sentencer to say well,
12 if the victim turns out to be a disabled person I'll go
13 ahead and add a kicker if I want to, but that need not in
14 fact have any relationship to the circumstances of the
15 crime beyond the possible fortuity of the victim's
16 disability? Is that what you would be allowing?

17 MR. ADELMAN: No, Your Honor. Most criminal
18 statutes define the conduct in terms of two elements, the
19 actus reus and the mens rea, that is intent. Intent is
20 different than motive. What's wrong with this statute is
21 that it doesn't talk about intending to batter someone who
22 is disabled. It talks about the why, the underlying
23 belief system. That's what the Wisconsin Supreme Court
24 interpreted the because of to mean, and that's the problem
25 with the statute. The statute is phrased in terms of the

1 belief system of the perpetrator.

2 QUESTION: Mr. Adelman, can I question that for
3 a moment?

4 MR. ADELMAN: Sure.

5 QUESTION: Supposing the criminal planning the
6 crime thinks that white people are not as well able to
7 defend themselves as people of other races and for that
8 reason they are sort of easy victims, and therefore makes
9 a practice of always selecting white victims and makes
10 that clear. And say the defendant is himself white and
11 therefore has no bias against whites. Would he not
12 violate the statute?

13 MR. ADELMAN: Your Honor, no. The Wisconsin
14 Supreme --

15 QUESTION: He selects his victim because of his
16 race.

17 MR. ADELMAN: The Wisconsin Supreme Court
18 interpreted the because of to mean biased motive. That
19 construction is binding on this Court. The underlying
20 conduct of intentional selection occurs in all cases. In
21 order to be convicted under this statute as this statute
22 appears before this Court it requires a biased motive, a
23 prejudice, a belief system opposing whites.

24 QUESTION: That part of the burden of proof of
25 the state is to show an animus towards the race of the

1 victim?

2 MR. ADELMAN: That's correct. If you look at
3 the Wisconsin Supreme Court, if you look at every single
4 application to date of this crime. It's after all,
5 Justice Stevens, it's called a hate crime statute, and
6 that's what it's directed at. It punishes hate. It
7 punishes crimes which are committed which, with a certain
8 mind set and certain animus which is in this particular
9 case not just a motive for a crime but a generalizable
10 belief system about a particular public matter. It's a
11 crude belief system, certainly, but it nevertheless is a
12 viewpoint.

13 QUESTION: Perhaps I'm wrong, counsel. On A8
14 again of the Appendix it is true that the state court says
15 without doubt the hate crime statute punishes bigoted
16 thought, but it seems to me that that isn't all it
17 punishes. It punishes selection of a victim by reason of
18 the victim's race. That's all the statute says. And I
19 don't think this is necessarily inconsistent with that.

20 MR. ADELMAN: Your Honor, the selection of the
21 victim is part of the underlying crime. All crimes
22 involve a selection of a victim. The operative words of
23 this statute are not selection of the victim. Because of.
24 As construed by the Wisconsin Supreme Court because of
25 means biased motive. And in addition all the evidence

1 concerning this particular statute makes it clear that
2 that's what is being talked about.

3 If you look at the legislative history, the
4 sponsors basically said that the purpose of this law is to
5 impose additional penalties because of, perpetrated
6 because of someone's religious or social biases. All of
7 the applications of this law to date have been to
8 situations involving a biased motive.

9 QUESTION: I suppose that's simply because it's
10 mostly bigots who select people because of their race.
11 That's just the way it happens to be, but that's not what
12 the statute says.

13 MR. ADELMAN: Well, Your Honor, even though the
14 state may come up with a few marginal creative
15 hypotheticals which would involve a hypothetical of
16 someone who was committing hate crimes without hate,
17 that's essentially what their hypothetical is, those would
18 be the most remote and marginal applications of this law.
19 I know of no such application across the country so far.
20 And that's not what this statute is about. This statute,
21 contrary to these creative hypotheticals, is about biased
22 crime or hate crime.

23 The --

24 QUESTION: Mr. Adelman, may I just ask you a
25 technical question? It's about the Wisconsin Supreme

1 Court's construction. I've got page A7 in the petition
2 for cert which, where the court's opinion is set out, and
3 the court says there because the hate crime statute --

4 QUESTION: Where about on the page, Justice
5 Souter?

6 QUESTION: It's the top of the carry over
7 paragraph, the last sentence in that paragraph. It says
8 because the hate crime statute punishes the defendant's
9 biased thought as discussed below and thus encroaches on
10 First Amendment rights, the burden is on the state to
11 prove constitutionality. Clearly the Wisconsin Supreme
12 Court is saying that the statute covers biased thought.
13 Does the court ever get more explicit in saying that that
14 is all it covers are biased action? Does the court ever
15 get more explicit in saying that that is all it punishes?

16 MR. ADELMAN: Your Honor, I think that the court
17 clearly was not thinking of these various hypotheticals
18 posed by the state --

19 QUESTION: Well, that may be but I just want to
20 stick at the moment to the specific question. Does the
21 court get more explicit later on in saying that it, that
22 the statute does nothing more than this, covers nothing
23 more than this?

24 MR. ADELMAN: I don't think the court says that
25 explicitly, but I think it's clear that that's, that their

1 interpretation is to bias. I might also add on that
2 point, Justice Souter, that the state itself in their cert
3 petition on page 16 concedes that the statute is about
4 prohibiting bias-motivated action. Furthermore, when the
5 state talks about such cases as Dawson, which have to do
6 with the admissibility of biased motive and First
7 Amendment protected activity, the state then concedes
8 essentially that we're talking about a biased motive.
9 It's only when the state talks about the facial challenge
10 that then they say well, it doesn't involve biased motive,
11 but then when they talk about Dawson they say well, biased
12 motive is okay. So the state is really trying to have it
13 both ways.

14 It's clear what this statute's about and it's
15 clear that the overwhelming if not 100 percent of the
16 applications will be to biased motive.

17 QUESTION: Mr. Adelman, suppose you didn't have
18 a statute and you just have a normal prosecution for a
19 murder. The defendant is convicted and the judge, a
20 common law judge sentencing says I am going to give you a
21 particularly harsh sentence because you are a person who
22 believes in violence. You are a particularly vicious and
23 obnoxious person because of your belief in violence. Now,
24 judges have always done that throughout the history of the
25 common law. Isn't -- what's the matter with believing in

1 violence? That's a belief system too. People can go
2 around believing in violence. You can't punish them for
3 that, can you? But if they commit some other crime you
4 can send them up for longer than you otherwise would
5 because of their belief system. We have always done that.
6 So what's so unusual about doing it in this statute?

7 MR. ADELMAN: In Dawson this Court said that the
8 First Amendment applied its sentence and that biased
9 motive or belief may be considered as evidence of a
10 content-neutral sentencing factor. A court, whether it's
11 a court or a legislature, they can't impose an additional
12 penalty because the court or the legislature disapproves
13 of the belief of the defendant. If that belief is
14 relevant to a content-neutral sentencing factor, such as
15 the defendant being violent, future dangerousness, lack of
16 remorse, the court may consider that as evidence. And in
17 Dawson this Court said that they can consider it as
18 evidence only with the greatest caution.

19 So yes, traditional sentencing practice allows
20 courts every day to take into consideration all kinds of
21 things, including biased motive, but those must be related
22 to traditional sentencing factors such as violence.

23 QUESTION: Are you arguing that biased thought
24 is an element of the offense?

25 MR. ADELMAN: It's clear, Your Honor, that --

1 QUESTION: And is it clear in this case that
2 that element was proved beyond a reasonable doubt in this
3 case?

4 MR. ADELMAN: Well, it's clear that the -- yes,
5 we do not dispute that.

6 QUESTION: But -- you think also the record
7 really does show that this defendant had this kind of bias
8 against whites?

9 MR. ADELMAN: That's a more difficult question,
10 Your Honor, and I think that brings up another problem --

11 QUESTION: It seemed to me, very frankly, that
12 if you thought that was an element of the offense you
13 might well have argued a failure of proof.

14 MR. ADELMAN: Well, Your Honor, that might have
15 been argued below and I think that brings up another
16 problem with this statute, and that is the over-
17 inclusivity. If the 1992 amendments to the statute
18 clarify the meaning of the original law, the biased motive
19 is not even required to be 100 percent biased. In fact
20 under these, under this law you could have a 1 percent
21 biased motive and 99 percent some other motive, a greed
22 motive, and still be subject to the enhanced penalty.

23 The -- I was talking about the content-neutral
24 alternatives, and the real problem with this statute --

25 QUESTION: Well, incidently, the Wisconsin court

1 hasn't said that it doesn't have to be a substantial
2 factor, does it? This just hasn't been interpreted. This
3 is a statute that was amended after this case came up.

4 MR. ADELMAN: That's correct. And it's clear
5 that we don't know what the quantum of motive was required
6 under this law, but under --

7 QUESTION: So this issue is something not before
8 us.

9 MR. ADELMAN: Well, I think, Your Honor, that
10 the, that the 1992 amendments may well have clarified the
11 meaning of the original law, and it's clear that the law
12 now that's in effect in Wisconsin covers because of in
13 whole or in part, which means you can have an unconscious
14 amount of racism, the most minute percentage of
15 disapproved or disfavored motive, and still be subject to
16 this additional penalty. It's clear what the state is
17 doing here is that they were searching out to find bias
18 wherever they could find it, even in minute qualities.

19 The statute also covers not just violent crimes,
20 but it covers every crime in the whole Wisconsin criminal
21 code, including such minor offenses as mooring a water
22 craft to the wrong pier. That can be enhanced if there's
23 a 1 percent racial bias.

24 QUESTION: Did the Supreme Court of Wisconsin,
25 Mr. Adelman, comment on the meaning of in whole or in

1 part? I mean, does it support your view that 1 percent
2 would be sufficient?

3 MR. ADELMAN: They didn't say. They didn't say.
4 And the in whole or in part wasn't the law as it applied
5 to, wasn't in the statute. That was a subsequent
6 amendment, Your Honor.

7 QUESTION: What did the statute say at the time
8 your client --

9 MR. ADELMAN: Because of.

10 QUESTION: Because of. Any indication why the
11 legislature amended it to say in whole or in part?

12 MR. ADELMAN: Well, I think that the only, I
13 think it's clear because they wanted to get at even minute
14 quantities of the disfavored motives. It's clear that
15 that's what they're trying to do essentially, and that's
16 what's wrong with the statute. Not only are there
17 content-neutral alternatives which could get at these
18 effects without implicating bias, and we have mentioned a
19 couple of them, but the statute also is over-inclusive.

20 And what that makes clear is that there's an
21 unspoken purpose to this law, one that the state does not
22 say, and that's an improper and unconstitutional purpose,
23 and that purpose is essentially to find little bits or big
24 bits of prejudice wherever it is and then impose an
25 enhancer. This statute is about bigotry. And however

1 abhorrent and disgusting bigotry may be, it is
2 nevertheless a viewpoint which is protected by the First
3 Amendment.

4 QUESTION: Is there any evidence in the record
5 of the way the statute has been used by Wisconsin
6 prosecutors? I mean in fact are people who moor the boats
7 at the wrong dock ever charged of having done so because
8 of a bigoted motive?

9 MR. ADELMAN: The evidence in the record
10 suggests that this statute isn't used much at all in any
11 particular situation, but it surely could be, Your Honor.
12 Prosecutors and law enforcement surely under this law have
13 the discretion to apply it anywhere they want. There's a
14 huge scope for discretion here, and in fact that I think
15 is another serious problem in this case.

16 But, as I was saying, the unspoken purpose of
17 this law is essentially to identify certain disfavored
18 prejudices and punish them wherever they find them. The
19 enhancer is not narrowly tailored.

20 It is also under-inclusive because there are
21 certain situations where the same harms would occur if the
22 state asserts other justifications for the statute. For
23 example women. Women are not a protected category. You
24 get more time if you commit a crime against somebody
25 because of their sexual orientation but not because of

1 their gender. Surely a gender-based crime would cause the
2 same terror or harm that the state asserts as its reason
3 for enacting this law.

4 QUESTION: Our cases have said that the
5 legislature can address evils one at a time, that it
6 doesn't have to cover the whole waterfront, so to speak,
7 in one statute.

8 MR. ADELMAN: But this Court has said also that
9 when under-inclusivity is based on content and viewpoint
10 that makes the statute subject to strict scrutiny. This
11 statute is subject to strict scrutiny because it does
12 punish thought. Thought is protected by the First
13 Amendment. The content and viewpoint specificity of this
14 law is not necessary. The state --

15 QUESTION: Well, maybe the Wisconsin legislature
16 thought there weren't any misogynists in Wisconsin.

17 MR. ADELMAN: It's possible, but I --

18 QUESTION: You don't believe so?

19 (Laughter.)

20 MR. ADELMAN: The point is, Your Honor, the
21 content and viewpoint specificity is not necessary. A
22 decision striking down this law is not a decision that
23 says to Wisconsin you can't do this, you can't deal with
24 the problem of biased crimes. All it is is a decision
25 saying do this the right way. Address the particular

1 harms. Pass an enhancer if you will which addresses harms
2 or addresses effects. We have suggested several of them.
3 If the penalties are insufficient -- I mean, after all,
4 what does this enhancer do? It just increases the judge's
5 ability to give out penalties. Well, if the penalties in
6 the Wisconsin law are insufficient, a content-neutral way
7 of solving the problem would just be to figure out those
8 crimes where you need larger penalties, increase the
9 total --

10 QUESTION: Suppose, Mr. Adelman, suppose
11 Wisconsin had a separate statute that said if you do this
12 sort of thing because of race, if you assault another
13 person on account of race you must have a, and they
14 specify the minimum penalty which is just larger than the
15 normal assault statute has in it. I suppose you would
16 attack that statute?

17 MR. ADELMAN: The statute can't be based on
18 thought. That's the problem with this statute.

19 QUESTION: Well, but you would also say that the
20 statute I just posited would be unconstitutional? A
21 separate statute saying if you assault anybody on account
22 of race it's 10 years, whereas the regular assault statute
23 is 5 years.

24 MR. ADELMAN: If it was because of your views on
25 race that would be unconstitutional.

1 QUESTION: What do you do about section 242 of
2 the Federal Criminal Code which says that if you deprive
3 any person of a right, privilege, or immunity protected by
4 the Constitution of the United States and you do it on
5 account of color or race, you have committed a crime and
6 you are punished for that?

7 MR. ADELMAN: There are two answers to that,
8 Your Honor. One, 242 requires state action under color of
9 state law. When the state --

10 QUESTION: So? Nevertheless it punishes some
11 person who is acting under color of state law for this
12 conduct that he is, that he is doing on account of race.
13 And it's on account of race or color. And it covers only
14 the crime is, has to be motivated by race or color.

15 MR. ADELMAN: Your Honor, 242 is distinguishable
16 because it serves a different interest. What 242 does,
17 it's a narrowly tailored statute which is addressed at
18 specific kinds of interference with federally protected or
19 federally guaranteed rights. It serves to protect rights
20 that the Federal Government --

21 QUESTION: Maybe so, but it's, the thing that
22 makes it a crime is that the conduct is engaged in because
23 of race. And why isn't that a criminalizing of bias?

24 MR. ADELMAN: Because the statute is not
25 directed at bias. It only implicates race to the extent

1 necessary. And incidentally, that statute if subjected to
2 strict scrutiny would survive strict scrutiny because it's
3 not directed at bigotry.

4 QUESTION: Well, I would suppose that your
5 supreme court would declare this statute unconstitutional.
6 It would just read it and say that this statute is, has to
7 be aimed at bias.

8 MR. ADELMAN: I'm sure they wouldn't, Your
9 Honor, because in that case --

10 QUESTION: Well, I don't know.

11 MR. ADELMAN: -- the bias, the motive, and the
12 conduct are inextricable. The problem with this enhancer
13 law is that the conduct is already punished and basically
14 what they have done is added a separate punishment which
15 is only addressed. It's not necessary to do it that way.
16 They could address the problem of biased crimes without
17 punishing thought. And that suggests that really what --

18 QUESTION: On that basis I would think 242 would
19 be even more suspect because it just isn't an enhancer.
20 The only reason there's any kind of a punishment at all is
21 because of a bias, of race-motivated conduct.

22 MR. ADELMAN: No, Your Honor, that's not true.
23 It's because there's an interference with Federal rights,
24 and the Federal Government has an obligation to protect
25 people --

1 QUESTION: Well, I know, but it doesn't, this
2 statute doesn't cover all interferences -- under this,
3 this statute would not be violated by someone who
4 interfered with somebody's federally constituted,
5 protected rights for some reason besides race. It just
6 wouldn't be reached at all.

7 MR. ADELMAN: But the reason you need --

8 QUESTION: We have a separate statute here
9 criminalizing conduct motivated by race.

10 MR. ADELMAN: You need that because of in that
11 statute to give meaning to the phrase interference with
12 Federal rights. If you didn't have a because of, that
13 would be a too general law, almost as if, almost like the
14 issue in Griffin v. Breckenridge where the court read in a
15 kind of an animus to give specific intent to avoid the
16 shoals of a Federal tort law. So in a sense that proves
17 our point, Your Honor, because there the bias is
18 necessary. It would pass strict scrutiny, as opposed to
19 by contrast the enhancer law where the, having bias in the
20 law is totally unnecessary and serves no purpose other
21 than to punish the improper motives.

22 QUESTION: What about treason and espionage laws
23 which make certain acts unlawful if committed with the
24 intent to give aid and comfort to the enemy? I'm
25 certainly entitled to wish the enemy well in a war that my

1 country's engaged in. I don't think I can be put in
2 prison for hoping that my country loses. But if I perform
3 an act which otherwise would be lawful, but I do that act
4 with the intention of helping the enemy --

5 MR. ADELMAN: Intention is different than
6 motive, Your Honor.

7 QUESTION: Intention is different from motive?

8 MR. ADELMAN: Yes, intention affects --

9 QUESTION: Okay, then strike it. I do it with a
10 motive of --

11 (Laughter.)

12 QUESTION: -- of helping the enemy.

13 MR. ADELMAN: Whatever you call it, in your
14 hypothetical that's intent. It affects the conduct. The
15 treason statute is addressed at conduct. It's not, it
16 doesn't punish you for being, for disliking --

17 QUESTION: No, no, the conduct is turning over
18 the information. The conduct is simply an act. Maybe
19 it's bombing something, maybe it's disclosing secret
20 information. But the only thing that makes it treason is
21 that I do it with the motive of giving aid and comfort to
22 the enemy.

23 MR. ADELMAN: See, you could turn it over by
24 accident, and that wouldn't be treason.

25 QUESTION: That's right.

1 MR. ADELMAN: That's why you need the intent in
2 there. And that's not motive, it's intent. Because if it
3 was an accident it wouldn't be any --

4 QUESTION: Oh, no, but I -- no, I can turn it
5 over intentionally and I know I am giving it to this
6 person. It's fully intentional. But unless my motive is
7 to help the enemy it's not treason.

8 MR. ADELMAN: I believe that treason statutes
9 don't punish, I think they punish the intent --

10 QUESTION: I think you're wrong. I don't see
11 any difference between that and what's going on here.

12 MR. ADELMAN: Well, Your Honor, intent affects
13 the what of conduct. If it's reckless or if it's
14 intentional it's different conduct than if it's accidental
15 conduct. I don't think the treason statute --

16 QUESTION: I think treason statutes are directed
17 against bad people who wish the country harm, and the same
18 act performed by that person is made more serious than one
19 that is performed by some other person.

20 MR. ADELMAN: Wisconsin's concern about biased
21 crimes is well-intentioned. It's tempting to sacrifice a
22 part of the First Amendment in the name of an important
23 problem such as racial harmony, but the First Amendment
24 protects the thought we hate as well as the thought that
25 we like. It protects the viewpoints of even inarticulate

1 people like Todd Mitchell as much as the viewpoints of the
2 erudite.

3 More than anything minorities need an
4 uncompromised First Amendment, for it is minorities more
5 than anyone who are likely to think the thoughts which are
6 offensive to the powers that be. And any statute that
7 gives the Government the power to punish thought is going
8 to be used more against minorities than against anyone.

9 So in fact sometimes this case has been talked
10 about as a conflict between interests of liberty and
11 interests of equality. It's not that at all. The
12 affirmance of this Wisconsin Supreme Court decision is a
13 victory for the First Amendment, and it's also a victory
14 for equality and for the rights of all of us to think what
15 we want. That's what this statute does.

16 Thank you.

17 QUESTION: One question, Mr. Adelman.

18 MR. ADELMAN: Yes, Justice Thomas.

19 QUESTION: There were 10 individuals involved
20 here?

21 MR. ADELMAN: That's correct.

22 QUESTION: Let's assume that five were told to
23 attack a white person and five said they would attack a
24 black person, for whatever reasons. Now, the first five
25 of course would be covered by the statute. Would the

1 second five not be covered?

2 MR. ADELMAN: The second five -- any kind of
3 biased motive would be covered.

4 QUESTION: The statute says because of race.

5 MR. ADELMAN: Yes. I think both would be
6 covered.

7 QUESTION: So where is the bias in the second
8 five?

9 MR. ADELMAN: The bias is a racial bias. The,
10 you can have a bias against whites or a bias against
11 blacks. Either way is a bias, Your Honor. Either is a
12 viewpoint, and that statute is content and viewpoint-
13 specific. If it punishes, if it's a statute that punishes
14 content and viewpoint-specificity it's subject to strict
15 scrutiny. If the achievement, if that goal can be
16 achieved in another way by a content-neutral alternative,
17 then the state has an obligation to do it and the statute
18 is unconstitutional.

19 QUESTION: So you're assuming that there's
20 intraracial bias simply because they decided to attack a
21 black person also?

22 MR. ADELMAN: The statute is directed at bias,
23 racial bias.

24 MR. ADELMAN: I understand you said that, but my
25 question is most of your argument seemed to depend, or at

1 least your assessment of bias seems to depend on the
2 interracial nature of the crime. I am putting it in an
3 intraracial context to at least isolate the notion, the
4 existence or non existence of bias. The statute does not
5 refer to bias, so where is the bias on an intraracial
6 basis?

7 MR. ADELMAN: In order to prove the crime on an
8 intraracial bias under the construction by the Wisconsin
9 Supreme Court the state would have to be shown that there
10 was an intraracial bias. If it was just an assault
11 without a bias -- and an intraracial bias is a hard
12 hypothetical to imagine --

13 QUESTION: So in all the cases that you are
14 aware of the state actually had to prove that there was
15 bias, not simply that this individual was chosen, the
16 victim was chosen because of his or her race, for whatever
17 reason?

18 MR. ADELMAN: The Wisconsin Supreme Court said
19 that because of meant biased motive. This is a hate crime
20 statute. All of the applications of this statute have
21 been to cases involving bias, and that's an element of the
22 state's burden of proof.

23 QUESTION: Thank you, Mr. Adelman.

24 MR. ADELMAN: Thank you.

25 QUESTION: General Doyle, you have 2 minutes

1 remaining.

2 REBUTTAL ARGUMENT OF JAMES E. DOYLE

3 ON BEHALF OF THE PETITIONER

4 GEN. DOYLE: Thank you, Your Honor. With
5 respect to the questions about the Wisconsin Supreme Court
6 and whether they went beyond statements about whether this
7 just simply applies to bias and thought, I direct the
8 Court's attention to footnote 13 in the Appendix and the
9 petition for the writ at page 14, in which the court says
10 while the statute as-written may extend to situations
11 where the actor in fact is not biased, this does not save
12 the statute. So the Wisconsin Supreme Court at least to
13 this instance did read the words of the statute and did
14 recognize that the words of the statute extend to somebody
15 who is not in fact biased.

16 Further, with respect to several of the
17 questions, Justice Thomas' question at the end, let, I'd
18 like the record to be clear in this case that there was no
19 evidence put in at the trial court by the state other than
20 the facts of the case themselves and the words about go
21 get a white, are you all hyped up to get a white boy.
22 There was no evidence put in by the state about any
23 underlying bias on the part of Mr. Mitchell. To this day
24 the state does not know whether Mr. Mitchell harbors
25 biased thoughts or benign racial thoughts. I suspect they

1 are not good based on the crime itself, but there was no
2 evidence on that.

3 And finally I'd like to mention just briefly the
4 in whole or in part so that there's no confusion. That's
5 an amendment to the statute that occurred after this
6 particular case came up. The, Wisconsin generally defines
7 because of as a substantial factor test. Justice Bablitch
8 in his dissent indicated that it was a substantial factor
9 and a kind of a hybrid substantial factor but-for test.
10 And in fact the jury instruction that was not objected to
11 that is part of the record said that if, that the reason
12 for the selection of the victim, it said the reason for
13 the selection of the victim had to be on account of the
14 victim's race.

15 If there are not other questions --

16 CHIEF JUSTICE REHNQUIST: Thank you, General
17 Doyle.

18 The case is submitted.

19 (Whereupon, at 11:10 a.m., the case in the
20 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

WISCONSIN, PETITIONER V. TODD MITCHELL

CASE NO. 92-515

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)