Comment, Constitutional Law: Penalty Enhancements for Bigoted Beliefs

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Police arrested respondent and charged him with aggravated battery for the beating of a young white boy. [FN1] Respondent had met with a group of black youths shortly after the group watched the movie Mississippi Burning. [FN2] Respondent asked the group if they felt “hyped up to move on some white people.” [FN3] When respondent spotted the victim across the street, he directed the youths to go after the victim. [FN4] The group proceeded to beat the boy severely. [FN5]

At trial, a jury convicted respondent of aggravated battery. [FN6] Under a Wisconsin statute, [FN7] the judge increased respondent's sentence because he *744 intentionally selected the victim based on the victim's race. [FN8] After the Wisconsin Court of Appeals affirmed, [FN9] the Wisconsin Supreme Court reversed finding that the penalty enhancement statute punished thought and, therefore, violated the First Amendment. [FN10] On certiorari, [FN11] the United States Supreme Court reversed and HELD, a trial judge may enhance a defendant's sentence based solely on the defendant's racial motive without violating the First Amendment. [FN12]

The United States Supreme Court had never before confronted the constitutionality of a penalty-enhancing statute such as Wisconsin's. [FN13] The nearest it had come was defining under what circumstances a trial judge could consider evidence of motive when deciding whether to impose the death penalty. [FN14] In Barclay v. Florida, [FN15] for example, the Supreme Court found that a trial judge, in deciding whether to impose the death penalty, could constitutionally consider racial hatred as a factor bearing on other statutory aggravating factors. [FN16] Defendants in Barclay were members of the Black Liberation Army (BLA), a group whose goals were to start a race war and kill white people. [FN17] Defendants picked up a white hitchhiker and drove him to an isolated area against his will. [FN18] Defendant Barclay stabbed the hitchhiker several times with a knife. [FN19] Defendant Dougan then shot him twice, killing him instantly. [FN20] Defendants placed a note on the victim's body proclaiming that the BLA was starting a black revolution. [FN21]

*745 The jury returned a guilty verdict against defendant Barclay for first-degree murder. [FN22] At the sentencing hearing, the jury recommended life imprisonment. [FN23] The trial judge, however, disregarded the recommendation. [FN24] The judge found that several aggravating circumstances enumerated in the death penalty statute [FN25] were applicable to the case and imposed the death penalty. [FN26] The judge likened the racial motive for the murder to his own experiences with Nazi concentration camps. [FN27] Defendant argued on appeal to the United States Supreme Court that the Court should vacate the sentence because the trial judge im-
properly considered the racial motive of the murder as an aggravating circumstance. [FN28]

In a plurality opinion, the Court upheld the death sentence [FN29] stating that a judge may take the elements of racial hatred into account if relevant to the statutory aggravating factors. [FN30] The plurality stated that a reviewing court must defer to the sentencing judge's discretion unless it is so arbitrary as to violate the Constitution. [FN31] The plurality concluded that the trial judge's comparison of defendant's racial motive with Nazi concentration camps was a permissible way of weighing the statutory aggravating circumstance of "especially heinous, atrocious, or cruel" murder because it was neither arbitrary nor irrational. [FN32]

*746 Nine years later in Dawson v. Delaware, [FN33] the United States Supreme Court faced the issue of whether the trial court violated petitioner's First Amendment rights when, during the sentencing phase, it allowed the prosecution to introduce evidence of petitioner's membership in the Aryan Brotherhood even though the evidence had no relevance to issues in the proceeding. [FN34] In Dawson, petitioner escaped from a correctional center and brutally murdered a woman preparing for work in the early morning hours. [FN35] At trial, a jury convicted petitioner of first-degree murder. [FN36] The court then conducted a penalty hearing before the jury. [FN37] As an element bearing on petitioner's character, the prosecution offered evidence that petitioner was a member of the Aryan Brotherhood. [FN38] Despite agreeing to a stipulation [FN39] regarding the Aryan Brotherhood evidence, petitioner objected to its introduction on the grounds that it was irrelevant, inflammatory, and violated his constitutional rights. [FN40] The trial judge overruled the objection and allowed the evidence. [FN41] The jury recommended a death sentence on the basis of three aggravating circumstances, [FN42] and the trial court imposed the death penalty. [FN43]

The United States Supreme Court reversed concluding that the judge should not have admitted evidence of petitioner's membership in the Aryan Brotherhood. [FN44] The Court noted that there was no constitutional per se *747 barrier to considering evidence of a defendant's beliefs during sentencing just because his beliefs are protected by the First Amendment. [FN45] However, in Dawson, unlike in Barclay, [FN46] the Court found that the evidence was irrelevant to the sentencing phase because it was not tied in any way to the murder of petitioner's victim. [FN47] The Court acknowledged that in some cases such evidence might be relevant character evidence or might be relevant to prove other aggravating circumstances, [FN48] but the Court held that the state cannot use evidence of petitioner's "abstract beliefs" at a sentencing hearing when those beliefs are not relevant to the issue before the court. [FN49]

While the Supreme Court had not confronted a penalty enhancer prior to the instant case, the state courts have ruled on their constitutionality. Shortly after the Dawson decision, the Ohio Supreme Court reviewed the constitutionality of Ohio's "ethnic intimidation" statute [FN50] in State v. Wyant. [FN51] In Wyant, after a black couple complained about racial slurs and threats coming from appellant's adjoining campsite, appellant was indicted and convicted of ethnic intimidation predicated on aggravated menacing. [FN52] The statute provided that if the accused committed one of the enumerated offenses "by reason of the race, color, religion, or national origin of another person" his offense was raised to the next higher degree. [FN53]

On appeal, instead of focusing on Barclay and Dawson, the Ohio Supreme Court focused on the penalty enhancer's treatment of motive. [FN54] *748 The court distinguished the use of motive in the penalty enhancer from the use of motive in antidiscrimination statutes. [FN55] The court found that antidiscrimination laws target the act of discrimination, not the motives or thoughts of the actor. [FN56] In contrast, the Ohio penalty enhancer punishes the act as the underlying offense and separately punishes the actor's motive by enhancing the penalty. [FN57] As a result, the court concluded that the penalty enhancement focuses entirely on the actor's motives or
thoughts. Then, relying on First Amendment jurisprudence prohibiting the punishment of thoughts, the court invalidated the Ohio statute.

In the instant case, the United States Supreme Court directly confronted for the first time a penalty-enhancing statute similar to the one in Wyant. Wisconsin's penalty enhancer provides for an increased penalty if a person commits the underlying offense “because of” the race of the victim. The Court held that a judge may consider a defendant's racial motive in determining what sentence to impose even where that motive is the only aggravating factor invoking the enhanced penalty. In reaching its conclusion, the Court relied on Barclay and Dawson. While neither of these cases involved a penalty-enhancing statute, the Court dismissed this distinction. Both cases involved the death penalty which the Court viewed simply as the severest form of penalty enhancement. Thus, the Court reasoned, under Barclay the judge may take into account the defendant's racial motive for the crime, and under Dawson the judge may consider such racial motives if relevant to the proceeding. Putting these two concepts together, the Court decided that a judge may consider racial motives in the sentencing phase anytime they are relevant to the proceeding.

As to the role of motive in the Wisconsin statute, the instant Court pointed to the “because of” language in both the penalty enhancer and Title VII employment discrimination laws and concluded that motive plays the same role in both. Earlier Supreme Court decisions held that Title VII's consideration of motive did not violate an employer's First Amendment rights. The instant Court reasoned that if the consideration of motive in antidiscrimination laws is constitutional and the Wisconsin penalty enhancer uses the same “because of” language, the Wisconsin penalty enhancer's consideration of motive is also constitutional.

In reaching its decision, the instant Court distorted the role of motive in punishing a criminal defendant. It first misread Barclay and Dawson to say that racial motive can be the sole factor in a penalty enhancer. Then, to dispel the argument that the penalty enhancer punishes bigoted thoughts, the Court ignored the Wyant analysis finding that the Wisconsin penalty enhancer treats motive the same way as do antidiscrimination laws.

The Supreme Court, in Dawson, maintained that there was no per se constitutional barrier to admitting evidence of a defendant's beliefs at sentencing. However, the Court did not hold that a judge may use racial motive alone to increase a defendant's sentence. In Barclay, the Supreme Court allowed the sentencing judge to take account of defendant's membership in the Black Liberation Army and his desire to start a race war. The instant Court correctly acknowledged that the racial hatred in Barclay was “relevant to several aggravating factors.” But, the instant Court misconstrued the holding to mean that racial hatred can be an aggravating factor itself. The racial animus in Barclay was not a statutory aggravating factor. In reality, the judge considered the animus as an element which was relevant to weighing other statutory aggravating factors. There is no suggestion in the Barclay opinion that racial motive alone could be a statutory aggravating factor in sentencing a defendant.

Likewise, the instant Court used Dawson for more than it actually says. In Dawson, the Court held that defendant's membership in the Aryan Brotherhood was “not relevant to help prove an aggravating circumstance.” The instant Court interpreted this to mean that a sentencing judge may use racial motive in the sentencing phase any time that evidence is relevant. A correct reading of Dawson reveals that there is no problem with using evidence of racial animus when relevant to other aggravating circumstances. But Dawson does not say that such evidence is permissible as an aggravating circumstance by itself.
By misreading Barclay and Dawson, the instant Court has opened the doors to a dangerous expansion of proper sentencing factors. As a judge may consider a wide range of relevant evidence in making a sentencing determination, this does not mean a legislature may take any factor a judge considers and make it the subject of a penalty enhancer. Barclay and Dawson simply authorize a sentencing judge to consider a defendant's motive only when relevant to other statutory aggravating factors.

Furthermore, even though the instant Court acknowledged that a judge may not take defendant's abstract beliefs into account, it upheld a statute that can do that very thing. When an actor commits one of the underlying crimes listed in the penalty enhancer statute, a prosecutor might use any abstract beliefs the actor expressed at any time as evidence that the crime was motivated by those beliefs. Under the statute, the actor's punishment could then be enhanced based on abstract beliefs held or expressed at some other time. Thus, by incorrectly applying Barclay and Dawson, the instant case presents a serious First Amendment problem because this application essentially punishes thought. While the First Amendment does not expressly prohibit the punishment of thought, the Supreme Court has historically recognized freedom of thought as an underlying basis for freedom of speech.

In addition to the instant Court's misreading of Barclay and Dawson, it misperceived the role of motive in the Wisconsin statute by likening it to antidiscrimination laws, specifically Title VII. However, Title VII is distinct for several reasons. The most obvious is that the Wisconsin penalty enhancer is a criminal statute whereas Title VII is a civil statute. In addition, as noted by the Wyant court, Title VII focuses on the act of discrimination and not the motives of the actor. The Wyant court pointed to the Supreme Court's finding that the congressional purpose for Title VII was to remedy the consequences of employment discrimination not the motivations behind them. Moreover, Title VII does not punish an individual more severely for having a bigoted motive when he commits a discriminatory act. Indeed, the punishment is the same whether an employee proceeds under a disparate impact or a disparate treatment theory.

In contrast, under the Wisconsin statute, the focus is on the bigoted thoughts of the actor rather than on any discriminatory act. As explained in Wyant, a defendant's act has already been punished as the underlying offense. Unlike Title VII, if no motive is found under the Wisconsin penalty enhancer, the law cannot be applied. Because the state has punished the conduct through the underlying criminal offense, the additional punishment provided by the penalty enhancer operates solely to punish the actor's bigoted beliefs and not his actions. Thus, as the Wyant court concluded, the penalty enhancer's punishment of a defendant's beliefs violates the First Amendment.

It is important to note that the instant Court only discussed the use of motive in the sentencing phase of criminal cases and in civil antidiscrimination statutes. As a result, it has not sanctioned the use of motive as an element of the crime itself. However, by reading Barclay and Dawson to allow racial motive to be the sole factor in enhancing a sentence, the Court has potentially limited the First Amendment's protection of freedom of thought. This limitation is fostered by the instant Court's misperception that motive plays the same role in the Wisconsin penalty enhancer as it does in antidiscrimination laws. If racial motive, and thus bigoted thought, can be more severely punished under criminal law, there is nothing to stop the legislature from increasing sentences “because of” the actor's opposition to some government action, abortion, or any other moral or political viewpoint.

There is no doubt that the Wisconsin legislature's reasons for enacting the penalty enhancer were admirable given the increasing number of bias-related incidents this country is experiencing. However, as Justice
Black noted, “The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of ‘witches.’ ” [FN112] Even well-intentioned legislation must yield to the protections afforded by the Constitution. [FN113]

[FNa]. Dedicated to my parents for their support. Special thanks to Dan Katz and Carla Ippolito for their guidance.


[FN2]. Id.

[FN3]. Id.

[FN4]. Id. at 2196-97.

[FN5]. Id. at 2197.

[FN6]. Id.

[FN7]. WIS.STAT.ANN. § 939.645 (West Supp.1993) (providing both pre- and post-amendment versions of the Wisconsin Statute). Wisconsin’s penalty enhancer at the time of Mitchell’s trial, prior to the 1992 amendment, provided:

(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 ... because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person....

(2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

Id.

[FN8]. Mitchell, 113 S.Ct. at 2197; WIS.STAT.ANN. § 939.645(1)(b) (West Supp.1993). The court sentenced him to imprisonment for four years. Mitchell, 113 S.Ct. at 2197. Because the jury convicted Mitchell of the felony of aggravated battery, the judge applied § 939.645(2)(c) of the Wisconsin statute and increased his sen-
tence to seven years. Id.


[FN11] Mitchell, 113 S.Ct. at 2198. The Court granted certiorari because of the importance of the question and a conflict of authority among state courts on the constitutionality of penalty-enhancement statutes. Id.

[FN12] See id. at 2202. The decision was unanimous. Id. at 2196.


[FN16] Id. at 949 (plurality opinion); id. at 969-71 (Stevens, J., concurring).

[FN17] Id. at 942 (plurality opinion).

[FN18] Id. (plurality opinion).

[FN19] Id. (plurality opinion).

[FN20] Id. (plurality opinion).

[FN21] Id. at 943 (plurality opinion). Later, defendants made tape recordings conveying the same message and mailed them to the mother of the victim and local broadcast stations. Id. (plurality opinion).

[FN22] Id. at 944 (plurality opinion).

[FN23] Id. (plurality opinion). However, the jury recommended the death sentence for defendant Dougan. Id. (plurality opinion).

[FN24] Id. (plurality opinion).


[FN26] Barclay, 463 U.S. at 944 (plurality opinion). The trial judge found four of the statutory aggravating factors applicable to Barclay's case: (1) Barclay knowingly created a great risk of death to many persons; (2) the murder was committed during a kidnapping; (3) Barclay attempted to disrupt law enforcement and governmental functions; and (4) the murder was especially heinous, atrocious, or cruel. Id. (plurality opinion). Barclay unsuccessfully challenged each of these findings on appeal. Id. at 947 (plurality opinion). Florida law provides that mitigating evidence be allowed to offset any statutory aggravating circumstance. Id. at 953 (plurality opinion).
However, in this case, the trial judge found no mitigating circumstances. Id. at 944 (plurality opinion).

[FN27] Id. at 948-49 (plurality opinion). On automatic appeal, the Florida Supreme Court affirmed, but later vacated and remanded the case to give defendant an opportunity to rebut the information in the presentence report. Id. at 945 (plurality opinion). The case was remanded because of a United States Supreme Court decision holding that a defendant must have the opportunity to deny the information that led to his death sentence. Id. (plurality opinion); Gardner v. Florida, 430 U.S. 349, 362 (1977). On remand, the trial judge reaffirmed his earlier finding and the Florida Supreme Court again affirmed. Barclay, 463 U.S. at 945-46 (plurality opinion).

[FN28] Barclay, 463 U.S. at 948-49 (plurality opinion).

[FN29] Id. at 958 (plurality opinion).

[FN30] Id. at 949 (plurality opinion).

[FN31] Id. at 950-51 (plurality opinion).

[FN32] Id. at 949 (plurality opinion). In a dissenting opinion, Justice Marshall found the trial judge's consideration of nonstatutory aggravating factors contrary to constitutional principles requiring fair and reasonable consistency in sentencing. Id. at 986 (Marshall, J., dissenting). Marshall also pointed out that Florida statutes and case law limited the aggravating circumstances to those listed in the statute. Id. at 985 (Marshall, J., dissenting).


[FN34] See id. at 1095-99. The court also found that the defendant's Fourteenth Amendment rights were violated but it explicitly addressed only the First Amendment issues. Id. at 1095.

[FN35] Id. at 1095. The defendant stole a car and burglarized a house before proceeding to the house where he committed the murder. Id.

[FN36] Id. The jury also found petitioner guilty of various other crimes including possession of a deadly weapon while committing a felony. Id.

[FN37] Id.

[FN38] See id. at 1096.

[FN39] Id. The stipulation provided, “The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.” Id. (alteration in original).

[FN40] Id.

[FN41] Id. The trial court also accepted evidence of petitioner's criminal record. Id. Petitioner was permitted to present mitigating evidence of good character based on family members's testimony and on the fact that he earned good time credits during a prior prison sentence. Id.

[FN42] Id. The aggravating circumstances were that (1) an escaped prisoner committed the murder, (2) the murder was committed during a burglary, and (3) petitioner committed the murder for monetary gain. Id. Each
of the aggravating circumstances alone made petitioner eligible for the death penalty. Id. The jury concluded that the aggravating evidence outweighed petitioner's mitigating evidence. Id.

[FN43] Id.

[FN44] Id. at 1096-97.

[FN45] Id. at 1097.

[FN46] See supra text accompanying notes 30-32.

[FN47] Dawson, 112 S.Ct. at 1097-98. The parties stipulated that the Aryan Brotherhood was a “white racist prison gang” that originated in California and that gangs using the same name existed in many state prisons, including Delaware. Id. at 1096. Thus, the stipulation was too narrow to be relevant to petitioner's membership in the Delaware chapter. Id. at 1097-98. Because the stipulation referred to the California chapter as a “white racist prison gang,” the jury might characterize the Delaware chapter the same way, despite the absence of any proof of the Delaware chapter's beliefs. Id. at 1098. A further inference by the jury might impermissibly attach those beliefs to petitioner. Id.

[FN48] Id. at 1098. Admitting evidence of petitioner's membership invited the jury to infer that the “abstract beliefs” of the Delaware chapter of the organization constituted part of petitioner's character, despite no proof that the Aryan Brotherhood committed any unlawful acts. Id. The Court said it seemed as though the prosecutor employed the Aryan Brotherhood evidence simply because the jury would find this association “morally reprehensible.” Id.

[FN49] Id. at 1099.


[FN52] Id. The court of appeals affirmed appellant's conviction. Id.

[FN53] OHIO REV.CODE ANN. § 2927.12 (Anderson 1993). The enumerated offenses included aggravated menacing, menacing, criminal damaging or endangering, criminal mischief, and telephone harassment. Wyant, 597 N.E.2d at 452-53 & nn. 1-5. Each of these offenses is independently punishable under other Ohio laws. Id. at 453.

[FN54] Wyant, 597 N.E.2d at 453. The court and commentators have noted that motive is not relevant to substantive criminal law. Id.; WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.6, at 227 (2d ed. 1986). The court said “intent” refers to the actor's will or state of mind at the time he acts. Wyant, 597 N.E.2d at 454. “Motive,” on the other hand, is the reason an individual acts. Id. “Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.” BLACK'S LAW DICTIONARY 810 (6th ed. 1990). An actor may have the intent to commit a crime with a number of different motives. See Wyant, 597 N.E.2d at 454.

A common definition of burglary provides an illustration of the distinction between intent and motive. The Model Penal Code defines burglary as entering a building or occupied structure with the purpose to commit a
crime inside. MODEL PENAL CODE § 221.1(1) (1985). Under this definition, the act of entering the building is being punished if the intent or purpose is to commit a crime inside the structure. See Wyant, 597 N.E.2d at 455. The actor's motive for committing the crime is irrelevant. See LAFAVE & SCOTT, supra, § 3.6, at 227. While his intent may be to commit a theft inside, his motive may be to pay bills, to give to charity or to harass the property owner. Wyant, 597 N.E.2d at 455.

In Wyant, appellant's actions and intent were already punishable under the separate offense of aggravated menacing. See id. at 452 & n. 1, 459. Because the offense of ethnic intimidation required no additional conduct or intent beyond that required to convict appellant of aggravated menacing, the court concluded that the Ohio statute punished thoughts and motives rather than criminal acts or intent. Id. at 459.

For a contrary view, see State v. Plowman, 838 P.2d 558 (Or.1992), cert. denied, 113 S.Ct. 2967 (1993). Plowman was decided one day after Wyant and upheld the constitutionality of Oregon's ethnic intimidation statute. Id. at 565. Oregon's statute provides in relevant part: “Two or more persons acting together commit the crime of intimidation in the first degree, if the persons: (a)(A) Intentionally, knowingly, or recklessly cause physical injury to another because of their perception of that person's race, color, religion, national origin or sexual orientation....” OR.REV.STAT. § 166.165(1) (1991). The Oregon court reasoned that the statute punishes the commission of an act, not the actor's beliefs. Plowman, 838 P.2d at 563. The court said the law proscribes the forbidden effect of two or more persons jointly causing physical harm to someone based on their perception of the victim as a member of a particular group. Id. The Plowman court said the legislature was entitled to determine that the harm is greater when two or more persons act together and that assaulting a victim because he belongs to a particular group creates a harm distinct from the assault alone. Id. at 563-64.


[FN56]. Id.

[FN57]. Id. at 457.

[FN58]. Id. at 459.

[FN59]. See id. at 456-58 (discussing specific cases which outline the constitutional objection to punishment of thought); infra notes 93-94 and accompanying text.

[FN60]. Wyant, 597 N.E.2d at 459.

[FN61]. Mitchell, 113 S.Ct. at 2196.


[FN63]. See Mitchell, 113 S.Ct. at 2200.
[FN68]. See id.

[FN69]. Id. Title VII of the Civil Rights Act of 1964 provides for civil penalties if an employer has been discriminating against an employee “because of” the employee’s race or color. 42 U.S.C. § 2000e-2(a)(1) (1988).


[FN71]. See Mitchell, 113 S.Ct. at 2200.

[FN72]. See Hearings, supra note 13, at 65 (statement of Susan Gellman).

[FN73]. Mitchell, 113 S.Ct. at 2200. While the criminal law traditionally may punish criminal intent, the First Amendment prevents the government from punishing motive because the net result would be to punish the thoughts of the actor, not his actions. See Susan Gellman, Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws, 39 UCLA L.REV. 333, 363-64 (1991).

[FN74]. Dawson, 112 S.Ct. at 1097.

[FN75]. See id.

[FN76]. Barclay, 463 U.S. at 949 (plurality opinion).

[FN77]. Mitchell, 113 S.Ct. at 2200.

[FN78]. See Hearings, supra note 13, at 65 (statement of Susan Gellman).

[FN79]. See Barclay, 463 U.S. at 949 (plurality opinion).

[FN80]. Id.; see supra text accompanying note 30.

[FN81]. See Barclay, 463 U.S. at 948-58 (plurality opinion). In fact, under the Florida law in effect at the time of this case, the statutory aggravating circumstances for the death penalty were exclusive. Id. at 985 (Marshall, J., dissenting). Thus, a judge could not use nonstatutory aggravating circumstances to sentence a defendant to death. Id. at 985-86 (Marshall, J., dissenting). Barclay was already eligible for the death penalty because of the existence of other statutory aggravating circumstances. Id. at 944 (plurality opinion). Thus, the racial motive alone did not raise the level of the punishment. See id. (plurality opinion).

[FN82]. Dawson, 112 S.Ct. at 1098 (emphasis added).

[FN83]. See Mitchell, 113 S.Ct. at 2200.

[FN84]. See Dawson, 112 S.Ct. at 1098.

[FN85]. See id.

[FN86]. See Gellman, supra note 73, at 378 n. 199 (providing examples of common sentencing factors).

[FN87]. See Dawson, 112 S.Ct. at 1097.
See Gellman, supra note 73, at 378 n. 199. For instance, while a judge may be able to consider a defendant's religious background as character evidence of how remorseful he might be, the legislature could not constitutionally decide that being an atheist subjects the defendant to an enhanced penalty. See Hearings, supra note 13, at 65 (statement of Susan Gellman).

For instance, while a judge may be able to consider a defendant's religious background as character evidence of how remorseful he might be, the legislature could not constitutionally decide that being an atheist subjects the defendant to an enhanced penalty. See Hearings, supra note 13, at 65 (statement of Susan Gellman).

See supra notes 30-32, 48-49 and accompanying text.

Mitchell, 113 S.Ct. at 2200.

See Gellman, supra note 73, at 360 (discussing possible effects of such a statute).

Id.

As Professor Gellman notes:

In addition to any words that a person may speak during, just prior to, or in association with the commission of one of the underlying offenses, all of his or her remarks upon earlier occasions, any books ever read, speakers ever listened to, or associations ever held could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense.

Id.

U.S. CONST. amend. I. The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Wyant, 597 N.E.2d at 456; see also, e.g., Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977) (“[A]n individual should be free to believe as he will, and ... in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state.”).

Mitchell, 113 S.Ct. at 2200.

Wyant, 597 N.E.2d at 456; Gellman, supra note 73, at 367-68.


See id. Under antidiscrimination laws, there are two ways to prove a violation. Id. The first is a disparate impact theory in which a finding of discriminatory motive is not necessary. Id. The second is a disparate treatment theory which requires a showing that an employer discriminated “because of” his employee's status. Id. However, under the disparate treatment theory, the object of the punishment is the treatment of the victim, not the biased thoughts of the actor. Id.

Wyant, 597 N.E.2d at 453. One view maintains that adding the motive element to the underlying offense creates an entirely new offense. See Gellman, supra note 73, at 365 n. 151. However, Professor Gellman
believes this approach would run into constitutional vagueness problems. Id.


[FN105]. See Wyant, 597 N.E.2d at 457.

[FN106]. See supra notes 58-60, 95-96 and accompanying text.

[FN107]. See Mitchell, 113 S.Ct. at 2200.

[FN108]. See supra notes 93-96 and accompanying text.

[FN109]. See supra notes 97-106 and accompanying text.

[FN110]. Wyant, 597 N.E.2d at 457; Hearings, supra note 13, at 32 (statement of Susan Gellman). Professor Gellman, in a prepared statement also stated: “Bigotry and hatred surely do cause fear, sorrow, and alarm when they are expressed through criminal acts. However, bigotry and hatred also cause fear, sorrow, and alarm when they are expressed through books, speeches, and rallies.” Id.


[FN112]. Wyant, 597 N.E.2d at 458 (quoting Beauharnais v. Illinois, 343 U.S. 250, 274 (1952) (Black, J., dissenting)).

[FN113]. See Mitchell, 485 N.W.2d at 817.

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