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First Amendment Jurisprudence and the Local Law Enforcement Hate Crimes Prevention Act of 2005

The Rule of Evidence (the Rule) delineated in the Local Law Enforcement Hate Crimes Prevention Act of 2005 (the Act). H.R. 2662, 109th Cong. (2005) does not restate, expand, or limit existing evidence and First Amendment law. The Rule permits the introduction of relevant character evidence within the confines of the Federal Rules of Evidence (FRE). The introduction of character evidence does not contravene the First Amendment as the drafters of the Rule limited the introduction of such evidence to cases where the defendant's conduct is being punished, not her speech. In addition, such evidence can only be introduced if it is specific evidence of a defendant's biases or it is being used to establish the defendant's motive.

Facts

Representative John Conyers Jr. introduced the Act in the House of Representatives on May 26, 2005. The Act authorizes the Attorney General to provide technical, forensic, prosecutorial, or other assistance in the criminal investigation and prosecution of a hate crime. *Id.* In addition, the Attorney General may award grants to assist local law enforcement officials investigating or prosecuting a hate crime if a local or state government will be forced to expend extraordinary resources in investigating or prosecuting the hate crime. *Id.* The Act makes it a crime to willfully cause bodily injury to any person because of the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the person. *Id.* An individual who violates the Act can be imprisoned for up to 10 years and fined for the offense. *Id.* Moreover, the perpetrator may be imprisoned for life if the victim dies or if the offense includes any of the following: an attempt to kill, kidnapping, an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse. *Id.* Last, the Act establishes the Rule of Evidence for the prosecution of offenses under the Act. The Rule prohibits the introduction of substantive evidence of the defendant's expression or associations, unless the evidence specifically relates to the offense or is used to impeach a witness. *Id.*

Discussion

Drafters of hate crimes legislation have to balance competing interests: the interest of the government in punishing hate crimes and the rights of the defendant. The Act strikes the appropriate balance. The Act allows the government to punish hate crimes more severely because of the distinct emotional harm they cause their victims, the community unrest they incite, and the

likelihood that they will provoke retaliatory crimes. *See Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993) (upholding a hate crimes punishment enhancement statute). However, the Act also protects a defendant's rights by only permitting the introduction of evidence within the confines of the FRE and the First Amendment. Ultimately, a defendant's First Amendment freedoms are constrained to a limited and permissible extent because the Act is aimed at conduct and the only admissible constitutionally protected speech is specific, relevant speech.

I. The Rule Does Not Alter Evidence Jurisprudence

The drafters of the Act appear to have limited the introduction of expression and association evidence to comport with existing Evidence law. The Rule permits the introduction of evidence of the defendant's expressions or associations in two situations: (1) if the evidence specifically relates to the offense or (2) if the evidence is used to impeach a witness. H.R. 2662, 109th Cong. (2005). Both of these uses are within the parameters of the FRE. The FRE permit the introduction of character evidence so long as the evidence is not solely used to show that the person on trial possesses a particular character trait and that she acted in conformity with that trait. FED. R. EVID. 404(a). In addition, the FRE permit the introduction of evidence of a witness's character. *See* FED. R. EVID. 404, 607, 608, 609.

A. The Rule Permits the Admission of Expression or Association Character Evidence Within the Confines of FRE Rule 404

The FRE limit the introduction of character evidence solely used to prove that the defendant's character indicates that she has a propensity to commit crimes. FED. R. EVID. 404(a). This type of character evidence is unfairly prejudicial to the defendant because it leads the jury to conclude that if the defendant possesses bad character traits, she must have acted in conformity with those traits. *Id.* If such evidence were admissible, a jury could conclude that a defendant is guilty merely because character evidence indicating that she is the type of person who would commit the crime was presented. *Id.* Moreover, admitting this type of evidence would be unfair to a defendant because a jury could convict the defendant simply because it found her beliefs morally reprehensible. *Barclay v. Florida*, 463 U.S. 939, 949 (1983) (plurality opinion).

The FRE do, however, permit the introduction of character evidence in four instances. First, character evidence may be introduced if the defendant's character is at issue in a trial. For example, evidence of a defendant's truthfulness can be admitted in a trial for libel. Second, the defendant can offer evidence of pertinent character traits of the defendant or the victim, and then the prosecution can introduce evidence to rebut that evidence. FED. R. EVID. 404(a)(1). But, the accused must "open the door" for character evidence, meaning that, the prosecution cannot offer character evidence until the accused introduces it. Third, the prosecution may introduce evidence of the victim's peacefulness in a homicide prosecution, but only if the defendant has offered evidence that the victim was the first aggressor. FED. R. EVID. 404(a)(2). Fourth, character evidence is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. FED. R. EVID. 404(b).

In some respects, the Rule limits the introduction of character evidence to the same extent that the FRE limit the introduction of character evidence. For instance, Rule 404 of the FRE is only applicable to acts extrinsic to the charged crime. FED. R. EVID. 404. Acts intrinsic to the charged crime are admissible character evidence. *See Huddleston v. United States*, 485 U.S. 681 (1988).

Similarly, the Rule provides that only evidence that specifically relates to the offense will be admissible. H.R. 2662, 109th Cong. (2005). Evidence that specifically relates to the offense will likely include intrinsic acts such as shouting derogatory terms at the defendant while committing the hate crime. Thus, under both the FRE and the Act, evidence of a defendant's expressions while committing the hate crime should be admissible.

In addition, in prosecutions for hate crimes under the Act, evidence of the defendant's expressions and associations should be admissible for any of the purposes listed in Rule 404(b), such as to prove motive, opportunity, or intent, because this type of character evidence specifically relates to the hate crime. Admission of character evidence for this limited purpose should sufficiently protect defendants' First Amendment rights because the evidence admitted under FRE 404(b) would be used to establish a specific element of the crime, such as motive or intent. *See discussion* Parts II.B. & II.C. The prosecution needs to introduce evidence to establish this element, but only to the extent that it relates to the offense. *See Kapadia v. Tally*, 229 F.3d 641, 648 (7th Cir. 2000) (permitting the introduction of expression or association evidence to establish motive). Evidence of a defendant's abstract beliefs cannot be introduced. *Dawson v. Delaware*, 503 U.S. 159, 167 (1992). Thus, the Act punishes a defendant's conduct, including the reason for the conduct, but does not punish a defendant's associations unrelated to that conduct. *Cf. United States v. Richmond*, 222 F.3d 414, 416 (7th Cir. 2000) (reasoning that evidence of a defendant's association with a gang was admissible because it was intrinsic to the charged crime).

On the other hand, the Rule may be construed more narrowly than the FRE, prohibiting the introduction of character evidence that would otherwise be admissible. For example, the Rule only permits the introduction of evidence of expressions or associations if it specifically relates to the offense whereas the FRE permit the introduction of *pertinent* character traits of the accused and the victim. A character trait could arguably be pertinent but not specifically relate to the offense at issue. Evidence specifically relates to the offense if it is connected to the offense, if it establishes a causal link, or if the introduction of evidence is limited to evidence connected with the crime. However, judicial interpretation of "pertinent" as used in FRE Rule 404—that evidence must be relevant, tending to make the existence of a fact more or less probable—indicates that the legal definitions of pertinent and specifically relates may be analogous. *See, e.g., United States v. Martinez*, 988 F. 2d 685 (7th Cir. 1993).

B. Evidence of Expressions or Associations of the Defendant are Admissible to Impeach a Witness

The Rule explicitly states that "nothing in this section affects the rules of evidence governing the impeachment of a witness." H.R. 2662, 109th Cong. (2005). Evidence of a defendant's expressions or association, introduced as reputation or opinion evidence, can therefore be introduced to challenge the credibility of the defendant if the defendant is called as a witness. FED. R. EVID. 607, 608. Evidence of a defendant's expressions or associations can only be introduced to challenge the defendant's truthfulness or untruthfulness while on the stand. FED. R. EVID. 608. For example, if a defendant claims that she is not a member of an antigay group but she actually is a member, the prosecution can introduce evidence establishing that the defendant was a member of the antigay group. FED. R. EVID. 608. Last, in limited situations, evidence that a defendant has committed another hate crime is admissible. *See* FED. R. EVID. 609.

II. The Rule Does Not Alter First Amendment Jurisprudence

A. The Act is Aimed At Conduct Unprotected by the First Amendment

The First Amendment forbids the government from punishing an individual's speech, including an individual's expressive associations. A defendant charged with violating the Act could argue that it is unconstitutional to admit evidence of her expressions or associations because it permits the government to punish her conduct more severely based on the exercise of her First Amendment rights. Furthermore, a defendant could argue that the Rule is viewpoint and content discriminatory because it punishes an act more severely if the defendant has expressed bigoted speech or associated herself with intolerant groups. Also, a defendant could argue that the Rule is overbroad, and thus unconstitutionally chills speech, because defendants will not express themselves or join particular groups for fear that evidence of these actions will be used against them in court. This argument, however, is unlikely to succeed because the Supreme Court explicitly rejected it in *Wisconsin v. Mitchell*. 508 U.S. 476, 488-89 (1993). The court noted that the chilling of speech was far too attenuated, unlikely, and speculative to violate the First Amendment.

The First Amendment protects speech and expressive conduct. The Act punishes criminal conduct, which is not protected by the First Amendment. Any argument that the Act punishes expressive conduct would likely be unsuccessful because using violence to convey one's ideas is outside the scope of the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). In *Wisconsin v. Mitchell* the Court distinguished between statutes that are explicitly directed at expression and statutes that are directed at conduct. 508 U.S. at 487. The Court upheld the statute in *Wisconsin v. Mitchell* because it was directed at criminal conduct, unlike the statute at issue in *R.A.V. v. St. Paul*, which the Court struck down because it was explicitly directed at expression. *Id.* The critical flaw with the statute at issue in *R.A.V.* was that it was viewpoint discriminatory: it prohibited otherwise permissible speech based on the subject and perspective of the speech. *R.A.V. v. St. Paul*, 505 U.S. 377,391 (1992). Here, the Act is not punishing expressive conduct, such as cross burning or flag burning. Rather, the Act is only directed at criminal conduct that is independently criminal, such as assault or murder. It punishes already criminal conduct more severely because of the defendant's motivation in choosing her victim. Thus, evidence of a defendant's expressions and associations can be admitted under certain circumstances.

B. The Rule Restates First Amendment Law by Permitting the Introduction of Specific Evidence But Not Evidence of the Defendant's Abstract Beliefs

The Rule permits the introduction of evidence of a defendant's expressions or associations only if the evidence *specifically relates to the offense*. H.R. 2662, 109th Cong. (2005) (emphasis added). This is similar to First Amendment jurisprudence, which limits the introduction of expression and association evidence to specific evidence of the defendant's beliefs that have bearing on the issue being tried. *Barclay v. Florida*, 463 U.S. 939, 949 (1983) (plurality opinion); *Dawson v. Delaware*, 503 U.S. 159, 168 (1992). Evidence of a defendant's abstract beliefs is inadmissible. *Dawson*, 503 U.S. at 167. For example, the Court held that admitting evidence of a defendant's membership in a white supremacist prison gang violated the First Amendment because it was not tied to the murder he was on trial for; it was merely evidence of his abstract beliefs. *Id.* at 166. If the prosecution had proven that the supremacist gang committed or endorsed unlawful or violent act, the evidence would

probably have been admissible. *Id.* at 166-67. In *Barclay*, the prosecution established that the defendant was a member of an organization that sought to induce a “race war” and the Court held this evidence was properly admitted because it was an endorsement of unlawful acts. 463 U.S. at 942-44, 949-50. Moreover, the Court permitted the introduction of this evidence because it was related to the murder and because it was relevant to the statutory aggravating factors. *Id.* at 949-50. Thus, the Rule’s explicit requirement that evidence specifically relate to the offense appears to be a reiteration of First Amendment jurisprudence.

C. The Rule Restates First Amendment Law by Permitting the Introduction of Character Evidence to Establish a Defendant’s Motive

Under the Rule, admission of expression or association evidence to establish a defendant’s motive appears to be permissible because a defendant’s motive is integral to the offense and therefore specifically relates to the offense. This aligns with First Amendment jurisprudence, which permits the introduction of expression and association evidence to establish motive or future dangerousness. *Kapadia v. Tally*, 229 F.3d 641, 648 (7th Cir. 2000). If animus is relevant to a criminal proceeding, then it can be introduced to establish criminal motive. The Court has permitted the introduction of a defendant’s expressions and associations to establish motive because it is within the province of the legislature to define crimes in any manner they see fit, including punishing certain acts more severely than others. *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993). For instance, a legislature may determine that bias-motivated crimes should be punished more severely because in addition to their effect on the victim, they have an effect on an entire community. *Id.* Outside the arena of hate crimes, the legislature differentiates between crimes and punishes crimes that it finds more offensive more severely. Such differentiation sometimes occurs based on the defendant’s motive or intent. For example, states punish defendants who commit premeditated murder more harshly than defendants who commit manslaughter. In addition, it is constitutional for the government to punish a defendant because of her discriminatory motive, such as holding an employer liable for employment discrimination under Title VII. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989) (plurality opinion).

Conclusion

The Act appears to be a reiteration of existing First Amendment and Evidence law. Evidence of a defendant’s expressions or associations is only admissible within the parameters of the FRE and the First Amendment.