Will U.S. Supreme Court abolish 'hate crime' laws?

On April 21, Wisconsin State Sen. Lynn Adelman will argue before the U.S. Supreme Court that "hate crime" laws such as Wisconsin's are unconstitutional, because they create a category of "thought crimes." The court will decide whether an additional penalty can be imposed on a person guilty of a crime if the crime were committed because of certain disfavored motives. The ruling could overturn "hate crime" laws enacted by 36 states. Anita Gallagher interviewed Senator Adelman on April 9.

EIR: The U.S. Supreme Court has ruled "hate crimes" unconstitutional in the case of *R.A.V. v. St. Paul* (1992), and the Ohio State Supreme Court has made a similar ruling on Ohio's statute. How is your case, *Wisconsin v. Todd Mitchell,* different from these cases? What does the Wisconsin statute actually say?

Adelman: The Ohio Supreme Court decision on the *Ohio v. Wyant* case (1992) held that the First Amendment invalidated the Ohio "hate crime" statute. The U.S. Supreme Court ruled against a St. Paul, Minnesota ordinance, which is basically what one would call a "cross-burning" ordinance. What the court held there was that even though the speech that was involved in the St. Paul ordinance was so-called "fighting words" speech—"fighting words" is a kind of speech which traditionally has been held to be *unprotected* by the First Amendment—in the St. Paul case, the U.S. Supreme Court held that even *unprotected* speech could not be subject to what the court calls "distinctions based on content and viewpoint." So, we think that that principle will be very important in terms of the U.S. Supreme Court's analysis of the Wisconsin law.

Basically, the Wisconsin law says that anybody who commits a crime because of one of the disfavored motives, which are race, religion, sexual orientation, ancestry, ethnic background, or disability, will receive an extra punishment, on top of the punishment they receive for the underlying crime. Under the Wisconsin law, they receive an extra punishment for the presence of one of the state-disapproved motives. Now, we think that the principle of *R.A.V.* will require a like result, and what that means is that in *R.A.V.*, the U.S. Supreme Court said that even punishable speech could not be subjected to distinctions based on *content* and *viewpoint*. In our case, what the state is doing is imposing content and viewpoint distinctions on thought; that is, on motive.

The state is saying that because the motive is linked to an executed crime, that allows the state legislature to get around the general prohibition on imposing punishment on certain speech or thought based on content and viewpoint. So, the state is arguing that because we are talking about motives or crimes, the First Amendment doesn't apply. However, we think that the state is clearly wrong.

The U.S. Supreme Court has already said that just because there is criminal conduct, it doesn't mean that the state can further punish the motive or the message of that conduct based on content and viewpoint. For example, there was criminal conduct in both the flag-burning case (*Texas v. Johnson*), and in the St. Paul case. You can punish the battery, or you can punish the robbery, or you can punish the conduct all you want, but you can't add on more punishment because the battery was committed because the defendant didn't like the government. For example, *Texas v. Johnson* would say that you could not impose an additional penalty on a defendant because he committed a crime because he was not patriotic. You can't impose an additional penalty based on the fact that the state doesn't like your idea. That's what it amounts to.

EIR: In your case, the defendant's sentence was doubled because of his motive?

Adelman: He could have had his sentence increased by three and one-half times. The way this law works is that after trial, the jury first reaches a verdict on whether the defendant committed the underlying crime; in this case, it was aggravated battery. Todd Mitchell got two years for the aggravated battery. Then the next question is, "Well, *why* did he do it?" This is really fairly unusual in criminal law; in fact, unprecedented, where the state goes at your motive, and the state looks into your brain and asks, "Why you did it?" So that's the second question. And the jury in this case decided that the defendant committed this crime because he didn't like white people. So then the judge gave him another two years, not for any *conduct*, because he had already been

punished for the conduct in the first jury verdict, but because he didn't like white people. That's why the "enhancer" part of this statute violates the First Amendment. We don't have any objection to him being sentenced for the underlying battery, and that was appropriate.

EIR: What will it mean for "hate crime" laws in the United States if the Supreme Court rules in your favor?
Adelman: It would certainly depend on the breadth of the opinion. Here, the state is saying, look, these kinds of crimes which are motivated by bias, or by certain views, create worse crimes. They create a condition of terror in the victimized community, and they create alarm, and there is an additional harm that arises out of these crimes. Now, that may be, and if that's true, then what the state should do is identify and punish that harm, by writing a statute that is addressed toward whatever effects the state asserts are caused by these kinds of things.

But that is not this statute. This statute doesn't say anything about extra harms. All it does, is punish the motives of the crimes. It just punishes the prejudice, and it does so in ways that are very peculiar; for example, even if the prejudice is only a minute percentage of the motive. In a lot of crimes, there is a mixed motive. Maybe somebody wants money, but, say, 1% of their motive is racism, and 99% is greed. Well, in that case, under this Wisconsin law, you are still subject to the "enhancer." Even if you have one, little, minute, single brain cell of unconscious racism, you can still get the "enhancer." Now, there is not going to be any kind of extra harm caused by that kind of situation.

So, when you really look at the Wisconsin statute, what you are compelled to conclude is, that even though the state *says* they are trying to get at these harms, they are really *not,* because there are a lot of ways they could write this statute to get at the harms which would be constitutional, but what they're really interested in here is condemning certain selected forms of belief, and that's why the statute is unconstitutional. For example, there are some biases which are not even touched by this statute, like a gender bias.

So that causes you to wonder, are they really interested in these harms, as they say they are, or are they just interested in picking out a bunch of prejudices that the state disapproves of, and saying, "Well, we don't like *these* prejudices, and so we are going to add more punishment."

EIR: Do the selected, prohibited biases cohere with somebody's "politically correct" agenda, such as the Anti-Defamation League's (ADL) "World of Difference" program?
Adelman: I don't know anything about that. What I know, is that the principle we're asserting is that the state is precluded by the First Amendment from selecting out certain opinions and saying "we're going to punish these opinions, or motives, or beliefs, more than other opinions." Under the First Amendment, the state has got to be neutral. That is, there are no "good ideas" or "bad ideas" as far as the government is concerned. The government has got to be epistemologically humble. That's what the First Amendment means. The government cannot be in the business of favoring some ideas and disfavoring others. Because, if you can do that, how do you decide which ideas are going to be favored, or disfavored? That decision is going to be made by whoever is in political office; whoever is *in power,* and that is exactly what the First Amendment is supposed to prevent.

There's another point. Aside from their constitutionality, I think these laws are fairly useless laws. It is sort of trying to get at a social problem on the cheap. It's easy to throw a criminal law at a problem and pretend you've done something. But the notion that we are going to get to be a more tolerant society by criminalizing certain biases would seem to defy common sense.

EIR: Some proponents of these laws say that motive has always been considered in punishing criminal acts. What is the difference between *motive* and *intent?*
Adelman: *Motive* can and should be permitted to be considered in all kinds of ways. For example, motive is often evidence of an intent; or it's evidence of an identity. But motive is *never* separately punished based on its content.

Now, *intent* is different than motive. Intent really has to do with someone's state of mind when they commit a given act. It has to do with the *what* of conduct. For example, I run into somebody with my car. If I did it because I was not paying attention, and I was just being negligent, then I am less culpable than if I did it on purpose. One is an accident, and one is an intended result. So, *intent* has to do with *what* the actor was trying to accomplish. It's a question of volition. And some *intents* are worse than others, e.g., if you are cold and calculated and commit a crime, that might be different than if you commit a crime in the heat of passion.

But neither of those have anything to do with motive. Motive doesn't have to do with the *what* of conduct, like intent does; it doesn't have any affect on the nature of the conduct. Motive is the *why,* what is your underlying belief system, or ideology, or opinion, which prompted you to commit this act in the first place. Criminal law traditionally can punish *intent,* but it is not interested in *motive,* and it cannot constitutionally punish it, and it certainly cannot punish motives relating to bias and belief. I think there's an argument whether it could ever punish motives like pecuniary gain, which are not close to the core of First Amendment protection, such as motives relating to racial, religious, or political themes.

EIR: The proponents of "hate crime" legislation argue that hate crimes are occurring with greater frequency in the United States. Is that true, and do statistics show that "hate crime" laws deter such incidents?
Adelman: As far as Wisconsin is concerned, the state as-

serts that, but the statistics that are available to us in Wisconsin, both from the Anti-Defamation League and the FBI, show that Wisconsin has hardly any "hate crimes"; what the FBI statistics show is that Wisconsin had a handful of incidents of graffiti and vandalism. As far as "hate crimes" are concerned, I think there have been fewer than a half-dozen prosecutions in six years.

EIR: Wasn't the constitutionality of restricting free speech to protect certain groups from terror and fear addressed by the Seventh Circuit Court of Appeals in the Skokie case in 1978? [Skokie, Illinois has a large number of Jewish concentration camp victims among its citizens.]

Adelman: The First Amendment law is that you can't justify prohibiting something based on its communicative impact. When the Nazis were going to march through Skokie, the ruling was that the Village of Skokie did not have authority to prohibit that march because of its concerns that this would cause alarm. The alarm, again, related to the *content* of the Nazi message, which certainly is abhorrent and intolerable to all of us, but nevertheless, the First Amendment prevents government from criminalizing the impact of the message. There really is a question, as to whether any state interest is served by punishing these bias crimes, apart from the communicative impact.

EIR: Hasn't the Wisconsin legislature already amended its "hate crime" law because of "vagueness" with respect to "mixed motive" cases?

Adelman: The Wisconsin legislature added the words "in whole or in part" because it wanted to make sure that somebody didn't defend themselves by saying, "I may have been a little bit bigoted, but really, I was greedy."

I think that that really makes this law look particularly bad, because the state is saying, "Look, we are going to punish a little bit of prejudice wherever we find it." It's inconceivable that a 1% racial motive is going to cause terror or special harm to anybody. So, by punishing that, too, the state is really saying, "Hey (wink, wink), it's not really the harm here that is our concern; we don't like certain prejudices and we want to criminalize them." That is the improper and unstated reason that is served by these laws; to select out certain disfavored views, to punish them. That's why the statute, in our opinion, is unconstitutional.

EIR: Do "hate crime" laws fit into the species of anti-discrimination laws, and would their unconstitutionality affect laws against discrimination?

Adelman: We think that that's kind of a scare tactic. The state doesn't really have such a good argument on the constitutionality, so they quickly move away from the "enhancer" law and say, "Well, court, if you find this law unconstitutional, then you are going to jeopardize all these other laws which we all agree are very important."

The fact is, discrimination laws are really very different. Let's take Title VII, which provides certain anti-discrimination provisions with respect to hiring. You can prove a Title VII claim based on a disparate impact. That means all you have to do is show certain patterns of behavior by the employer; you don't have to show the employer's *motive* at all. The point is, anti-discrimination laws are concerned with *effects;* and the "enhancer" law is concerned not only with *effects,* but with *beliefs*. The anti-discrimination laws seek to provide equal opportunity for people, and they are not concerned with bigotry.

Now, some Title VII violations *do* involve *motive,* but motive is used in a way very different from how it's used in the *enhancer*. The Supreme Court has a doctrine of *strict scrutiny,* and under strict scrutiny the state can impose *content* and *viewpoint* discrimination on certain ideas, but *only if it is necessary to accomplish some compelling state interest.* Now, in a Title VII case, you couldn't pass a law that said every employer had to hire everybody who applied for a job. Now, that would be content-neutral, but it would be irrational, because a lot of people might not be qualified. . . . So that's not really a legitimate alternative. So therefore, how does the state distinguish refusals to hire that are based on race, from legitimate refusals to hire, which are based on lack of experience? The only way they can do it is to implicate *motive*. Motive is used there only to define a standard of conduct which the state has a compelling state interest in identifying. But that's completely different from the "enhancer," because with the "enhancer" you don't need *motive* to distinguish illegal batteries from legal batteries; because all batteries are by definition illegal from the get-go. So, when you are talking about conduct that is already illegal, it is hardly necessary to make an additional *content* and *viewpoint* distinction. So that's why Title VII survives this *strict scrutiny* and the "enhancer" doesn't.

EIR: Will these laws cause a chilling of free speech in the United States if they remain in effect?

Adelman: It's a real problem, because the only way you can ever prove *motive* is through somebody's speech. I know of no "hate crime" conviction not based on somebody's speech. If you are trying to get at a person's ideas or beliefs, the only way you can prove those is generally by what the person said, and who he associated with. There's no saying that a state couldn't reach back—the speech doesn't have to be contemporaneous with the crime.

Let's say someone commits disorderly conduct, and the state wants to impose an "enhancer" penalty because he committed that crime for a racial reason, or because of religious animus. The state could go back 15 or 20 years and scrutinize everything this person had ever read, or his speeches, or writings, to determine whether or not there was any bias, and whether the state could connect that bias to the disorderly conduct. So it really does allow the state substantial latitude

to look at a person's thoughts and ideas, and I think that does chill people.

EIR: Your brief says there would never have been any anti-discrimination laws if some people could not have held the disfavored opinion that segregation was wrong?
Adelman: That's true. We think these "hate crime" laws are really harmful to minorities, because what really helps minorities is the First Amendment. The First Amendment protects unpopular thought and views, and who is going to be most likely to have thoughts and views that are not popular?—minority groups, who may be interested in changing the status quo. In fact, if you look at a lot of the great First Amendment cases, many of them involved minorities, the National Association for the Advancement of Colored People [NAACP] in the '60s. Minorities are helped by a broad, full, rich reading of the First Amendment, not by a cramped reading. If this law is upheld, it's a big setback for minorities.

EIR: Have minorities been disproportionately prosecuted under the "hate crime" laws? Thirty percent of those prosecuted are minorities, while blacks make up only 12% of the U.S. population.
Adelman: That's what happens when you start punishing beliefs. If you want to protect vulnerable victims, you ought to write a statute that addresses that. But if you start talking about beliefs, whose beliefs will be punished? It's the people who are out of power.

EIR: These laws have not benefitted minorities, yet some minority organizations have filed "friend of the court" briefs in their favor. Who are the *amici* on both sides?
Adelman: On our side, it's the Criminal Defense Bar, the Ohio chapter of the American Civil Liberties Union, and some groups that are very interested in individual freedoms. On the other side, it's mostly groups that are interested in combatting various prejudices: Ethnic groups, the ADL, the ACLU national office, the NAACP Legal Defense Fund [distinct from the NAACP]. And the U.S. Solicitor General will argue to uphold these laws.

EIR: You've taken a case very unpopular with certain organizations. Have you been threatened or ostracized?
Adelman: Oh, no. The truth is, I think the average American, to the extent that these laws are explained, would think these laws are pretty dumb. There are certain groups who maybe think these laws do something, but I don't think that my side of this is particularly unpopular, except maybe in certain circles.

Here are laws that are supposed to be used to protect minorities. Well, who is the defendant, who is Todd Mitchell? He's a young, black male from Kenosha, Wisconsin—a minority.

Pike case: Masonic judge asked to recuse himself

The two political leaders who will go on trial April 19 for "statue-climbing" in Washington, D.C. have filed a motion in the U.S. District Court for the District of Columbia asking Judge Royce Lamberth to recuse himself in the case "on the basis of potential or actual bias, or the appearance of such partiality."

Defendants Anton Chaitkin and Rev. James Bevel were arrested last December at a rally to have the statue of Albert Pike, a Confederate general and Ku Klux Klan founder, removed from Judiciary Square. Chaitkin is a historian and author, and Bevel is a Baptist minister who was a former close associate of Dr. Martin Luther King and ran for the U.S. vice-presidency in 1992 as the running-mate of Lyndon LaRouche.

The recusal motion cites three principal grounds for Lamberth's recusal—all drawing upon statements the judge submitted to the Senate Judiciary Committee in 1987, when he was nominated to the court:

First, Lamberth is a member of the Masonic Order. His membership began with his induction into the Albert Pike Chapter, Order of De Molay in San Antonio, Texas, a youth organization of the Scottish Rite of Freemasonry. As the motion says, "There has been active opposition to the campaign to pull down the Pike statue by the Supreme Council, Ancient and Accepted Scottish Rite of Freemasonry, Southern Jurisdiction of the U.S.A."—the organization of which Pike was Sovereign Grand Commander for several decades!

Second, Lamberth has officially served as an attorney for the National Park Service and Park Service Police, in attempts to stop demonstrators from exerting their First Amendment rights. In their recusal motion, Bevel and Chaitkin point out that it was the same National Park Service which selectively singled out the two defendants for arrest and for an improper purpose.

Third, Lamberth played a critical role in the coverup of the My Lai Massacre in Vietnam and other war crimes. From 1969 to 1974, Lamberth served as a member of the U.S. Army defending soldiers in Vietnam from charges of war crimes, and then handled all litigation objecting to Gen. William Westmoreland's administrative review of the My Lai affair. This makes it unlikely that Lamberth could be unbiased toward Bevel and Chaitkin. Bevel was a leading figure in the Mobilization to End the War in Vietnam, and Chaitkin was also an outspoken opponent of the war. Chaitkin and Bevel are arguing the case *pro se*.