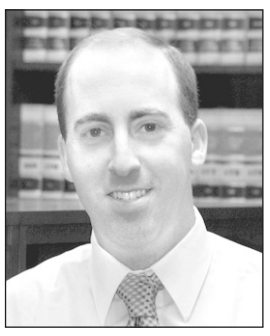
Should a Person Be Liable Under the Law for Thoughts Alone?

By Blair Schlecter

A well-established principle of the law is that one cannot be punished for thoughts alone. In order for a person to be guilty of a crime, that person must have a guilty mind (mens rea) and commit a guilty act (actus rea). Therefore, the existence of a guilty mind alone is not sufficient to give rise to criminal liability.

Although not widely discussed, this same principle also seems to apply to civil cases.

The 9th U.S. Circuit Court of Appeals' decision in *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006) challenges this principle of the law and holds that a police officer may be held liable for engaging in an otherwise legal act solely because the officer has an improper motive. This holding has the potential to significantly change the law as to what constitutes a proper basis for civil and criminal liability.



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In discussing the importance of the 9th Circuit's ruling in *Skoog*, it is important to understand the nature of claims made by individuals under the First and Fourth Amendments.

The First Amendment provides that "Congress shall make no law...abridging the freedom of speech." In support of this right, a citizen can pursue claims against government officials who retaliate against that citizen because of his or her protected speech.

Under the Fourth Amendment, an officer may not arrest a person or engage in a search unless such search or arrest is supported by probable cause. The existence of probable cause is an objective inquiry as to whether a reasonable officer would have found probable cause based on the facts and circumstances confronting him or her. Therefore, in contrast to the First Amendment, an officer's subjective motivations are irrelevant under the Fourth Amendment.

The issue here is whether a government official is liable under the First Amendment because of an improper motive to deprive a person of his or her rights even if there is probable cause for the official's action under the Fourth Amendment.

In *Skoog*, several police officers for Clackamas County in Oregon took part in a search of Daniel Skoog's office and seized a digital camera he had used to film Officer Herbert Royster during an investigation.

Skoog later filed a lawsuit claiming that the officers illegally searched and seized his recording equipment, in violation of the Fourth Amendment, and that Officer Royster obtained and executed the search warrant to retaliate against him for filing a previous lawsuit against Clackamas County in violation of his First Amendment rights. Officer Royster filed a motion for summary judgment, claiming he was entitled to qualified immunity on plaintiff's claims.

On appeal, the 9th Circuit found that Skoog failed to establish that his Fourth Amendment rights were violated, as there was probable cause for the search of his office by Officer Royster. The court next considered whether Skoog could still proceed on his First Amendment claim that Officer Royster conducted the search in retaliation for his prior lawsuit. The 9th Circuit concluded that even though the search and seizure of Skoog's digital camera was lawful, Skoog could still proceed with a First Amendment retaliation claim. The court reasoned that difficult questions about the relationship between an officer's motive and action did not exist in this case, and therefore there was no rationale to require the absence of probable cause. The court did find that Officer Royster was entitled to qualified immunity, as this First Amendment right was not yet clearly established at the time of this incident. The court did not discuss the consequences of imposing liability against an officer based solely on claims of improper motives.

Given that Officer Royster's search of Skoog's office was lawful, the only basis to impose liability against Officer Royster was that he was acting on an improper motive to retaliate against Skoog.

Interestingly, there are few cases discussing in depth the issue raised in *Skoog*. One of the few cases in the country that does is *Baldauf v. Davidson*, 2007 U.S. Dist. LEXIS 53924 (S.D. Ind. 2007), a district court case from Indiana. In *Baldauf*, the court considered the issue of whether a citizen's First Amendment retaliation claim could go forward where there was probable cause for the citizen's arrest. The court concluded that a plaintiff must establish a lack of probable cause under the Fourth Amendment to pursue a First Amendment retaliation claim. It stated, "to the extent that a plaintiff's injuries derive from the seizure of his or her person, then the retaliatory arrest claim differs little from a traditional Fourth Amendment claim, in which the Supreme Court has repeatedly held that an officer's subjective motivations are irrelevant." The court found that permitting a First Amendment retaliation claim to proceed "would allow numerous plaintiffs to bring Fourth Amendment claims that would otherwise be dismissed by relabeling them as First Amendment retaliation claims." Quoting the U.S. Supreme Court, the court concluded that "'It may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway.'"

Baldauf recognized that where probable cause exists for police action, allowing a First Amendment claim to proceed punishes an officer solely for having "bad thoughts." Additionally, allowing a First Amendment claim to continue circumvents Fourth Amendment law that states that an officer's subjective motivations are irrelevant.

Permitting a First Amendment retaliation claim even where there is probable cause for a search and seizure does give more force to First Amendment protections. In particular, it deters government actors from retaliating against individuals based on protected speech.

In theory, the ruling in Skoog could be analogized to claims of employment discrimination where the employer may be liable for wrongful termination when the employee is fired based on his or her race, religion or some other protected group. However, a closer look demonstrates that this comparison is flawed, since the act in question (a termination) is illegal because there is an improper motive (discrimination). Skoog is distinguishable because the act in question (a search or arrest) was clearly legal, even if the reason for the act (suppression of speech) was improper.

The rule announced in *Skoog* has the potential to result in a significant amount of "thought punishment." In First Amendment retaliation cases where an officer has probable cause to act, a court will also be forced to undertake the difficult and speculative task of determining an officer's mental state as the sole basis for liability. Neither courts nor society are well equipped to deal with this task.

Additionally, the idea that an officer or other individual can be held liable for improper motives conflicts with the legal principle that a person cannot be held liable for thoughts alone. It also conflicts with our understanding as a society of what amounts to a "bad act." No one in society expects to be punished solely for having "bad thoughts." The ruling in *Skoog* could overturn our understanding of when someone is guilty of a crime or liable for damages.

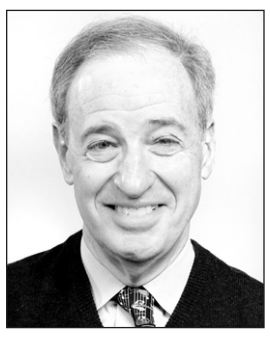
There are good grounds for the 9th Circuit to reverse its decision in *Skoog* and require that in a First Amendment retaliation case against a government official, an individual must establish the absence of probable cause for the actions of a government official in order to pursue the claim.

Faith, Fashion, And the American Workplace

By Jeffrey Freedman

On Aug. 19, 2010, the *Los Angeles Times* reported on an incident at a Disneyland owned restaurant where a female hostess was sent home from work without pay for her refusal to remove a hijab she was wearing. A hijab is a head scarf worn by Muslim women. (Disney and the employee have since reached an agreement.)

But the employee could have sued Disney for religious discrimination. And this issue is one of great significance in a state like California, where ethnic and religious diversity includes communities with roots in virtually every country and every faith of the world.



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On Aug. 27, 2010 the U.S. Court of Appeals in Chicago decided *Xodus v. Wackenhut Corp.*, (Case No. 09-3082). This case points out some of the issues employers may face if confronted with an applicant or employee whose appearance includes some item of apparel or personal grooming preference associated with religious significance.

Both Title VII of the U.S. Civil Rights Act of 1964 and the California Fair Employment and Housing Act prohibit discrimination in employment based on religion. The courts have interpreted both statutes as requiring employers to accommodate religious practices unless doing so creates an undue hardship for the employer.

In *Xodus*, Lord Osunfarian Xodus applied for a security job with Wackenhut a few days after being terminated by another security company because he had refused to cut his hair to comply with the company's grooming policy. A Rastafarian, Xodus had his hair in dreadlocks. The court cited a dictionary definition of dreadlock as a "rope like strand of hair formed by matting or braiding." Rastafarians believe dreadlocks symbolize a bond with God, citing a passage from the Book of Numbers which reads: "No razor shall come upon his head; and he shall let the locks of his hair grow long." Xodus sued Wackenhut for religious discrimination after it refused to hire him as a security guard because he would not cut his dreadlocks.

A bench trial was held in the federal district court. The parties agreed that the only fact at issue was whether Xodus had actually brought to the interviewer's attention that his religious beliefs precluded him from cutting his dreadlocks. The trial judge credited the testimony of Clarence McCuller, the manager who interviewed Xodus. McCuller testified that Xodus never mentioned any religious significance in his hair even after McCuller told Xodus that his dreadlocks violated the company's grooming policy and that he would not be hired unless he cut his hair. Xodus told McCuller that "It's against my belief." McCuller testified that he did not infer from this statement that Xodus was referring to his religion. The trial judge ruled in favor of Wackenhut.

The Court of Appeals affirmed the judgment in favor of Wackenhut, concluding that Xodus had not expressly brought his religious belief to Wackenhut's attention and had not advised Wackenhut that the dreadlocks were worn for religious reasons.

The Court of Appeals concluded that, based upon the totality of the evidence, the trial judge could reasonably have credited McCuller's testimony, and discounted Xodus' testimony on this issue. McCuller testified that he was not aware of the Rastafarian religion and did not equate Xodus' use of the word "belief" with his religion. He said he told Xodus that he could always reapply if he "took out his braids."

Xodus claimed that his use of the word "belief" and the dreadlocks themselves sufficed to notify Wackenhut of the religious nature of his hairstyle. The court replied that a person's religion, unlike race or sex, is not always readily apparent. The court quoted one of its earlier decisions in which it wrote: "Even if he wears a religious symbol, such as a cross or a yarmulke, this may not pinpoint his religious beliefs and observances; in many ways employers are not charged with detailed knowledge of the beliefs and observances associated with particular sects." The court noted that an individual has a duty to give fair notice of religious practices that might interfere with his employment. On the other hand, an employer cannot shield itself from liability by intentionally remaining in the dark.

Thus, the Court of Appeals concluded that Wackenhut did not discriminate against Xodus and that the trial judge's decision to credit McCuller's testimony and discount that of Xodus could not be overturned. The court found that Xodus had not expressly brought his religious belief to McCuller's attention and that McCuller was not chargeable with that knowledge simply by seeing the dreadlocks or by Xodus' statement that cutting his hair was "against my belief."

Whether another U.S. Court of Appeals would reach the same conclusion on similar facts is unknown. If Xodus had told McCuller that cutting his hair was "against my religion" as opposed to "against my belief," a different result might have occurred. Further, an interviewer more "worldly" and knowledgeable than McCuller might have immediately recognized dreadlocks as a religious expression. The late musician Bob Marley was a Rastafarian who wore dreadlocks. However, the fact that someone wears dreadlocks does not necessarily mean that the person is a Rastafarian.

Associated Press

Imane Boudlal, right, a Muslim woman who works as a hostess at a Disneyland restaurant, covers her face as she leaves Disney's Grand Californian Hotel with civil rights coordinator Affad Shaikh, left, after she was denied by her employer in Anaheim, Aug. 18, 2010.

This case points out that employers must be very careful in this multicultural world when confronted with any employee or applicant with any item of wearing apparel or aspect of personal appearance that might have a religious significance. Further, even grooming or dress policies, which are not inherently discriminatory, may not be enforced on a discriminatory basis. Thus, an employer would likely be found liable for religious discrimination if it permitted employees to wear crosses around their necks but not stars of David. Further, it may well be discriminatory to allow one employee to wear a yarmulke but prohibit another one from wearing a hijab.

Had Disney been sued over its prohibition of the restaurant hostess' hijab, it may have prevailed if it could show that all employees are required to wear a uniform and that the uniform is an essential part of the restaurant's theme. This may be enough for Disney to establish an undue hardship. Otherwise, liability could well have been found.

Even though Wackenhut prevailed in the case brought against it by Xodus, it did so because of the specific facts and it would be unwise to read this decision as having broad application. The court found that Wackenhut had no reason to know that the dreadlocks had a religious significance and that Xodus had not adequately brought the fact of his religious requirement to the company's attention. Since each case is decided on its own specific facts, care must be taken in every situation to ensure that the employer responds appropriately. Therefore, prior to reacting the employer should consult with legal counsel to determine what response is appropriate and lawful.

Letter to the Editor

Civil Rights Protections Advance American Empire

I was amazed to observe that an entire "Perspective" page of the Los Angeles Daily Journal was dedicated to Dean R. Broyles' consternation that repealing "Don't Ask, Don't Tell" shows that America is on the brink of collapse (akin to the fall of the Roman Empire) with its military eroded by coerced homosexuality acceptance. ("*Don't Ask, Don't Tell Repeal: A Dangerous Sociological Experiment*," Sept. 21) Huh? I'm sure someone wrote something remarkably similar when slavery was abolished, or when inter-race sexual relations were constitutionally protected. Surely when women were allowed to vote, or allowed to join the military, someone probably felt the American empire was crumbling, too. The "barbarians at our gates" remain the orthodox religious thinkers demanding uniform conformity to non-constitutional standards. America will fall when it fails to protect the constitutional rights of its citizens in a manner unrelated to religion. For anyone fearing for our military and searching for better historical context, I suggest reading credible historical books on Alexander The Great, Julius Caesar's military campaign in Gaul, and the Spartan military culture. I translated from Latin Caesar's Gallic wars while a student at a Catholic high school many years ago, and recall that Roman military campaign crushed the opposition despite Caesar's self-chronicled personal preferences. If our country has citizens of any preference willing to fight the system for the right to fight for our country, I think America's cultural ability to muster the will to fight is doing just fine.

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