CONSTITUTIONAL LAW — SENTENCING — SEVENTH CIRCUIT HOLDS THAT SENTENCING JUDGE'S CONSIDERATION OF DEFENDANT'S WHITE NATIONALIST VIEWS DID NOT VIOLATE THE FIRST AMENDMENT. — *United States v. Schmidt*, 930 F.3d 858 (7th Cir. 2019).

At the sentencing stage, federal criminal judges must use the factors outlined in 18 U.S.C. § 3553(a) to guide sentencing decisions. Occasionally, judges must decide whether evidence of speech and association protected by the First Amendment is relevant to sentencing. In *Dawson v. Delaware*,[1] the Supreme Court partially tackled the issue, finding that while no per se rule prohibited courts from considering evidence of a defendant's beliefs or associations, the evidence needed to show more than the defendant's "abstract beliefs," and needed to be relevant to the crime and the factors outlined in § 3553(a).[2] Recently, in *United States v. Schmidt*,[3] the Seventh Circuit held that the sentencing judge did not violate the First Amendment by considering a defendant's white nationalist beliefs.[4] In its analysis, the Seventh Circuit adopted a generous reading of *Dawson*'s relevance requirement, finding the judge had properly considered the defendant's radical beliefs and associations even though they were not directly linked to the criminal actions at issue. In doing so, the Seventh Circuit weakened protections surrounding association and belief for criminal defendants at sentencing.

A national forest officer caught Erik Schmidt carrying a gun in the woods while camping on July 29, 2017.[5] A grand jury indicted him for possession of a firearm as a convicted felon, and he pleaded guilty.[6] Schmidt's criminal history spanned seventeen adult convictions: "[B]ail jumping, child abuse, . . . taking and driving a vehicle without the owner's consent[,] . . . unlawful use of the phone to threaten harm, criminal damage to property, carrying a concealed weapon, and multiple convictions for disorderly conduct and resisting an officer."[7] However, Schmidt had never been convicted of a hate crime.[8] In the sentencing recommendation, the probation officer referenced Schmidt's "self-avowed white supremacist" views, desire to "relocate to Germany to retrace his Nazi ancestral heritage," and "repeated disrespect and disregard to individuals in positions of authority."[9]

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[1] 503 U.S. 159 (1992).

[2] *Id.* at 166–67.

[3] 930 F.3d 858 (7th Cir. 2019).

[4] *Id.* at 867–69.

[5] *Id.* at 860.

[6] *Id.* Specifically, Schmidt was charged with violating 18 U.S.C. § 922(g)(1) (2012); he also paid restitution to the U.S. Forest Service for having cut down trees in a national forest without authorization. *Schmidt*, 930 F.3d at 860.

[7] *Schmidt*, 930 F.3d at 860.

[8] *See id.*

[9] *Id.*

The District Court for the Eastern District of Wisconsin sentenced Schmidt to forty-eight months' imprisonment and three years of supervised release.[10] Chief Judge Griesbach led the sentencing hearing.[11] The court began with the sentencing guidelines but hinged its final determination on two factors: the "nature and circumstances of the offense and the history and character of the defendant."[12] For the first factor, the court noted Schmidt's three prior felony convictions and Congress's clear intention to prevent felons from possessing firearms.[13] With regard to the second factor, the district court cited Schmidt's white nationalist views. The court noted not only that Schmidt's beliefs were themselves dangerous, but also that "they [made] a person who [held] them and with a history like [his] dangerous."[14] The court, despite claiming to have not heavily relied on Schmidt's beliefs, was concerned that a person like Schmidt had little respect for the law.[15] Additionally, the court observed that Schmidt's beliefs coupled with his seventeen prior convictions were evidence of his potential for dangerousness.[16] Ultimately, the court found that its sentencing decision fulfilled the goals of "deterrence," "punishment," and "protection of the public."[17]

The Seventh Circuit affirmed.[18] Writing for a unanimous panel, Judge Ripple[19] held that the district court's sentence was reasonable in light of the § 3553(a) factors — like promoting respect for the law, deterrence of future crimes, and protection of the public[20] — which judges consider at sentencing.[21] The court began by highlighting a judge's dual obligation at sentencing: to calculate the appropriate guidelines range and explain the factors relied on,[22] and to protect a defendant's constitutional rights.[23]

The panel began its analysis of Schmidt's First Amendment protections with the Supreme Court's precedent in *Dawson*. The

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[10] *Id.* at 859, 861.

[11] *See id.* at 859.

[12] *Id.* at 861.

[13] *Id.*

[14] *Id.* (emphasis omitted).

[15] *Id.*

[16] *Id.* The court explained that "[p]eople do things based on their ideas and if these are his ideas, he is a very dangerous person." *Id.*

[17] *Id.* at 862.

[18] *Id.* at 869.

[19] Judges Kanne and Rovner joined Judge Ripple's opinion.

[20] *See Schmidt*, 930 F.3d at 867.

[21] *See id.* at 868–69.

[22] The panel explained that the § 3553(a) factors a sentencing judge must consider are the "history and characteristics of the defendant, the nature and circumstances of the offense, the seriousness of the offense, the promotion of respect for the law, just punishment for the offense, . . . deterrence to criminal conduct, and protection of the public from further crimes by the defendant." *Id.* at 862 (omission in original) (quoting United States v. Christiansen, 594 F.3d 571, 576 (7th Cir. 2010)).

[23] *Id.*

Seventh Circuit understood *Dawson* to hold that the government, in order to introduce evidence of constitutionally protected association, would need to tie that evidence to the offense of the conviction, or use it to rebut mitigating evidence.[24] In either case, the government would need to show that the evidence "proved . . . more than [a defendant's] abstract beliefs."[25] Elaborating on the rule in *Dawson*, the panel highlighted *Kapadia v. Tally*,[26] a Seventh Circuit decision that held that radical beliefs and associations could be admitted as evidence for sentencing if "those statements [were] relevant to the crime *or to legitimate sentencing considerations*."[27] Both decisions, the panel concluded, suggested that associational evidence could be relevant to aggravating factors because it possibly indicated a defendant's potential danger to society.[28] The panel further noted that other circuits had upheld district courts' considerations of protected associations or beliefs when they were relevant to § 3553(a) sentencing factors — and that the few courts to have found First Amendment violations in sentencing considerations did so only when the protected speech or association at issue was entirely irrelevant to legitimate sentencing factors.[29]

Applying this precedent to Schmidt's case, the Seventh Circuit found that its decision turned on whether Schmidt's radical beliefs were "relevant to the crime or to legitimate sentencing considerations."[30] For the first consideration, Judge Ripple noted that the case at hand differed from *Kapadia* in that Schmidt's underlying crime, possessing a firearm as a felon, was not a "bias-motivated" one.[31] However, the panel found that Schmidt's beliefs were relevant to a legitimate sentencing consideration. The district court considered Schmidt's criminal history and beliefs — as required under § 3553(a)(1)'s command that it "consider the history and characteristics of the defendant"[32] — and found that Schmidt's history established a pattern of violence, anger, and threatening behavior, as well as an inability to control his impulses.[33] The district court then considered Schmidt's beliefs "not for the impermissible purpose of demonstrating general moral reprehensibility"[34] but "as evi-

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[24] *See id.* at 863 (quoting Dawson v. Delaware, 503 U.S. 159, 166–67 (1992)).

[25] *Id.* (quoting *Dawson*, 503 U.S. at 167).

[26] 229 F.3d 641 (7th Cir. 2000).

[27] *Schmidt*, 930 F.3d at 864 (quoting *Kapadia*, 229 F.3d at 648 (emphasis added)).

[28] *See id.* at 863–65 (first quoting *Dawson*, 503 U.S. at 166; and then quoting *Kapadia*, 229 F.3d at 647–48).

[29] *See id.* at 865–66.

[30] *Id.* at 867 (quoting *Kapadia*, 229 F.3d at 648).

[31] *Id.* (quoting *Kapadia*, 229 F.3d at 647).

[32] 18 U.S.C. § 3553(a)(1) (2012); *Schmidt*, 930 F.3d at 867.

[33] *See Schmidt*, 930 F.3d at 867.

[34] *Id.* at 868.

dence that he 'present[ed] a threat of future dangerousness to the community,'"[35] which the Seventh Circuit held was acceptable. The panel also held that the district court's consideration of the evidence was legitimate in light of § 3553(a)(2), which requires the sentence "to promote respect for the law."[36] Judge Ripple maintained that the district court correctly concluded that Schmidt's beliefs paired with his repeated violations of law illustrated a "willingness to continue on a path of lawlessness in the absence of significant correction."[37]

While punishing pure speech or association alone violates the First Amendment, the Supreme Court has made clear that sentencing judges can consider certain types of speech or association without violating the First Amendment. The Supreme Court has consistently approved consideration of belief or association when relevant to the motive of a crime. And in *Dawson*, the Court has further suggested that when a defendant is associated with a group that has acted in a way that is dangerous, association with that group is relevant to sentencing factors, like future dangerousness. Permitting the use of these two types of evidence — evidence of motive and evidence of ties to a group engaged in specific action — suggests that belief and association are relevant to sentencing when linked in some robust way to *action*. Departing from that logic, the panel in *Schmidt* found a defendant's beliefs relevant to the sentencing factors despite their having no direct relationship to the defendant's past or present criminal acts, and despite an absence of evidence of his membership in a criminally active group. As a result, *Schmidt* stretched *Dawson* and similar precedents to their furthest extent: unlike those cases, it provided little account of how Schmidt's beliefs or associations might have been tied to actions. In doing so, it approved sentencing based on something much closer to pure belief than *Dawson* or the Seventh Circuit's own precedents have ever explicitly allowed. By failing to illustrate how the defendant's abstract beliefs related to a seemingly unrelated crime, the Seventh Circuit hazardously approached criminalizing beliefs alone.

Belief and association are permissible sentencing considerations when they reflect a defendant's motive. In *Barclay v. Florida*,[38] a plurality of the Supreme Court authorized courts' consideration of belief and association as evidence of motive for the purpose of sentencing, and a majority of the Court endorsed that position ten years later in *Wisconsin v. Mitchell*.[39] In both cases, the defendants' prejudiced beliefs or associations, although protected, were the impetuses for their crimes. In *Barclay*, the defendant's membership in the Black Liberation Army was closely tied to the

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[35] *Id.* (quoting *Kapadia*, 229 F.3d at 647).
[36] § 3553(a)(2)(A); *Schmidt*, 930 F.3d at 868.
[37] *Schmidt*, 930 F.3d at 868.
[38] 463 U.S. 939 (1983).
[39] 508 U.S. 476 (1993).

defendant's motive to kill white people,[40] whereas in *Mitchell*, it was the defendant's stated antiwhite bias that motivated the crime.[41] In each case, the Court (or a plurality thereof) found the defendant's beliefs or associations to be legitimate sentencing considerations, despite First Amendment protections, because they illuminated motive[42] — the moment where thought translates to act. *Mitchell*'s reasoning has been summarized as a "one-act" approach, finding that the defendant's racist beliefs were so intimately tied to motive that they were "indistinguishable from his act of battery."[43] By drawing on the relationship between the defendant's beliefs and the motive for the criminal act, the Court was able to safeguard against punishing speech or association in and of themselves.

In *Dawson*, the logic of the Court's holding suggested another way that belief and association could be admissible at sentencing: where the defendant was part of a group that had committed violent actions related to its beliefs.[44] *Dawson* considered whether evidence of the defendant's association with the Aryan Brotherhood was admissible.[45] The Court rejected the evidence — which was narrow and irrelevant as presented[46] — and suggested that the defendant's group membership, in light of the limited evidence submitted about the Aryan Brotherhood, was alone insufficient to indicate the defendant's future dangerousness (a legitimate concern at sentencing).[47] The Court emphasized that the evidence submitted about the Brotherhood showed merely the group's and the defendant's "abstract beliefs," not that the group "had committed any unlawful or violent *acts*, or had even endorsed such *acts*."[48] The Court in *Dawson* went on to posit that a defendant's associational membership *could* indicate their "future danger to society," where that organization "endorse[d] the killing of any identifiable group."[49] The Court made clear that neither Dawson's nor the group's racist beliefs alone were relevant to the sentencing factors because, unlike in *Barclay*, those beliefs had no link to the underlying crime: a white-on-white murder.[50] Though the holding in *Dawson* hints at future cases where associational evidence could be relevant for aggravated punishment, it also protects against opening the gates to relevance too wide. By emphasizing the

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40 *See Barclay*, 463 U.S. at 942 (plurality opinion).

41 *See Mitchell*, 508 U.S. at 479–80.

42 *See id.* at 489–90; *Barclay*, 463 U.S. at 949 (plurality opinion).

43 Steven G. Gey, *What if* Wisconsin v. Mitchell *Had Involved Martin Luther King Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 GEO. WASH. L. REV. 1014, 1030 (1997).

44 *See* 503 U.S. 159, 166 (1992).

45 *See id.* at 160.

46 *See id.* at 165–68.

47 *See id.* at 166.

48 *Id.* (emphasis added).

49 *Id.*

50 *See id.*

relationship between the defendant's and association's beliefs and concrete acts of violence, the Court stopped short of allowing the punishment of defendants for their abstract beliefs alone.

Before *Schmidt*, the Seventh Circuit's leading case on the issue, *Kapadia*, also suggested that some robust link between belief and action could justify considering thought and association at sentencing. A close reading illustrates that the circuit's decision turned on motive, similar to the Supreme Court's decision in *Mitchell* and plurality opinion in *Barclay*. In *Kapadia*, the sentencing judge found that the defendant's anti-Semitic beliefs were tied to the crime at issue, robbing a Jewish community center.[51] In fact, he went so far as to draw a line of causality between the relevance of those beliefs to the crime and the legitimate sentencing factor of rehabilitation.[52] The circuit court reiterated the sentencing judge's findings that "*because* [the defendant] held these views *and* had committed a bias-motivated crime," his potential for rehabilitation was slim.[53] The court then suggested that had Kapadia's beliefs been further removed from the criminal motive — if Kapadia had "burglarize[d] and set fire to a Walmart, for example, or some other business with no particular affiliation, and then utter[ed] anti-Semitic slurs" — the determination on their relevance to the legitimate sentencing factors would have been different.[54] Ultimately, the defendant's beliefs were relevant to the sentencing factors given their close tethering to the criminal motive and the actions it spurred, not because they reflected a more general view of the defendant's potential for dangerousness or rehabilitation. While *Schmidt* read *Kapadia* to turn on whether the defendant's beliefs were "relevant to the crime or to legitimate sentencing considerations,"[55] the evidence approved in *Kapadia* actually had a much tighter link to action: motive for the crime committed.

Compared with these cases, *Schmidt* expands judges' ability to consider radical beliefs at sentencing. Unlike in either *Barclay* or *Mitchell*, both Schmidt's past and his present criminal actions were entirely removed from his prejudiced views. His crime, felon in possession, had no clear relation to his prejudiced views.[56] And the panel found no hateful motive or belief in his extensive criminal record.[57] When the court analyzed Schmidt's future dangerousness, it pointed to no previous instances

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[51] Kapadia v. Tally, 229 F.3d 641, 647–48 (7th Cir. 2000).

[52] *See id.* at 647.

[53] *Id.* (emphasis added).

[54] *Id.* at 648.

[55] *Schmidt,* 930 F.3d at 864 (emphasis omitted) (quoting *Kapadia*, 229 F.3d at 648).

[56] *See id.* at 867 n.21.

[57] In fact, the court even stated that "[t]here [was] no indication in the presentence report that Mr. Schmidt's white supremacist beliefs featured in any of the underlying conduct for [his prior] offenses." *Id.* at 867 n.20. Schmidt's criminal record arguably provided more than enough material

where Schmidt specifically acted on those racist beliefs.[58] Instead, it used his beliefs to indicate a general tendency for violence.[59] *Schmidt* also failed to provide the kind of link between group membership and action that the Court emphasized in *Dawson*: Schmidt's views, though radical, were merely a declaration of support for the Nazi movement; there were no signs that the Nazis endorsed Schmidt's actions or engaged as a group in criminal actions similar to that which Schmidt had committed, felon in possession. As a result, *Schmidt* runs far beyond the kind of beliefs and association previously approved for consideration at sentencing, holding that the court could consider beliefs both unrelated to motive and without any ties to an active group. In allowing the evidence of Schmidt's beliefs at sentencing, then, the Seventh Circuit passed on the opportunity to bolster defendants' First Amendment protections at sentencing.

By clearing the way for less protection of a defendant's beliefs, *Schmidt* not only expands existing precedent, but also breaks from congressional concerns regarding the courts' dealings with race-motivated crimes more generally. In general, the sentencing stage faces far less regulation than the trial one. The Sentencing Reform Act of 1984,[60] for example, contains 18 U.S.C. § 3661, which ensures that there will be "no limitation" on the court's consideration of "information concerning the background, character, and conduct" of a defendant at sentencing;[61] the Supreme Court determined this section to preserve certain principles from *Williams v. New York*,[62] which established that practical and policy concerns validated different procedural processes for sentencing and trials.[63] Despite this norm for more lax standards at sentencing, Congress amended the Sentencing Guidelines with the Violent Crime Control and Law Enforcement Act of 1994.[64] The Act added § 3A1.1(a) to the Sentencing Guidelines.[65] This addition required a sentencing authority to determine beyond a reasonable doubt that the defendant actually selected their victim due to a protected aspect of the victim's identity before finding the crime to be a hate crime and enhancing the sentencing range.[66] While the

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to support the panel's decision about his dangerousness. *See id.* at 867–68. The Seventh Circuit erred in taking Schmidt's Nazi beliefs as *yet more* proof of his future dangerousness. *See id.* at 868.

58 *See id.* at 868.

59 *See id.* at 860 n.3.

60 Pub. L. No. 98-473, tit. 2, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

61 18 U.S.C. § 3661 (2012).

62 337 U.S. 241 (1949); *see* United States v. Watts, 519 U.S. 148, 151–52 (1997); *see also* Marvin Sprouse, Note, *A Sentence for Acquittal: The Supreme Court Holds that Sentences May Be Enhanced for "Conduct" for Which Persons Have Been Tried and Acquitted:* United States v. Watts, *117 S. Ct. 633 (1997)*, 28 TEX. TECH L. REV. 963, 988 (1997).

63 *Williams*, 337 U.S. at 246–47; Sprouse, *supra* note 62, at 965–67.

64 Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of the U.S. Code).

65 *Id.* § 280004(a), 108 Stat. at 2096.

66 U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a) (U.S. SENTENCING COMM'N 2004).

amendment reflected Congress's concern with bias-motivated crime,[67] the special evidentiary requirement illustrated Congress's equal concern with punishing a defendant for their misplaced views alone.[68]

Similarly, *Schmidt* is out of step with the criminal justice system's broader historical interest in bolstering First Amendment protections in the context of race-motivated crimes. For such crimes, where the risk of unwarranted prejudice may be particularly high, the Court has maintained that evidence of biased past speech should be "scrutinized with care"[69] — beyond the standards of relevance set out by the Federal Rules of Evidence, according to one scholar.[70] In a number of cases, the Court has even required appellate tribunals to use de novo review when reviewing lower court decisions that involved evidence of biased past speech, no matter the review standard specified by other procedural rules.[71] These protections signal the system's preference for maintaining a sharp distinction between punishing bias crimes and protecting racist speech.[72] They indicate that "belief is only the 'first stage in the process of expression.'"[73] While criminal punishment for later stages of expression — after belief has led to action — is valid, punishment for the belief in isolation is not.[74]

By taking a broad reading of *Dawson*, *Schmidt*, more so than *Kapadia*, clears the way for wider acceptance of evidence of belief and association that are untethered to a defendant's actions. In taking a generous stance toward what can permissibly determine a defendant's future dangerousness, the circuit pressed against a foundational maxim of the justice system — not to criminalize a person for their thoughts alone.[75] Ultimately, the Seventh Circuit in *Schmidt* missed an opportunity to further safeguard a defendant's First Amendment rights. Instead, the circuit left future courts with a judicial guessing game as to when speech, particularly race-motivated speech, is abhorrent enough to be punished.

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[67] *See* H.R. REP. NO. 103-244, at 2 (1993).

[68] *See id.* at 4.

[69] Haupt v. United States, 330 U.S. 631, 642 (1947) (holding that past-speech testimony related to the defendant's anti-America posture "[was] to be scrutinized with care to be certain the statements [were] not expressions of mere lawful and permissible difference of opinion with our own government or quite proper appreciation of the land of birth").

[70] *See* Dan T. Coenen, *Free Speech and the Law of Evidence*, 68 DUKE L.J. 639, 643–44 (2019) ("[C]ourts are constitutionally required to thoughtfully assess the admissibility of past-speech evidence, regardless of its relevance, pursuant to a speech-sensitive balancing analysis when prosecutors seek to use that evidence at trial.").

[71] *See id.* at 681.

[72] *See, e.g.*, FREDRICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 83 (1999) ("Racially targeted behavior that vents the actor's racism, even if it disturbs the addressee greatly, constitutes racist speech that is protected by the First Amendment.").

[73] *See id.* at 85 (internal citation omitted).

[74] *See id.*

[75] *See* Gabriel S. Mendlow, Essay, *Why Is It Wrong to Punish Thought?*, 127 YALE L.J. 2342, 2345 (2018) (quoting ALAN BRUNDER, PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE 108 (2009)).