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Putting Hate in Its Place: The Codification of Bias Crime Laws in a Model Penal Code

Anthony M. Dillof*

I. INTRODUCTION

Begun in 1952 and completed in 1962, the drafting of the Model Penal Code (M.P.C.) constituted an unparalleled stride forward in the development of the criminal law. Since 1962 however, our society, crime, and our society's perception of crime have changed. With the benefit of hindsight, certain provisions of the Model Penal Code appear ill conceived, or if not ill conceived, at least profoundly outdated.¹ If the Model Penal Code is to be true to its name, some degree of remodeling is needed. But remodeling implies more than repair and renovation: It implies wholesale elimination of some provisions² and whole-cloth invention of others. In this latter category of provisions to be added fall, first, those needed to address antisocial phenomena that were either unknown or

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1. See, e.g., Model Penal Code art. 213 (Official Draft and Revised Comments 1985) (excluding from sexual offenses, other than deviate sexual intercourse, possible sexual offenses of husband against wife). Contrary to the Model Penal Code, the penal codes of most states today provide either no liability exemption or a limited liability exemption for husbands who commit sexual crimes against their wives. See Linda Jackson, Note, Marital Rape: A Higher Standard Is in Order, 1 Wm. & Mary J. Women & L. 183, 194-97 (1994). The marital rape exemption has been widely criticized for being unjustified and sexist, if not unconstitutional. See Robin L. West, Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment, 42 Fla. L. Rev. 45 (1990).

2. A candidate for wholesale elimination would be section 531.3, "Loitering to Solicit Deviate Sexual Relations," which criminalizes, inter alia, going to a bar in order to meet and suggest a sexual liaison with a person of the same sex. Model Penal Code § 531.3 (Official Draft and Revised Comments 1985).

uncommon when the M.P.C. was drafted. Examples of such phenomena are car jacking and computer hacking.

There is a second, less obvious, but equally important, set of provisions that should be added to the Model Penal Code. These are provisions needed to address antisocial phenomena that always existed, but the enormity of which was not generally recognized. Here bias crimes are a salient example. Loosely speaking, bias crimes are crimes committed from racial, religious, and other specified types of bigotry. Bias crime law laws increase the penalties for such crimes. Although foreshadowed by federal civil rights statutes,³ laws targeting bias crimes explicitly were relatively rare until fifteen years ago.⁴ Currently most jurisdictions in the United States have bias crimes laws of some type.⁵ They are thus well established members of modern penal codes. Regardless of how the controversy concerning their merit ultimately may be resolved,⁶ their prevalence today uncontroversially entitles them to at least a bracketed place in any modern model penal code.

The purpose of this article is to ask generally how bias

3. See, e.g., Ku Klux Klan Act of 1871, ch. 99, 16 Stat. 433 (1871) (criminalizing interference with the registration process for federal elections); 18 U.S.C. § 241 (1994 & Supp. IV 1998) (criminalizing conspiracies to intimidate or injure people in the exercise of their federal rights); 18 U.S.C. § 242 (1994 & Supp. IV 1998) (criminalizing the act of depriving a person of federal rights under color of state law).

4. See Geoffrey L. Padgett, Comment, Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies, 75 J. Crim. L. & Criminology 103 (1984).

5. See Frederick M. Lawrence, Punishing Hate: Bias Crimes Under American Law, app. A (1999).

6. Bias crime laws have attracted the critical scrutiny of scholars. See James B. Jacobs & Kimberly Potter, Hate Crimes: Criminal Law & Identity Politics (1998) (arguing bias crime laws based primarily on political considerations); Anthony M. Dillof, Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes, 91 Nw. U. L. Rev. 1015, 1049-48 (1997) (presenting skeptical perspective); 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 (1991) (challenging consistency of bias crime laws and free speech). For a recent defense of bias crime laws based on the society's duty to provide equal protection from crime to different potential victims, and a response to that defense, see Alon Harel & Gideon Parchomovsky, Hate and Equality, 109 Yale L. Rev. 507 (1999).

crime laws should best be formulated. While model bias crime laws have been drafted,⁷ none have been drafted with an eye toward the Model Penal Code.⁸ This article focuses on the question how should bias crime laws be formulated in the context of a possible revised Model Penal Code. As a methodological matter, because the contours and contents of any such revised code cannot be confidently predicted, this article assumes that a revised M.P.C. will leave much of the structure of the current M.P.C. intact. Undoubtedly, a revised Model Penal Code will retain one of the Model Penal Code's most important and distinctive features: its claim to being an *integrated* code. In contrast to its common law-based processors, the Model Penal Code is more than a compilation of diverse offenses and assorted defenses.⁹ The M.P.C. is built around a "general part" which includes generally applicable rules of interpretation, burden assignment, causation, and complicity.¹⁰ It employs a consistent vocabulary informed by a central set of definitions.¹¹ It provides an array of intelligent default rules to answer the otherwise overwhelming number of questions that might arise concerning mens rea requirements.¹² It possesses a logical organizational structure to enhance accessibility. In addition, by employing a limited number of well-defined terms, it aspires to efficiency and precision of expression.

7. See Civil Rights Division, Anti-Defamation League of B'nai B'rith, *Hate Crime Statutes: A Response to Anti-Semitism, Vandalism, and Violent Bigotry*, A.D.L. Law Rep. 1, Spring/Summer 1988, at app. A; Lawrence, *supra* note 5, at 170-71.

8. There have, of course, been bias crime laws drafted for M.P.C.-based penal codes. In the course of this article, I shall reference various drafting alternatives that have been adopted.

9. See Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 *Buff. Crim. L. Rev.* 297, 297 (1998) (before M.P.C., "many jurisdictions had previously been content with relatively loosely organized compilations of the accumulated criminal statutes passed over the years, many of which simply embodied or assumed traditional common law rules").

10. See Model Penal Code §§ 1.02, 1.12, 2.02, 2.03, 2.06 (Official Draft and Revised Comments 1985).

11. See *id.* § 1.13.

12. See *id.* § 2.02.

A bias crime law for a possible revised Model Penal Code should be drafted in light of these virtues. Rather than merely being haphazardly tacked onto a highly integrated structure, a bias crime law for a model penal code should be drafted in a manner to fit seamlessly within the Code's overall organization and to interact properly with the Code's other provisions. For the purposes of this article, fit and functionality therefore will be the guiding considerations. From this goal follows the article's structure: Part II.A considers formulations of bias crime laws that would place such laws in the general part of the Model Penal Code. Part II.A specifically examines bias as (1) a general type of culpability condition, and (2) as a general factor relevant to sentencing, with attention to the constitutional issues thereby raised. Part II.B considers formulations of bias crime laws that would place them in the specific part of the Code. Given this placement, it examines how they would thereby interact with the provisions of the Code's general part, specifically, the Code's provisions concerning complicity, transferred intent, attempt, culpability, and the choice of evils defense.

No one formulation of bias crime laws is advanced as being the uniquely right one. Rather, the advantages and disadvantages of different formulations are explored in a systematic fashion. In this manner, the implications of one formulation versus another may be better understood if and when the time comes for revising the Model Penal Code.

II. FORMULATING BIAS CRIME PROVISIONS

The Model Penal Code is a code of two parts. The first part is entitled "General Provisions," the second, "Definitions of Specific Offenses." This distinction between the general and the specific reflects a vision of the criminal law held by many leading scholars and employed as an organizing principle in their work.¹³ The distinction

13. See Paul H. Robinson, *Criminal Law* (1997); Charles E. Torcia, Wharton's

embodies the important insight that there are general principles, rules, concepts, constraints, and structures that pervade, control, and inform all of the specific offenses.¹⁴ Matters treated in the M.P.C.'s general part include culpability, mistakes, complicity, justifications, excuse, and attempts.¹⁵ By virtue of this general part and its unifying effect, the Model Penal Code may claim to have transformed criminal laws into criminal law. This fundamental distinction between the general and the specific parts of the M.P.C. generates a fundamental question in thinking about bias crime laws in the context of a possible revised Model Penal Code: Should the provisions establishing a bias crime law be placed in the Code's general or specific part? Certainly something is to be said for placing a provision where it "belongs." A code should be accessible. The definition of perjury should not be hidden among the subsections on the justified use of force. The question whether a bias crime provision belongs in the general or specific part of the code, however, is not simply the question whether a section number of 200 or greater should be assigned to it. Rather, the question goes to the heart of the issue of how bias crime laws should be thought of and formulated.

A. Bias Crime Laws as Provisions of the General Part

This section considers bias crime laws as components of the Model Penal Code's general part. Bias crime laws have a claim to a home in the M.P.C.'s general part by virtue of their derivative nature and potentially unlimited applicability. Many bias crime laws are formulated to establish what may be referred to "second-order" offenses. Rather than containing an explicit definition of the conduct which, when engaged in because of bias, will constitute a

Criminal Law (15th ed. 1993); George P. Fletcher, *Rethinking Criminal Law* (1978); Glanville Williams, *The Criminal Law: The General Part* (2d ed. 1961).

14. See Fletcher, *supra* note 13, § 6.1.

15. See Model Penal Code §§ 2.02, 2.04, 2.06, 3.02, 2.09, 5.01 (Official Draft and Revised Comments 1985).

bias crime, many bias crime laws incorporate other offenses by reference and use their occurrence as a predicate for the commission of a bias crime.¹⁶ For example, a simplified version of such a bias crime law might define a bias crime as "an assault, battery, or act of criminal mischief committed because of bias." This derivative formulation is not a feature of most specific offenses. Furthermore, bias crime laws are sometimes drafted to incorporate prior-defined offenses generally.¹⁷ A simplified version of such a law might define a bias crime as "a crime committed because of bias." Under such a provision, there could as much be a bias crime based on forgery as assault. Because the punishment for a bias crime is usually a function of the underlying offense, it makes sense to speak of distinct forms of bias crimes, such as bias-assaults or bias-thefts, even though a single code provision might be the basis of all the possible bias-crime charges. In this respect, bias crime laws resemble a prominent member of the M.P.C.'s general part: attempts.¹⁸ As with bias crimes, there is no such thing as an attempt simpliciter. To be liable for an attempt, one must be liable for either an attempted murder, an attempted rape, or some other attempted offense. The type of offense attempted determines the applicable punishment. Because of this derivative definitional structure, attempts, while a distinct set of substantive offenses, are formally unlike the offenses found

16. See 720 Ill. Comp. Stat. Ann. 5/12-7.1 (West Supp. 1999) (establishing as predicate offenses for bias crimes assault, battery, aggravated assault, misdemeanor theft, criminal trespass, disorderly conduct, and harassment among others); see also La. Rev. Stat. Ann. § 14:107.2(A) (West Supp. 2000); Nev. Rev. Stat. Ann. § 207.185 (Michie 1997); Ohio Rev. Code Ann. § 2927.12 (Anderson 1996); 18 Pa. Cons. Stat. Ann. § 2710 (West 1983); Wis. Stat. Ann. § 939.645 (West 1996).

17. See, e.g., 11 Del Code Ann. tit. 11, § 1304(a) (1999) (creating hate crime liability for "[a]ny person who commits, or attempts to commit, any crime as defined by the laws of this State, and who intentionally . . . selects the victim because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry, shall be guilty of a hate crime.") (emphasis added); Md. Ann. Code art 27, § 470A (1996) (creating hate crime liability for any person who "[h]arass[es] or commit[s] a crime upon a person . . . because of that person's race, color, religious beliefs, or national origin.").

18. Model Penal Code § 5.01 (Official Draft and Revised Comments 1985).

in the specific part. Just as attempts fit into the general part, because of their derivative and general nature, so arguably do bias crimes.

1. Bias as a Culpability Condition

If bias crime laws have a general aspect to them, how should they be incorporated into the general part of the M.P.C.? Let me begin to answer this question by offering an innovative proposal. Although I will ultimately conclude that it has significant drawbacks, the proposal more completely integrates bias crime laws into the woof and warp of the M.P.C. than any other formulation of a bias crime law.

A common feature of all bias crime laws is that the existence of bias, however defined, triggers an enhancement of the penalty range to which the perpetrator is exposed. While the definition and scope of bias may vary among different bias crime laws,¹⁹ bias at a minimum is a type of mental state which may be precisely defined without recourse to normative terms.²⁰ In this respect, bias resembles the four culpability conditions established by the M.P.C.: purpose, knowledge, recklessness, and negligence. Furthermore, like purpose, knowledge, recklessness, and negligence, bias is a mental state that arguably bears on an actor's culpability for the prohibited conduct or result he is alleged to have engaged in or caused. Many would consider the assault of a person simply because of his skin color, for example, a particularly deplorable act, one which clearly manifests an unusually wicked character.²¹

19. While most bias crime laws cover bias based on race, national origin, and religion, they vary regarding coverage of bias based on gender, sexual-orientation, disability, and veteran status. See Lawrence, *Punishing Hate*, supra note 5, app. A (comparing different forms of bias that are elements of different state bias crime laws).

20. In composing the M.P.C.'s section on culpability, the drafters of the M.P.C. sought to avoid vague and normatively-charged mens rea terms like "malicious" and "willfull." See Model Penal Code § 2.02 cmt. at 230 (Official Draft and Revised Comments 1985).

21. See James Weinstein, *First Amendment Challenges to Hate Crime*

Frederick Lawrence has written that this culpability-based rationale is in fact the one espoused by "most supporters" of bias crime laws.²² Lawrence explains that "[t]he motivation of the bias criminal violates the equality principle, one of the most deeply held tenets in our legal system and our culture."²³

Likewise, one might consider a person who engages in prohibited conduct because of bias particularly dangerous to society and its egalitarian values, just as a person who engages in such conduct purposely might be thought to be a greater threat than a person who does so merely negligently.

Finally, bias is distinguishable from certain mental states that are elements of offenses because of the wide range of conduct to which bias is thought relevant. Some M.P.C. mental states, such as "extreme indifference to the value of human life"²⁴ or "the purpose of arousing or gratifying sexual desire,"²⁵ only make sense as a liability element for the offense in which they appear. In contrast, acting based on bias seems equally relevant to a wide range of criminal misconduct.

In sum, because bias, like the four basic culpability conditions of the M.P.C., is a mental state, is arguably relevant to culpability and dangerousness, and is applicable to a wide range of offenses, there is a strong *prima facie* reason to treat it like these other culpability conditions. Specifically, there is a strong *prima facie* reason to include it among the kinds of culpability defined by M.P.C.'s central culpability section, section 2.02.

Here then is a possible formulation of a bias crime law for the Model Penal Code. First, introduce a new

Legislation: Where's the Speech?, *Crim. Just. Ethics*, Fall/Summer 1992, at 6, 9 ("beating someone because of animosity to the color of his skin is, at least according to my intuition, more morally reprehensible than hitting someone because of a dispute about a parking space.").

22. Lawrence, *Punishing Hate*, *supra* note 5, at 61.

23. *Id.*

24. Model Penal Code § 210.2(1)(b) (Official Draft and Revised Comments 1985) (murder).

25. *Id.* § 213.5 (indecent exposure).

culpability definition into section 2.02(2) specifying the mental state needed to constitute a bias crime. Bias crimes are often called "hate crimes." To be consistent with the adverbial constructions of the M.P.C.'s other culpability conditions ("purposely," etc.), this new culpability condition might be called "hatefully."²⁶ The "hatefully" provision would be inserted as a new subsection (a) of section 2.02(2) because the mental states therein are listed in order of decreasing liability or sentencing implications. Acting because of bias would be a higher form of culpability than acting merely purposefully because of the greater penalties that would result. Second, subsections 2.02(3) and 2.02(5), establishing the default culpability and the substitute culpability requirements, would have to be modified to accommodate the new culpability condition. Finally, with this foundational work done, bias-forms of selected specific offenses would have to be drafted. For example, a bias-assault provision could be added as a third subsection to section 211.1. Such a section might provide:

- (3) Bias Assault. A person is guilty of a bias assault if he hatefully:
- (a) attempts to cause, or causes, bodily injury to another; or
 - (b) attempts by physical menace to put another in fear of serious bodily injury; or

26. While "hatefully" connects neatly to the term "hate crime," it is misleading insofar as it suggests that to be liable for a bias, a perpetrator must be motivated by the emotion of hate. Some bias crime laws require only that the perpetrator "selects" his victim because of a specified characteristic of the victim. See, e.g., Wis. Stat. Ann. § 939.645 (West 1996). Under such laws, the nature of the desire informing the selection decision would be irrelevant. Even those that employ the label of "hate-motivated crimes" and require animus of some type, see, e.g., Vt. Stat. Ann. tit. 13, § 1455 (1998) (requiring perpetrator to be "maliciously motivated"), would probably be satisfied under a cooler variety of aversion than hatred. These important nuances of scope are explored in Kent Greenwalt, *Reflections on Justifications for Defining Crimes by the Category of Victim*, 1992/1993 Ann. Surv. Am. L. 617, 617-20. I take no position here on the substantive issue of the precise mental state needed for bias crime liability. Rather, I note that if the term "hatefully" were used in a revised Model Penal Code as a culpability term, it would have to be explicitly defined as are the other culpability terms, and the definition might have to vary somewhat from the ordinary usage of "hatefully."

(c) attempts to cause serious bodily injury to another, or causes such injury under circumstances manifesting extreme indifference to human life; or

(d) attempts to cause or causes bodily injury to another with a deadly weapon.

Bias assault under paragraphs (a) or (b) is a felony of the ____ degree; bias assault under paragraph (c) is a felony of the ____ degree; bias assault under paragraph (d) is a felony of the ____ degree.

Establishing bias crime laws by including bias as a general culpability condition, implemented by additions to various offense definitions, has a number of advantages. First, there are the advantages generally associated with the M.P.C.'s centralized culpability approach. A definition of bias would be established that would apply consistently across many offenses. Likewise, the relation of bias to the other M.P.C. culpability conditions would, through subsections 2.02(3) and (5), be established in a manner that would also apply consistently across many offenses. Second, drafting bias provisions for each offense would provide an opportunity for great drafting precision. Such precision is a central rationale for the M.P.C.'s "elemental approach"²⁷ to mens rea. Under the common law, a shotgun general-intent approach was employed either alone or supplemented by a relatively primitive specific-intent requirement for some conduct or result elements. In contrast, the elemental approach permits one of four culpability conditions to be individually assigned to each material element of an offense, allowing different culpability conditions to be assigned to different material elements within a given offense.

This greater precision and flexibility may be needed for bias offenses with multiple material elements. The M.P.C., for example, provides that a person is guilty of

27. See Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 *Stan. L. Rev.* 681 (1983) (explaining and critiquing M.P.C.'s element-specific approach to culpability).

disorderly conduct “if, with the purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he . . . engages in fighting or threatening, or in violent or tumultuous behavior.”²⁸ Exactly what would be required for the offense of bias disorderly conduct? Does this offense require a person to want to cause public inconvenience because of bias, as would members of the Ku Klux Klan who might march near Harlem in a threatening manner hoping to cause a traffic jam that would inconvenience African-American residents of Harlem? Or would the offense require a person to engage in fighting or threatening because of bias, as would members of the Ku Klux Klan who might threaten African-American bystanders seen in the course of a march in Mid-town Manhattan? A specifically formulated bias disorderly conduct provision, based on a general definition of “hatefully” in section 2.02(2), could avoid such ambiguity. It might, for example, provide that bias disorderly conduct requires “hatefully creating a risk of public inconvenience,” as opposed to requiring that the perpetrator “hatefully engages in fighting or threatening.”

Finally, formulating bias crime laws based on a central section 2.02(2) definition would avoid a problem that infects other versions of bias crime laws. As discussed in the next Part, bias crimes may be defined along the lines of “crimes committed because of bias.” Such a simple definition, however, raises complex problems of application. Specifically, when the definition of a bias crime includes the term “crime,” it is unclear whether “crimes” should include those crimes committed through complicity, those where the actor’s intent and the actual result diverge, those merely attempted crimes, and those for which there may be a defense. Because the potentially ambiguous term “crime” is not employed, these issues would not arise if bias were defined in section 2.02 and then, like other culpability terms, incorporated into the definitions of the various specific offenses. Proceeding in this manner would raise no

28. *Id.* § 250.2(a).

novel problems of statutory interpretation. Rather, because bias would be treated analogously to the M.P.C.'s standard culpability states, issues regarding bias-attempts, bias-complicity, etc. would be resolved analogously.

Nevertheless, adding bias as a general culpability term carries two serious disadvantages. First, many lengthy additions would have to be made to the M.P.C. The bias-assault provisions above are just an example of what would have to be added to every offense for which it was thought a bias-version was desirable. The M.P.C. has already been criticized for its length.²⁹ The drafting approach exemplified by the bias-assault provision above would give that criticism greater force. The increased clarity achieved would not be worth the substantial increase in bulk and commensurate decrease in accessibility of the Code. For this reason, the general culpability approach to bias crimes likely fails as a practical drafting option.

The second reason for not treating bias as a general culpability term challenges the underlying motivation for including bias in section 2.02. According to this objection, bias, while superficially resembling purpose, knowledge, recklessness, and negligence, does not in fact bear on moral culpability, as do the standard four conditions, and so should not be treated for purposes of drafting as a culpability condition. The argument that the existence of bias does not increase a person's moral culpability for his conduct runs as follows. Moral culpability, or blameworthiness, is essentially a matter of responsibility, or accountability.³⁰ The reason that a person's awareness of risk, knowledge, and purpose is relevant to a person's moral culpability for wrongful conduct is that each state establishes an increasing level of responsibility for the

29. See Paul H. Robinson, *Structure and Function in the Criminal Law* 185 (1997).

30. See Fletcher, *supra* note 13, at 495 ("The question of fair accountability is expressed in assaying whether the accused can be fairly blamed for his wrongdoing."); Christine Sistare, *Agent Motives and the Criminal Law*, 13 *Soc. Theory & Prac.* 303, 309 (1987) ("Just as both responsibility and illegality are required for liability, so both responsibility and fault are required for culpability.").

conduct. A person is most responsible for a result when it is his purpose to cause it because, through his values and desires, he becomes committed to the result's occurring. A person is significantly responsible for a result when he knows his acts will cause it because acting with such knowledge implies a full acceptance of such a result. A person is less responsible for such a result when she is merely aware of the risk of the result because acting in light of the risk shows a willingness to accept the result, but one that may be tempered by the hope that it will not occur. The criminal law reflects these relative levels of responsibility. A person who purposely tries to cause the death of another, but does not, is subject to greater liability than a person who is practically certain that his acts will cause a death, even if they do not.³¹ A person who knowingly causes a death is subject to greater liability than a person who recklessly causes a death.³²

Bias, however, does not increase one's responsibility for a given wrongdoing. If Defendant 1 punches Victim 1 because he was paid to, and Defendant 2 punches Victim 2 because Victim 2 is Jewish, they are equally responsible for the wrongdoing of punching a person who does not deserve to be punched. The purposeful, or perhaps the purposeful and premeditated,³³ causing of a harm for its own sake represents maximal responsibility for the harm and so maximal moral culpability. Rather than increasing the degree of one's responsibility, bias increases the *scope* of one's responsibility. Defendant 3 assaults Victim 3, a Jew, because he believes Victim 3 is Jewish. Defendant 4, not realizing that Victim 4 is a Jew, assaults Victim 4, because he believes Victim 4 is carrying a lot of money. Based on

31. Attempted murder is a felony of the second degree; reckless endangerment is merely a misdemeanor. Compare Model Penal Code §§ 5.01 (attempt), 5.05 (grading) (Official Draft and Revised Comments 1985), with id. § 211.2 (recklessly endangering another person).

32. Murder is a felony of the first degree; manslaughter is a felony of the second degree. Compare id. § 210.2(1)(2) (murder), with id. § 210.3(1)(2) (manslaughter).

33. Various criminal codes reserve the harshest penalties for those homicides committed with premeditation. See, e.g., Cal. Penal Code § 189 (West 1991).

Defendant 2's subjective understanding of his action, we might say that Defendant 2 is responsible for assaulting "a person who is Jewish." In contrast, based on Defendant 4's subjective understanding of his action, Defendant 4 is responsible for assaulting "a person who is carrying a lot of money." While acting because of bias increases the scope of a person's responsibility, it does not do so in a morally significant way. Being Jewish neither raises nor lowers a person's moral worth, just as carrying a lot of money neither raises nor lowers a person's moral worth. Consequently, Defendant 3 and Defendant 4 are equally morally culpable for all morally significant aspects of their actions.³⁴

The foregoing argument was intended to show that bias motivation does not increase an actor's moral culpability for a given intentional wrongdoing. Even if this argument is not accepted, however, it at least demonstrates that bias does not bear on culpability for wrongdoing *in the manner* that the traditional M.P.C. culpability states do. Purpose and knowledge, and even recklessness (understood as being aware of the possibility of an event) and negligence (understood as having grounds for being aware of the possibility of an event) are not mental states that are inherently immoral. They only create moral culpability depending on their content, for example having the purpose of or being reckless about causing physical or emotional harm to another. In contrast, bias, implying an erroneous devaluation of another based on certain characteristics of personal or cultural significance, entails a character flaw and grounds for moral criticism. Bias is a much narrower and value-specific mental state than the traditional M.P.C. culpability states. This point may be

34. Acting because of bias, admittedly, has some moral implications. If a person who acts wrongfully is motivated by bias, he cannot be motivated by some consideration that might diminish his responsibility for the wrongdoing. A person who destroys property because of bias cannot plead that he acted based on some exculpatory motive such as the desire to prevent a greater harm to others. While acting based on bias therefore may preclude an actor's responsibility from being mitigated, it still cannot increase it.

made in terms of section 2.02's general function of establishing mens rea requirements. Purpose, knowledge, recklessness and negligence are determinants of legal culpability because they represent attitudes (broadly construed) toward the material elements of an offense. Bias is not an attitude toward a material element, but an attitude toward the race, religion, or other specified characteristic of the victim. Such specified victim characteristics are not material elements of any M.P.C. offense, or, indeed, any existing penal code offense. To incorporate bias into section 2.02 would at a minimum suggest a false analogy between it and the M.P.C.'s standard culpability states. The structure of a penal code should reflect the substantive nature of its elements. Accordingly, bias does not deserve a place in the M.P.C.'s pantheon of culpability-creating mental states.

2. Bias As a Sentencing Factor

An alternative formulation of bias crime laws that places them in the M.P.C.'s general part is one that treats bias as a sentencing factor. Currently, the M.P.C. provides little guidance or structure for courts in determining sentences within the generally wide sentencing ranges for different degrees of misdemeanors and felonies.³⁵ Within the statutorily prescribed range, courts are generally given full discretion to select a sentence in light of a pre-sentence investigation.³⁶ The only exception to prescribed sentencing ranges is the M.P.C.'s provision for extended terms, which the M.P.C. generally reserves for defendants the court finds to be persistent offenders or professional criminals.³⁷ If bias were to be incorporated in the M.P.C. as a factor relevant to sentencing, the most natural means would be to insert a provision in sections 7.03 and 7.04 to permit the court to order an extended prison term upon a

35. See Model Penal Code §§ 6.06, alternative 6.06, 6.09 (Official Draft and Revised Comments 1985).

36. *Id.* § 7.07.

37. *Id.* §§ 6.07, 6.09, 7.03, 7.04.

finding that the defendant acted because of bias.³⁸

a. The Constitutional Question

A number of states,³⁹ as well as the federal government,⁴⁰ have chosen to establish increased penalties for bias crimes by treating the existence of bias as an aggravating sentencing factor to be determined by a trial judge after a sentencing hearing. A serious question, however, has recently arisen regarding whether this popular approach is legally viable. In November 1999, the

38. Such an addition would fit comfortably with other possible revisions to the M.P.C.'s sentencing provisions. As the Code's Commentaries recognize, there has arisen concern, not without merit, that wide sentencing discretion invites inconsistency in sentencing and produces resentment among those subject to it. Model Penal Code pt. I §§ 6.01-7.09 cmt. at 11-12 (Official Draft and Revised Comments 1985). A revised Code would very likely incorporate discretion-limiting provisions of one type or another.

39. See e.g., Alaska Stat. § 12.55.155(c)(22) (Michie 1998) (permitting increase beyond presumptive term for offenses); Ariz. Rev. Stat. Ann. § 13-702(c)(14) (West Supp. 1999) (establishing bias as aggravating factor within standard range of possible sentences); Cal. Penal Code § 433.75(a) (West 1999) (permitting additional term of up to three years); Fla. Stat. Ann. ch. 775.085(1)(a) (West Supp. 2000) (mandating one-step increase in misdemeanor or felony type); Iowa Code Ann. § 712.9 (West 1993) (mandating one-step increase in misdemeanor or felony type); Neb. Rev. Stat. Ann. § 28-111 (Michie Supp. 1998) (mandating one-step increase in misdemeanor or felony type for specified offenses); N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999) (mandating extended sentence); R.I. Gen. Laws § 12-19-38 (Supp. 1999) (mandating additional term of imprisonment); Tex. Penal Code Ann. § 12.47 (Vernon Supp. 2000) (mandating one-step increase in misdemeanor or felony type); Vt. Stat. Ann. tit. 13, § 1455 (1998 & Supp. 1999) (permitting increase in maximum sentence or to statutory maximum defined for offense); Wis. Stat. Ann. § 939.645 (West 1996) (sometimes permitting and sometimes mandating increase in maximum sentence).

40. See U.S. Sentencing Guidelines Manual § 3A1.1(a) (1995). Section 3A1.1(a) provides:

If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels.

Although Congress has considered legislation making the commission of a bias crime a federal offense, see the Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999), Congress to date has not enacted such legislation.

United States Supreme Court agreed to review *Apprendi v. New Jersey*.⁴¹ *Apprendi* directly raises the issue whether the Constitution permits a court to increase a defendant's sentence based on its own finding of bias. This issue is part of the larger one of the constitutionality of permitting facts found at the sentencing phase of the trial, rather than the liability-determination phase, to have an impact on the range of penalties that a defendant is exposed to. This issue has attracted significant scholarly attention.⁴² I shall consider it relatively briefly.

In *New Jersey v. Apprendi*,⁴³ the New Jersey Supreme Court considered the appeal of Charles Apprendi. Apprendi had pled guilty to two counts of possession of a firearm for unlawful purpose and one count of unlawful possession of a prohibited weapon, second and third degree felonies respectively, with the sentence for the latter to run concurrently.⁴⁴ As a second-degree crime, possession of a firearm for an unlawful purpose exposed Apprendi to a penalty of five to ten years.⁴⁵ The state, however, consistent with its plea agreement, applied for an extended sentence under New Jersey's hate crimes law. This law would permit a doubling of the maximum and minimum sentence of a second-degree crime.⁴⁶ On the basis of a hearing prior to sentencing, the trial court concluded that Apprendi's acts were the product of racial bias and

41. 731 A.2d 485 (N.J. 1999), rev'd, 120 S. Ct. 2348 (2000).

42. See, e.g., Note, *Awaiting the Mikado: Limiting Legislative Discretion to Define Criminal Elements and Sentencing Factors*, 112 Harv. L. Rev. 1349 (1999); Richard G. Singer & Mark D. Knoll, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of McMillan v. Pennsylvania*, 22 Seattle U. L. Rev. 1057 (1999); Frank R. Herrmann, 30=20: "Understanding" Maximum Sentence Enhancements, 46 Buff. L. Rev. 175 (1998); Benjamin J. Priester, *Further Developments on Previous Symposia: Sentenced for a "Crime" the Government Did Not Prove: Jones v. United States and the Constitutional Limitations on the Factfinding by Sentence Factors Rather Than Elements of the Offense*, 61 Law & Contemp. Probs. 249 (1998); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. Cal. L. Rev. 289 (1992).

43. 731 A.2d 485 (N.J. 1999).

44. *Id.* at 487.

45. *Id.*

46. See N.J. Stat. Ann. § 2C:44-3(e), 2C:43-7(a)(3) (West Supp. 1999).

sentenced him on one of the unlawful purpose counts to an extended term of twelve years imprisonment with four years of parole ineligibility.⁴⁷

Apprendi challenged the imposition of the extended sentence on the ground that it was imposed without due process. Specifically, Apprendi argued that by permitting the court to find bias based on a preponderance of evidence presented at the sentencing hearing, New Jersey had violated the requirement of *In Re Winship*⁴⁸ that every element of an offense be proven beyond a reasonable doubt. Apprendi did not deny that under New Jersey law, bias functioned as a sentencing factor. Rather, he contended that because the existence of bias would result in an increased penalty range, bias must be characterized as an offense element for constitutional purposes.

If a fact is determined to be an element of an offense, a bevy of constitutional consequences follow. Not only must the fact be found beyond a reasonable doubt, the defendant also has the right to demand that the finding be made by a jury, where he will have the right to confront witnesses and to enjoy compulsory process.⁴⁹ Likewise, the fact must be charged in an indictment and submitted to a grand jury where appropriate.⁵⁰ Thus, Apprendi's appeal addressed the lynchnpin issue: when should a fact that bears on the range of punishments to which a defendant is exposed be deemed an offense element?

The Supreme Court has long struggled with this question in one guise or another. In *Mullaney v. Wilbur*,⁵¹ the Court held that where Maine had defined first-degree murder to exclude killing in the heat of passion, it must bear the burden of proving that fact beyond a reasonable doubt. In *Patterson v. New York*,⁵² the Court held that where New York had established that murder would be

47. Apprendi, 731 A.2d at 487.

48. 397 U.S. 358 (1970).

49. See U.S. Const. amends. VI, VII.

50. See U.S. Const. amend. V.

51. 421 U.S. 684 (1975).

52. 432 U.S. 197 (1977).

mitigated to manslaughter based on a finding of "extreme emotional disturbance," it would be able to place the burden of demonstrating this fact on the defendant. The homicide statutes at issue in *Mullaney* and *Patterson* were close in substance. Both provided that a defendant who was adequately provoked would be liable for manslaughter rather than murder. In order to uphold the New York statute, the Court in *Patterson* rejected a broad reading of *Mullaney* under which:

the State may not permit the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of the fact, as the case may be, beyond a reasonable doubt.⁵³

According to the *Patterson* Court, the flaw of the Maine statute was that Maine had, with one hand, established lack of provocation as an element of murder (by defining murder in terms of malice aforethought, which implied an absence of heat of passion) and had, with the other hand, permitted it to be found simply based on proof of an intentional killing.⁵⁴ According to the Court, this implementation of the law allowed the absence of heat of passion to be presumed. In contrast, "nothing was presumed or implied against Patterson."⁵⁵ In *Patterson*, the Court was clear that its holding was premised on the desire to leave states free to structure criminal offenses as they wished. Such freedom, the Court noted, might often accrue to the benefit of defendants as states established factors that, if shown by defendants, would defeat an offense.⁵⁶ Such a mitigating factor, even when the proof fell to the defendant, was better than nothing at all.

Nevertheless, the question remained: In what sense

53. *Id.* at 214.

54. *Id.* at 215-16.

55. *Id.* at 216.

56. *Id.* at 215 n.15.

had Maine ever established that absence of heat of passion was a fact the State had to prove, given that it ultimately allocated proof of its existence to the defendant? Was the New York statute constitutional only because New York had more clearly labeled the proof requirements for various elements in the first place? If so, could the requirements of the due process clause be eviscerated through the simple stratagem of labeling a traditional offense element "not an offense element"? To these concerns the court stated:

This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard. "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." The legislature cannot "validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt."⁵⁷

These constitutional limits—no liability based on a mere indictment or proof of identity—are exceedingly minimal. Even if they are not exhaustive, but merely illustrative, they suggested that states would, for all practical purposes, have carte blanche to allocate (but just not reallocate) facts to the defendant's case.

Following *Patterson*, starting in 1984, the Court decided a string of cases in which the issue was not "what facts can be allocated to the defendant to disprove by a preponderance of the evidence," but "what facts can be allocated to the sentencing phase of adjudication so that they merely need be proved by a preponderance of evidence?"⁵⁸ These cases culminated in the 1999 case,

57. See *id.* at 210 (citations omitted).

58. See *Monge v. California*, 524 U.S. 721 (1998) (holding that Double-Jeopardy Clause is not implicated when offenses differ because facts determined at sentencing, not trial); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (holding statutory maximum sentence may be increased by sentencing hearing

United States v. Jones.⁵⁹ *Jones* was a statutory interpretation case. The statute before the Court was a federal car jacking statute that permitted higher penalties for car jackings that resulted in serious bodily injury and death. At issue was whether, pursuant to the statute, resultant serious bodily injury or death was an element of the offense, which therefore had to be found beyond a reasonable doubt by a jury, or was a sentencing factor, in which case one or the other merely had to be found by the trial court to have been established by a preponderance of the evidence. Here a five-justice majority invoked the doctrine of constitutional doubt to hold that the existence of resulting serious bodily injury or death was an element of the offense. According to this doctrine, where possible, statutes should be construed in a manner that would not call their constitutionality into doubt.⁶⁰ The Court concluded that whether the determination of a fact that increased statutory sentencing range could be taken from the jury and given to a court at sentencing "raise[d] a genuine Sixth Amendment issue not yet settled."⁶¹

The Court appears evenly balanced on the question of how this issue should be settled. In *Jones*, two justices, Stevens and Scalia, seemed adamant that such a statute, like the statute *Apprendi*, would be unconstitutional. In his concurrence, Justice Stevens stated flatly, "I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal

finding of recidivism); *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam) (holding that capital sentencing determination could be made by judge); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (upholding a sentencing hearing determination of fact that established a mandatory minimum sentence); *Spaziano v. Florida*, 468 U.S. 447, 457-65 (1984) (per curiam) (rejecting argument that capital sentencing must be decided by a jury).

59. 526 U.S. 227 (1999).

60. See Roberta Sue Alexander, Note, *Dueling Views of Statutory Interpretation and The Canon of Constitutional Doubt: Almendarez-Torres v. United States*, 118 S. Ct. 1219 (1998), 24 U. Dayton L. Rev. 375, 388-90 (1999) (discussing versions of constitutional doubt doctrine held by different justices).

61. *Jones*, 526 U.S. at 248.

defendant is exposed.”⁶² Likewise, Justice Scalia, in his concurrence, opined that in his “considered view,” it is unconstitutional “to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed.”⁶³ The hate crime law in *Apprendi* would run afoul of these principles because the determination of bias after an adjudication of guilt would double the range of penalties a defendant would be exposed to. Both justices referenced earlier opinions in which they, in the minority, had clearly staked out their positions.⁶⁴ Their concern clearly was the concern flagged but dismissed in *Patterson*: allowing sentence-determining facts to be found by less than proof beyond a reasonable doubt by a jury would allow the constitutional protections guaranteed a defendant to be circumvented.⁶⁵

The four dissenters in *Jones* appear equally firmly committed to the contrary position that in general no constitutional issues are implicated by a sentencing factor that raises the maximum possible penalty. The dissent obliquely suggested that it might have constitutional concerns in cases where the factor constituted distinct culpable conduct that a legislature might wish to punish independently.⁶⁶ The dissent, however, characterized the sentencing factor in *Jones*, serious bodily harm or death, as the result of conduct rather than conduct itself, and would

62. *Id.* at 252 (Stevens, J., concurring).

63. *Id.* at 253 (Scalia, J., concurring).

64. See *id.* at 252 (Stevens, J., dissenting); *Id.* at 254 (Scalia, J., dissenting).

65. See *McMillan v. Pennsylvania*, 477 U.S. 79, 102 (1986) (Steven, J., dissenting) (“It would demean the importance of the reasonable-doubt standard — indeed, it would demean the Constitution itself—if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct is not an ‘element’ of a crime.”); *Monge*, 524 U.S. at 740 (1998) (Scalia, J., dissenting) (“the California legislature . . . may have stumbled upon the El Dorado sought by many in vain since the beginning of the Republic: a means of dispensing with inconvenient constitutional ‘rights.’”).

66. See *Jones*, 526 U.S. at 255 (Kennedy, J., dissenting). Although it provided no example, the dissent might have imagined a hypothetical statute that increased the statutory maximum penalty for assault upon a sentencing-hearing finding that the defendant unlawfully took the victim’s property after the assault.

undoubtedly find that acting because of bias was not distinct culpable conduct. In reaching its conclusion, the dissent did not attempt to weigh the competing interests of a states' freedom to define offenses against a defendant's interest in having a jury determine facts significantly bearing on his punishment. Rather, the dissent relied on two other arguments. First, the dissent contended that prior decisions of the Court foreclosed the issue. Here the dissent cited powerful precedent including *Patterson*, a subsequent case that upheld the use of a sentencing factor to raise the statutory minimum sentence,⁶⁷ and finally a case that upheld the use of the defendants' recidivism as a sentencing factor to increase the statutory maximum.⁶⁸

Second, the dissent challenged the majority to define the implications of the position it found to be constitutionally unsettled. Would this position invalidate only those sentencing schemes including a factor that raised the statutory maximum for the offense, or would it also invalidate those sentencing schemes including a factor that raised the maximum penalty *within* the statutorily defined range?⁶⁹ An example of the latter type of scheme would be one in which the offense of unlawful possession of a weapon carried a sentence of five to twenty years, but the relevant sentencing scheme provided that a sentence exceeding ten years could only be imposed based on a finding of bias made at the sentencing hearing. The implications of the challenge were clear: if the majority were entertaining only the former, more narrow, principle, a legislature could easily respond by simply increasing the relevant statutory offense range and redrafting the sentencing scheme to convert factors which formerly were maximum increasing to factors that were necessary to reach the new statutory maximums; if the majority were

67. See *id.* at 265 (Kennedy, J., dissenting) (discussing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)).

68. See *id.* at 265-66 (Kennedy, J., dissenting) (discussing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (holding statutory maximum sentence may be increased by sentencing hearing finding of recidivism)).

69. See *Jones*, 526 U.S. at 265-68 (Kennedy, J., dissenting).

entertaining the latter, more expansive position, then any sentencing scheme where a fact-finding might have a necessary effect on the sentence imposed would be invalid. The federal sentencing guidelines would be immediately rendered presumptively unconstitutional.⁷⁰ Thus, the dissent implied, the position the majority entertained was either formalistic and empty, or would force states to return to systems of indeterminate sentencing where the trial judge's discretion was vast and inconsistency rife.

The majority did not accept the dissents' challenge to seize one or the other horn of the dilemma. Instead, the majority responded with language that simultaneously denied that its tentative position was in tension with sentencing schemes generally (without explaining specifically why) and warned that if there were such a tension, the sentencing schemes would have to yield to the requirements of the Constitution. The Court stated:

[T]he dissent suggests that our decision will unsettle the efforts of many States to bring greater consistency to their sentencing practices through . . . administratively established guidelines governing sentencing decisions. The dissent's concern is misplaced for several reasons. . . . [E]ven if we assume that the question we raise will someday be followed by the answer the dissenters seem to fear, that answer would in no way hinder the States (or the National Government) from choosing to pursue policies aimed at rationalizing sentencing practices. If the constitutional concern we have expressed should lead to a rule requiring jury determination of facts that raise a sentencing ceiling, that rule would in no way constrain legislative authority to identify the facts relevant to punishment or to establish fixed penalties. . . . [W]hile we disagree with the dissent's dire prediction about the effect of our decision on the States' ability to choose certain sentencing policies, it should go

70. See U.S. Sentencing Guidelines Manual (1998-99). In *Mistretta v. United States*, 488 U.S. 361 (1988), the Supreme Court held that the Congress, in establishing the Federal Sentencing Commission and federal sentencing guidelines, neither made an improper delegation nor violated the separation of powers principle. The Court did not consider whether the guidelines violated any of the provisions of the Bill of Rights.

without saying that, if such policies conflict with safeguards enshrined in the Constitution for the protection of the accused, those policies have to yield to the constitutional guarantees.⁷¹

When it comes time to fish or cut bait, as it will when the Court considers *Apprendi*, will the three remaining members of the *Jones* majority—Justices Souter, O'Connor, and Thomas—find the constitutional doubt expressed in *Jones* to have been a false alarm or find that the Constitution precludes a legislature from empowering a trial court at sentencing to find facts that have the effect of raising or altering the range of penalties to which the defendant is exposed? Or will it adopt the “formalistic” position that a legislature may allocate such fact-finding to the sentencing phrase of adjudication, so long as it also increases the statutory maximum in the definition of the offense so that the fact found at sentencing does not increase the maximum (even if it is a necessary condition for reaching the maximum)?

By taking the position they did in *Jones*, this bloc of the Court demonstrated that they did not feel strongly bound by the Court's prior jurisprudence in the area. Nevertheless, if history can be used as a guide, it is more likely than not that they will pull back from holding that the Constitution places significant substantive limits on the extent to which sentence-determining facts can be established at the sentencing phase (which limits cannot be evaded through resetting statutory maximums and relabeling sentencing-enhancement factors as sentencing-maximum necessary-conditions). With *Patterson*, the Court indicated its unwillingness to pursue a path at least suggested by *Mullaney*: a substantive inquiry into the content of affirmative defenses to determine which were “really” offense elements. Such an inquiry would likely have produced catastrophic results for the nation's criminal justice system as wide swaths of defenses were reassigned

71. *Jones*, 526 U.S. at 252 n.11.

to the prosecution.

Likewise, it can be expected that the Court will be exceedingly reluctant to accept the dissent's challenge and invalidate state and federal sentencing guidelines generally. Indeed, to accept the constitutional principle advanced by the *Jones* majority would seem to commit the Court to overhauling the nation's rules of substantive criminal law as well. If a legislature cannot establish sentencing factors that would increase the penalty range to which the defendant was exposed, then neither should it be able to establish that the lack of these factors is an affirmative defense that the defendant will have to prove. If a fact is an offense element by virtue of its sentence-increasing effect, then it must be proven beyond a reasonable doubt. Because the facts establishing or negating affirmative defenses affect the range of penalties a defendant is exposed to, the proof of such facts would have to be reallocated to the prosecution. Contrary to precedent,⁷² all affirmative defenses that involve any degree of burden shifting would become constitutionally suspect.

It is also possible that the Court will reach a compromise which will allow some facts bearing on sentencing range to be determined at the sentencing phrase, but will require other facts to be determined only at trial with the full panoply of constitutional protections. The Court has already (narrowly) upheld the use of recidivism as a factor that may be determined at sentencing and will increase the sentencing range to which a defendant is exposed.⁷³ The use of recidivism, however, is relatively noncontroversial since recidivism (1) is a traditional sentencing factor, (2) is not related to the underlying events for which the defendant is prosecuted

72. See *Martin v. Ohio*, 480 U.S. 228 (1987) (upholding requirement that defendant prove self-defense by preponderance of evidence); *Leland v. Oregon*, 343 U.S. 790 (1952) (upholding requirement that defendant prove insanity beyond a reasonable doubt).

73. See *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (5-4 decision).

and which the jury generally determines, and (3) will seldom be disputed.⁷⁴ The existence of bias presents a stronger case for being treated as an element of the offense. Although bias is neither a traditional sentencing factor nor a traditional element, it is a mental state of the sort that juries traditionally find. Furthermore, as Justice Kennedy noted in his dissent in *Jones*, factors inherent in the conduct itself, such as the perpetrator's mental state—as opposed to factors outside the perpetrator's immediate control, such as his criminal record—are more appropriately left to the jury.⁷⁵ Finally, because bias arguably goes to the moral culpability of the defendant and so is stigmatizing, its ascription to a defendant deserves the procedural protections appropriate for standard offense elements. Consequently, if the Court follows a middle road according to which the nature of the fact at issue will determine whether it must be treated as an offense element, bias will likely come out an offense element.

b. The Merits of Using Bias as a Sentencing Factor

If the Constitution permits bias to be used as a sentencing factor to increase the range of potential sentences, the question remains whether this approach should be adopted. The next part of this article considers various doctrinal implications of treating bias as a sentencing factor, some of which favor the defendant. Here I will discuss considerations that do not involve other code provisions.

Regardless whether bias is an offense element or a sentencing factor, the bottom-line is the same: When found, bias will result in a longer sentence for the defendant. Thus, to the extent bias crimes warrant penalty enhancements, the retributive, rehabilitative, and preventative rationales for punishment are equally

74. See *id.* at 243-44.

75. 526 U.S. at 270 (Kennedy, J., dissenting).

satisfied regardless whether bias is determined at trial or at a sentencing hearing. Furthermore, on the plausible assumption that potential bias criminals would as likely know of bias offense-based enhancements as bias sentencing-based ones, general deterrence also will be equally achieved. Nevertheless, it has been argued that it is necessary for bias to be incorporated into the criminal law as an offense element rather than a sentencing factor in order for society to make a sufficiently clear statement concerning its disapproval of bias crimes. According to Frederick Lawrence, “[W]hen bias crime legislation becomes law, [t]his act of law-making constitutes a societal condemnation of racism, religious intolerance, and other forms of bigotry.”⁷⁶ Conversely, “if bias crimes are not expressly punished in a criminal justice system . . . a message is expressed by the legislation, a message that racial harmony and equality are not among the highest values held by the community.”⁷⁷ On the basis of the expressive value of punishment, Lawrence concludes that “not only are bias crime laws warranted, . . . they are essential.”⁷⁸

The differential expressive effect of bias as an offense element and bias as a sentencing factor are difficult to gauge, and Lawrence makes no effort to do so. Certainly putting before the jury the issue whether the defendant was motivated by bias would make a powerful statement to the jurors about the significance our society attributes to bias motivated crimes. Treating bias as a sentencing factor, however, would not preclude the fact of the defendant’s bias motivation from being demonstrated at trial for example, as part of the prosecution’s proof of purpose. In any event, a jury is a relatively narrow audience. It would seem unlikely that the general public’s ear would be sensitive enough to distinguish between, on one hand, a person’s being convicted as a bias criminal and being sentenced and, on the other, a person’s being convicted and

76. Lawrence, *supra* note 5, at 167.

77. *Id.* at 168.

78. *Id.* at 163.

being sentenced as a bias criminal. It seems equally unlikely that the term "bias crime" would fade from our cultural vocabulary if there were no bias-based offenses, just bias-based sentences. Accordingly, viewed from the perspective of traditional theories of punishment, it makes little difference whether bias is incorporated into a penal code as an offense element or a sentencing factor.

B. Bias Crime Laws as Provisions of the Specific Part

Thus far I have discussed bias crime laws as they might be established through the modification of the Model Penal Code's general part. Bias crime laws, however, have a fair claim to being incorporated into the M.P.C.'s specific part. As discussed earlier, bias crimes, unlike most offenses, are frequently defined in terms of other crimes and so are derivative offenses. In this sense, they resemble the M.P.C.'s attempt provision which defines attempts derivatively.⁷⁹ The attempt provision clearly belongs in the General Part because it establishes a general formula for determining whether any specific offense has been attempted. Yet bias crimes laws differ from attempts in a significant respect. Attempts are defined in terms of the absence of some element of the offense, such as a necessary result or attendant circumstance. Attempts of different specific offenses therefore have nothing in common, except in the Pickwickian sense of all lacking something. Even here, however, there is no commonality for attempts of different offenses may lack different substantive features depending on the offense. Attempted assault is no more similar to attempted perjury than completed assault is similar to completed perjury.

In contrast, bias crimes share a substantive common feature: the existence of bias. Earlier I discussed the increased culpability that some would ascribe to the perpetrators of bias crimes simply by virtue of their particularly offensive motive. But there is another equally

79. See Model Penal Code § 5.01 (Official Draft and Revised Comments 1985).

powerful understanding of bias crimes that supplies an alternative rationale for their enhanced punishment. According to this alternative explanation, bias crimes are more harmful than similar crimes committed for other reasons. It is not that bias crimes involve harms greater in degree than the harms typically associated with the underlying offense. If bias assaults were simply more injurious than generic assaults, they could be effectively prosecuted as aggravated assaults. Rather, bias crimes, it is claimed, involve unique social harms that are not specifically addressed by the usual range of specific offenses.⁸⁰

I have elsewhere labeled these additional harms "secondary harms," because they both rest upon and go beyond the "primary" harms that most specific offenses are defined in terms of.⁸¹ The secondary harms associated with bias crimes may be divided into three categories: those suffered by the primary victim; those suffered by persons who share the characteristics of the primary victim that caused her to be targeted (the "victim's group"); and those suffered by society generally. Harms in the first category include the psychological trauma and resultant defensive responses that come from being victimized based on a characteristic essential to one's self-identity. Harms in the second category include the vicarious anxiety, fear, withdrawal, and hostility experienced by members of the victim's group upon learning of the bias motivation of the crime's perpetrator. Harms in the third category include loss of cultural and social interchange, productivity, and general flourishing that occurs when the identity of diverse groups becomes defined by incidents of violence and antagonism.⁸²

80. See Lawrence, *supra* note 5, at 58-63.

81. See Dillof, *supra* note 6, at 1049-51.

82. It is sometimes suggested that the purpose of bias crime laws is to convey a message about the societal unacceptability of bigotry and hate-based conduct. See, e.g., Staff Project, *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States* 1 *Syr. J. Leg. & Pol'y* 29, 63 (1995) ("Essentially, hate crime statutes serve to increase the sentences for crimes motivated by racial, ethnic, and religious bias in an effort to promote

If the occurrence of such secondary harms provides the best justification for the enhanced punishments imposed by bias crime laws, the bias crime provisions of a model penal code belong in the specific part. The M.P.C.'s specific part is organized around threats to different broad categories of interests: "Offenses involving danger to the person," "Offenses against property," "Offenses against the family," etc.⁸³ The specific crimes within these categories may be identified with threats to specific interests, such as life, freedom of movement, and sexual autonomy. As discussed, inchoate offenses, such as attempts, are not associated with harm to a particular interest and so are found in the general part. Bias crimes, of course, are not defined in terms of any particular social harm. A bias crime is complete when a crime is committed because of bias, regardless of whether the particular bias threatens any societal concern. In this manner, the definition of a bias crime differs from, for example, the definition of assault which explicitly requires physical harm to a person to occur, be risked, or be threatened.⁸⁴ Nevertheless, bias may be understood as a proxy for secondary harms. The use of such a proxy may be justified on the ground that secondary harms are essentially diffuse and cumulative, thus making proof beyond a reasonable doubt of their occurrence impractical.⁸⁵ Understood as a proxy for secondary harms, bias crimes laws become secondary harm laws. A provision prohibiting bias crimes would then belong in the specific part, perhaps within M.P.C. article 250, "Offenses Against Public Order and Decency."

public awareness that conduct based on bigotry and prejudice will not be tolerated."). This rationale for bias crime laws appears to presume the validity of the harm or culpability theories of bias crimes presented above. If bias crimes are no more harmful than generic crimes, and those who commit them are no more culpable than generic criminals, the message conveyed by bias crime statutes that bias warrants particular condemnation would be deceptive.

83. Model Penal Code §§ 210.0-213.6, 220.1-224.14, 230.1- 230.5 (Official Draft and Revised Comments 1985).

84. See *id.* § 211.1.

85. See Dillof, Punishing Bias, *supra* note 6, at 1057-59. (discussing the merits of this claim).

The subsequent sections examine the doctrinal implications of treating bias crime laws as specific offenses. In particular, how bias crime laws as specific offenses would interact with the M.P.C.'s general provisions is explored.

1. Bias Crimes and Complicity

Assume that a section is inserted into the M.P.C.'s specific part that established bias crimes as a distinct offense. An actual bias crime provision would have to define precisely the nature of the mental state necessary for a bias crime, including the range of victim characteristics this state would have to be directed toward and the required nexus between this state and the actor's conduct. For ease of exposition, I shall pass over these issues and base my discussion on a section that simply provides that "a person commits a bias crime when he commits a crime because of bias." How would such a section be applied to situations where one or more actor is involved in a crime but not every actor is motivated by bias?

a. Unbiased Accessory, Biased Principal

Let us consider two cases involving an accessory before the fact who directs that a crime be committed and a principal in the first degree who carries out the direction. In the first case, the accessory is unbiased and the principal is biased. We might imagine the boss of a local mob who orders an underling to commit a crime of some sort to divert the police from the neighborhood of a planned bank robbery, or a loan shark who pressures a bankrupt client into committing a theft, or a gang leader who requires, as condition of initiation to the gang, that a would-be member deface property of some type. These individuals, though acting culpably to promote crime, are not acting in any way because of bias. In contrast, we might imagine that the underling, the bankrupt debtor, or

the aspiring gang member is racist, anti-Semitic, or homophobic and so selects his victim to assault, house to burglarize, or property to vandalize based on bigoted values. To make the case stronger for acting "because of bias," we might imagine that the principal had a predilection to engage in the crime all along, but the encouragement of the accessory was the condition that spurred him to act at that time. There is no reason to believe that the requirement of acting "because of bias" requires such a high degree of bias motivation that the possibility of an encouraging accessory before the fact is ruled out as a matter of law. In these cases, the principal is straightforwardly liable for a bias crime. What about the accessory?

There are two possible theories for holding the accessory liable. This is so because both the definition of a bias crime and the definition of an accomplice are derivative ones. Thus, in theory, liability for a bias crime might equally be established first based on the complicity provision to establish liability for the underlying crime and then based on the bias crime provision, or vice-versa. Pursuant to the first theory, the accessory of course is liable for the underlying crime committed by the principal. The fact that the accessory committed it through the act of another is irrelevant under the M.P.C. Promoting prohibited conduct is just another way of engaging in prohibited conduct. The accessory thus has committed an offense and so fulfilled the threshold requirement for committing a bias crime. The accessory, however, by hypothesis, has not acted because of bias. He has acted to cause the police to be diverted, to secure a profit, or to maintain the cohesion of the gang. Thus, though he is a perpetrator of the underlying crime, he cannot be, we might say, the bias-perpetrator of that crime.

The analysis is less clear, however, with respect to the second theory of accessory liability. The principal has committed a bias crime. Even if not a biased accomplice to a crime, could the accessory be considered an accomplice to the bias crime itself and so derivatively liable for a bias

crime? For simplicity, let us assume the underlying crime is a conduct crime and so the principal has committed a bias conduct crime. To determine whether the accessory is liable, M.P.C. section 2.06(3)(a) must be consulted. According to this subsection, a person must act "with the purpose of promoting or facilitating the commission of the offense."⁸⁶ Because this subsection does not require bias itself, merely a purpose of a particular type, it is possible that a person might be liable for a bias crime even if not himself biased. For example, a person who disliked society generally might urge a friend to commit a bias crime so that a cycle of violence between different racial groups would be initiated. Such a person, although himself not biased, would be liable for a bias crime via section 2.06. This result—the liability of an unbiased person for a bias crime—is no more unusual than the consequence that a woman may be liable for rape under the M.P.C. by encouraging or aiding a man to engage in the prohibited conduct. Complicity provisions frequently expand the potentially class of perpetrators.

In the hypotheticals we have been considering however, the accessory is not interested in a bias crime in particular being committed. Might he still be liable as an accomplice to a bias crime? The answer here depends on the scope of "offense" as used in section 2.06(3)(a). The Commentary to this subsection states "[To be an accomplice,] the actor must have a purpose with respect to the proscribed conduct or the proscribed result, with his attitude towards the circumstances to be left to the resolution of the courts."⁸⁷ The M.P.C. defines "conduct" as "action or commission *and its accompanying mental state*."⁸⁸ Thus, it may be argued that in order for a person to be an accomplice to a bias crime, he must have the purpose, i.e., conscious object, that the principle be motivated by bias. Here it may be objected that purpose is

86. Model Penal Code § 2.06(3)(a) (Official Draft and Revised Comments 1985).

87. *Id.* § 2.06 cmt. at 311.

88. *Id.* § 1.13(5).

only defined with respect to the material element of an offense,⁸⁹ and mental states, while elements, are not material elements (for it would make no sense to require, pursuant to section 2.01, a type of culpability with respect to the very mental states that create culpability). To this objection, however, it may be retorted that unlike most mental elements, bias relates in part to the "harm or evil, incident to the conduct, sought to be prevented by the law defining the offense."⁹⁰ Indeed, if bias crimes carried enhanced penalties because they involve secondary harms, bias relates directly to the harm sought to be prevented. Under this analysis, then, the accessory mob boss, loan shark, or gang leader, lacking the purpose that the principal act from bias, would not be liable for a bias crime.

There is, however, an alternative analysis available. It starts from the premise that bias in the context of crime does not, as do most mental states relevant to criminal law, establish moral culpability, but instead serves as a proxy for secondary harms. Understood in this light, engaging in an assault because of bias is analogous to engaging in the assault of an African-American while in a Ku Klux Klan outfit or engaging in an assault with a deadly weapon. In both these cases, because of a factor in addition to the assault, there is a likelihood of additional harm to the victim (psychological harm or death) and harm to others (African-Americans or bystanders). The possession of a deadly weapon, which would convert an assault into an aggravated assault, would most likely be considered an attendant circumstance.⁹¹ Certainly being in a KKK outfit would be considered an attendant circumstance. Similarly, being motivated by bias, which may have an effect on the victim like that of wearing KKK garb, may be thought of as an attendant circumstance. If bias were considered an attendant circumstance, the culpability that a person would have to have with respect to it in order to be an

89. See id. § 2.02(2)(a) ("A person acts purposely with respect to a *material element* of an offense when . . .") (emphasis added).

90. Id. § 1.13(10).

91. See id. § 211.

accomplice, according to the M.P.C.'s commentary, would either be purpose or the culpability established by the substantive offense.⁹² Bias crime laws do not explicitly include a culpability requirement for bias, however that state, construed as an attendant circumstance, might be defined or understood. Therefore, applying the M.P.C.'s default culpability rule,⁹³ recklessness regarding the existence of bias would suffice. Such a requirement would not unduly restrict the scope of bias crime laws because, except for extreme cases of unconscious bigotry, a perpetrator of a bias crime will be aware of his bias motivation. Under this analysis, the mob boss, loan shark, and gang leader would be liable for committing a bias crime if they were at least aware of a substantial risk that the crime they encouraged would be a bias crime.⁹⁴

The uncertain scope of complicity for bias crimes is a result of the ambiguity of the M.P.C.: Should mental states that do not relate solely to moral culpability be treated as part of the conduct or as an attendant circumstance? The relevance of this question is not limited to complicity for bias crimes. The same ambiguity arises with respect to complicity for offenses such as burglary which requires a person who enters building to do so "with the purpose to commit a crime therein."⁹⁵ This mental state appears

92. See *id.* § 2.06 cmt. at 311 n.37 ("There is deliberate ambiguity as to whether the purpose requirement extends to circumstance elements of the contemplated offense or whether, as in the case of attempts, the policy of the substantive offense on this point should control.").

93. See *id.* § 2.02(3).

94. If the bias crime committed by the principal is a crime of result, the analysis is similar. The M.P.C. §2.06(4) provides:

When causing particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

Id. at § 2.06(4). This provision, on its face, establishes no culpability requirement for attendant circumstances. Thus, strictly construed, it would permit liability without any kind of culpability with respect to the attendant circumstances of the underlying offense. Because this result cannot have been intended, the additional culpability requirements that apply to complicity for conduct crimes should also apply to result crimes.

95. *Id.* § 221.1.

relevant because of the risk of greater harm the entry carries with it rather than because of an increased moral culpability for the act of entering per se. Because the issue of the status of nonculpability mental states affects complicity for other crimes than bias crimes, it cannot be cured through the drafting of the bias crime provision. Rather, a revised Model Penal Code should address this issue through redrafting of its general definitions or section on complicity. How it should be resolved turns on the prior question of whether the culpability for attendant circumstances needed for complicity will be purposiveness or will be governed by the rule of substantive offense.⁹⁶ Because I believe that the latter approach is more sensible, I would favor applying this principle as widely as possible, a result that would be achieved by construing mental states that do not establish culpability for a material element, such as bias or the purpose of committing a felony, as attendant circumstances rather than an aspect of conduct that an accomplice must have as his purpose. In this way, the mob boss, loan shark, and gang leader would be liable for a bias crime if they were at least reckless regarding the motivation of the principal.⁹⁷

b. Biased Accessory, Unbiased Principal

There remains to be considered the case of the biased accessory and the unbiased principal. Here we might imagine a member of the KKK who pays a local thug-for-hire to vandalize an African-American church. The thug is

96. See Model Penal Code § 2.06 cmt. at 311 n. 37 (Official Draft and Revised Comments 1985) (leaving question open).

97. The conclusion that some mental states should be considered attendant circumstances seems most plausible in the context of complicity, where a principal's bigoted tendencies, for example, may be thought of as a circumstance of the accomplice's criminal activity and where the M.P.C.'s definition of conduct as "action or commission and its accompanying mental state," id. § 1.13(5), may be construed as defining the status of a mental state for only actor himself. Because persons are generally aware of their mental states, it does not matter greatly how mental states that are material elements are classified for purposes of first-person liability.

not biased, though he knows that the person who has hired him to commit the crime is motivated by bias. The legal analysis here largely tracks that of the previous section. The only difference is that here, in order for the thug to be derivatively liable of a bias crime, the M.P.C.'s complicity provision must be invoked twice: Once to permit the biased KKK member to be liable as an accomplice for the non-bias crime committed by the principal, and once in order to make the unbiased thug potentially liable as an accomplice to the KKK member's bias crime.

Although the legal analysis is similar, there may be substantive differences between the cases of the unbiased accessory/biased principal and the biased accessory/unbiased principal. If bias crime laws are to be understood as resting on a theory of secondary harms, it may be questioned whether the secondary harms that are alleged to typically accompany bias crimes are as great when non-biased accomplices are involved.

The answer clearly depends on the bias crime at issue. On one hand, the effects of painting a swastika on the wall of a synagogue likely do not depend on whether the perpetrator was himself biased or acting on behalf of biased accessory. On the other hand, if a person is assaulted or property is damaged by one hired out of bias, there may be little in the circumstances of the crime to indicate to the victim or others that bias was behind the crime. Similarly, if a non-biased accessory encourages a principal to commit a crime, knowing that the victim may be selected based on the bias of the principal, the accessory's purpose—the diversion of the police, the obtaining of stolen property, etc.—may appear to be the only motivation and thus mask the principal's bias. While proxies do not have to be perfectly correlated with their targets, these considerations may make the case weaker for an unbiased accomplice's liability for a bias crime.

Finally, it should be noted that if bias were treated as a sentencing factor, rather than an element of a specific offense, there would be no possibility of an enhanced sentence for an unbiased accomplice to a bias crime. Even

if an unbiased accomplice aided another to commit a crime with the hope that it would be a bias crime, there would be no additional liability. The accomplice would be liable for the underlying crime but, lacking bias himself, would not be subjected to an enhanced penalty at sentencing. In order to avoid this conclusion, a sentencing guideline would have to be drafted that referred explicitly to the bias of the accomplice or otherwise extended the definition of bias to include an actor that, per hypothesis, was without personal bias.

2. Bias Crimes and Attempts

Like the definition of complicity, the definition of an attempt is derivative. Whether a person has engaged in an attempt depends largely on the requirements of the substantive offense that she is alleged to have attempted. Because bias crime laws are also derivative, a similar set of definitional issues arises with respect to the interplay of bias crimes and attempts as arose with respect to the interplay of bias crimes and complicity. These issues turn on the fact that there are two possible ways that an attempt provision and a bias crime provision might combine. Just as a participant in a bias crime might fall into either the category of a bias-accomplice to a crime or an accomplice to a bias crime, so an incomplete bias crime might be characterized as either a bias attempted-crime or an attempted bias crime.

Consider the case of a person who is apprehended on his way to planting a firebomb at a mosque because he despises Moslems. He has committed the crime of attempted arson, and he has done so because of bias. If bias crimes are defined as "crimes committed because of bias," he theoretically could be prosecuted for the crime of bias attempted-arson, analogous to the crime of bias-arson (an arson committed because of bias). Alternatively, he has "with the kind of culpability otherwise required for the commission of the offense" taken "a substantial step in the course of conduct planned to culminate in his commission

of the crime,⁹⁸ here the crime of bias-arson. Thus he theoretically could be prosecuted for attempted bias-arson.

The distinction between an attempted bias crime and a bias attempted crime is more than terminological. How the unsuccessful effort to destroy the mosque is characterized will likely affect the size of the bias penalty enhancement. In many jurisdictions, the range of punishments for an attempted offense is half that of the completed offense.⁹⁹ For purposes of illustration, assume that the maximum penalty for arson is twenty-years imprisonment and that the maximum penalty enhancement for a bias crime is an additional ten-years imprisonment. It follows that when a person commits a bias-arson, he faces a penalty of up to thirty years. If a person who merely takes a substantial step toward committing such a crime is charged with attempting to commit a bias-arson, he will be exposed to half of that maximum penalty, or fifteen years. In contrast, if the perpetrator is charged instead with bias attempted-arson, he would be exposed to a sentence of ten years for attempted arson plus a ten years enhancement for bias, yielding a maximum possible sentence of twenty years.¹⁰⁰

Which is the better analysis of situations where crimes are attempted because of bias will depend, once again, on whether bias is better understood as a mental state increasing an actor's culpability for a given harm (or wrongdoing) or a mental state that serves as a proxy for increased harm (or wrongdoing) in the form of secondary harms. If bias is understood to increase culpability, the 50% failure discount for attempts should apply straightforwardly in the manner that it does for crimes involving a lesser level of culpability, such as generic arson. Thus a maximum sentence of fifteen years would be

98. *Id.* § 5.01(1).

99. See, e.g., Cal. Penal Code § 664 (West 1970); Colo. Rev. Stat. §§ 18-2-101 (1978); Criminal Code of 1961, §§ 8-4, Ill. Ann. Stat. ch. 38, §§ 8-4 (Smith-Hurd Supp. 1980-1981); Ohio Rev. Code Ann. §§ 2923.02 (Anderson 1975).

100. Although the Model Penal Code's sentencing provision for attempts would not create such disparities, the M.P.C.'s general failure to award a "failure discount" for attempts is so unusual that it is unlikely to be retained without an alternative provision in a revised code.

appropriate. The crime would be characterized as an attempted bias-crime. The requirements of attempt would be met because the perpetrator had the necessary culpability (bias) and took a substantial step toward the completion of the conduct establishing bias-arson. In contrast, if bias is understood to increase harm, even in the case of a failed attempt, the same amount of bias arguably exists, implying the same amount of resultant secondary harms. Thus, the crime would be characterized as a bias attempted-arson and a maximum sentence of twenty years would be appropriate. Here the crime of attempted arson would be established simply based on the perpetrator's purpose to commit the conduct constituting arson.

Of course, it may be responded that in the case of a failed attempt where there is no "primary harm," bias will be a particularly poor proxy for secondary harms. The intended victim may only learn of the attempt after the perpetrator has been apprehended and incapacitated. The fear of being targeted again based on an often unconcealable characteristic like race or national origin is greatly diminished. Because the target of the bias crime will feel less aggrieved, the vicarious reaction of the victim's group will be proportionately less. If such is the case, it may be sensible to revise the definition of a bias crime to "a *completed* crime committed because of bias." Such a formulation would preclude liability for a bias attempted crime. A person, however, would still be liable for attempting a bias crime, which as noted, would carry only a discounted enhancement for bias. This discounted penalty would appear to be a more fair one given the decreased secondary harms expected from a failed bias crime. It would also be consistent with the penalty enhancement recommended by the culpability theory of bias crime laws (just as the penalty enhancement for completed bias crimes is consistent with both culpability and secondary harm theories). In contrast, if bias were treated as a sentencing factor, and the same limitation to completed crimes were placed on it, no enhancement at all would be imposed. The defendant could only be convicted

for an attempted crime and bias enhancement at sentencing would not occur. Treating bias as an offense element, therefore, permits a more appropriate range of punishments to be established.

3. Bias Crimes and Divergent Results

Failed attempts are one example of how an intended bias crime may go awry from the point of view of the perpetrator. A second example are cases of divergent results. A racist throws a rock from a moving car at the house of an Asian family that has recently moved into his community, but the rock misses and hits a neighbor's flowerpot. A homophobe picks a fight with a gay man, swings at him, but, because the gay man ducks, the homophobe hits the woman standing beside him. Should these crimes be considered completed bias crimes and punished accordingly?

Subsections 2.03(2) and (3) are the provisions of the M.P.C. designed to handle cases where the actual result diverges from the intended result.¹⁰¹ Pursuant to these subsections, certain results that were not, strictly speaking, desired or contemplated by the perpetrator are deemed to be desired or intended. While the moral validity of this artificial extension of the perpetrator's purpose or conscious risk-taking has been questioned,¹⁰² it is generally thought that the resultant punishment for a complete crimes is not disproportionately harsh.¹⁰³ Under these sections, a person who acted from bias and as a consequence injured an unintended victim would still be liable for the underlying crime, just as a person who acted based on any other motivation would be liable for injury to an unintended victim. Assuming that a bias crime is

101. Model Penal Code §2.03(2)-(3) (Official Draft and Revised Comments 1985).

102. See Anthony M. Dillof, *Transferred Intent: An Inquiry into the Nature of Criminal Culpability*, 1 *Buff. Crim. L. Rev.* 501 (1998).

103. See e.g., Douglas N. Husak, *Transferred Intent*, 10 *Notre Dame J.L. Ethics & Pub. Pol'y* 65 (1996).

defined as “a crime committed because of bias,” the perpetrator, considered to have committed the underlying crime through the operation of subsections 2.03(2)-(3), also would be liable as for a bias crime because he acted from bias.

The appropriateness of this result may be questioned. Perhaps if another Asian family owned the flowerpot the rock hit, or the bystander injured was also gay, we might describe what happened as a bias crime. Where the actual victim does not possess the characteristic that is the target of the perpetrator’s animus, however, we are more likely to describe what has happened as an attempted bias crime than as a completed bias crime. This result makes sense if bias crimes are thought of as specific offenses designed to deter and punish the culpable causing of secondary harms. Certainly, the actual victim will not experience the adverse reaction that the intended victim would have felt had he been the victim of the bias attack. The actual victim will not “take it personally.” Furthermore, as in the previously discussed case of attempted bias crimes with no victims, the secondary harms to the victim’s group and society that flow from an attempt to commit a bias crime where the intended target is not injured tend, as a categorical matter, to be less severe than those where the target victim is injured.

Various drafting strategies are available for avoiding bias crime liability for the perpetrator in these divergent result cases. Bias crimes laws are commonly formulated to require that the crime be committed “because of . . . race, . . . religion, . . . nationality” [or other specified characteristic] *of the victim*.¹⁰⁴ This requirement will result in no liability for a completed bias crime in those cases where the actual victim does not possess the characteristic that the intended victim had and which was the basis for the crime. The requirement, however, is too broad. It would exclude many paradigm bias crimes which have

104. See, e.g., La. Rev. Stat. Ann. § 14:107.2 (West 1998); see also N.C. Gen. Stat. §14-3(c) (1993); Wash. Rev. Code § 9A.36.080 (1996).

significant secondary harms associated with them. Consider the case of a swastika spray-painted on a sidewalk or a racially derogatory phrase scrawled on the entrance to a hotel. Here, the actual victim—the municipality or owner of the hotel—need not possess the characteristic of the group that the perpetrator wishes to disturb. Similarly, the vandalizing of the office of a civil rights activist or the mailing of death threats to the white spouse of an African-American celebrity would not necessarily be crimes motivated by the race, religion, etc. of the victim; these crimes, which involve significant secondary harms, would be motivated by the position, beliefs, or status of the victim. In order to avoid these limitations on bias crimes, yet to exclude cases of divergent results not within the actor's biased objective, a provision might establish bias crime liability where "an actor because of a person' or persons' membership in a race, religion, nationality [or other specified group classification] commits a crime adversely affecting one or more members of that race, religion, nationality [or other specified group classification]." Pursuant to this formulation, the person the perpetrator adversely affects need not be the actual victim of the underlying crime. As long as the person affected is a member of the targeted group, there will be liability. If, however, a person of an unintended race, religion, or nationality were adversely affected, as in the hypotheticals beginning this section, there would be no liability because the person adversely affected (the actual crime victim) was not adversely affected because of his race or other specified characteristic.

4. Bias Crimes and Lesser Forms of Culpability

In the previous section, it was questioned whether an act may constitute a "crime" for the purpose of an M.P.C. bias-crime provision where a crime is only established pursuant to the effect of section 2.03(2). Likewise, it may be questioned whether "crime" includes those offenses that may be established with levels of culpability other than

purpose. The Model Penal Code frequently permits liability based on proof of knowledge or recklessness and occasionally upon proof of negligence.¹⁰⁵ As discussed below, a provision that employed the common "because of" locution would likely create bias-crime liability for crimes of knowledge, recklessness, and negligence where bias was involved.

The paradigm cases of committing crimes because of bias, such as assault or intimidation, involve purposeful criminal conduct motivated by animosity toward the victim because of her race, religion, or other specified characteristic. In such situations, bias acts as a consideration that motivates the perpetrator's illegal action. Nevertheless, there is nothing incoherent about bias crimes involving forms of culpability other than purpose. Acting knowingly, recklessly, and negligently all suggest an acceptance or culpable inadvertence with respect to a potential harm or condition. If such an acceptance or culpable inadvertence were a function of the race or religion of the potential victim, it could be said that the perpetrator had committed a bias crime of knowledge, recklessness, or negligence. Consider for example the case of a bigot who knowingly sells contaminated narcotics to persons in an African-American neighborhood, but who would not have done so in his own neighborhood. Or consider the case of an anti-Semite who recklessly drives at an unsafe speed through the streets of a Jewish community, but who would not have done so in his own community. In these cases, bias does not act as a motivation, but acts to negate what would otherwise be a

105. Recklessness will suffice to establish certain result crimes, see, e.g., Model Penal Code, §210.3(1)(a) (manslaughter) (Official Draft and Revised Comments 1985), and conduct crimes, see, e.g., id. § 211.2 (recklessly endangering another person), as well as being a sufficient form of culpability with respect to many attendant circumstances, see, e.g., id. §221.1(1) (burglary) (attendant circumstance of entering an occupied structure). Negligence will some times suffice for some result crimes, see, e.g., id. §§ 210.4(1) (negligent homicide), 211.1(1)(b) (assault with a deadly weapon) or attendant circumstance, see, e.g., id. § 218.6(1) (age of victim of sexual offense). Where recklessness or negligence will suffice, so will knowledge. See id. § 2.02(5).

constraining consideration, e.g., respect for the safety or health of another person. Even in cases of inadvertence, it is possible to speak of biased action. If a perpetrator would have paid more attention to the presence of the victim had the victim been of his own group, his negligence would be because of bias. While "because of" may indicate the presence of a reason, it is also frequently used to indicate the presence of a causal factor. Thus it may be said, in the causal sense of "because of," that because of bias, a bias crime of negligence was committed.

Because crimes of lesser levels of culpability may be coherently treated as bias crimes does not imply that they should be. To the extent that the punishment imposed on a perpetrator is limited by the perpetrator's desert, increased levels of punishment should be tied to increased harm or increased culpability for harm. Assuming acting based on bias is particularly blameworthy (or at least generally perceived to be by society), my sense is that in the context of lesser forms of culpability, such as recklessness and negligence, bias is proportionally less significant. Merely being relatively indifferent to a person's welfare, or inattentive with respect to that person, is less objectionable than actively desiring ill for that person. When bias is at the root of such recklessness or negligence, it plays a less significant role than when it is at the root of purposeful harming. Furthermore, other things equal, the gravity of the secondary harms that results from an act involving bias should be a function of the amount of increased culpability for the act because of the role of bias. The impact on the victim, the victim's group, and society at large of a bias crime largely comes from the perception that the victim has been done a greater wrong or injustice, or at least that it will be so perceived by the victim. Stated conversely, if bias were perceived as a type of motivation no worse or no more immoral than others, it is unlikely that acts based on them would be considered particularly demeaning, harmful, or inciting. Accordingly, it is likely that the secondary harms produced by non-purposeful bias crimes will, like their culpability, be proportionately less serious.

Because of the lesser harm and culpability associated with crimes of bias negligence and bias recklessness, it may be appropriate to exclude them from a bias crime provision, while permitting the presence of bias to bear on the defendant's sentence within the general sentencing range for crimes of recklessness or negligence. This result could most easily be achieved by making explicit the requirement that bias be an affirmative motive, a reason for acting, not merely a factor permitting or causing negligence or recklessness. Such a section might, for example, provide that a person commits a bias crime "by engaging in a crime motivated by bias" or "by committing a crime for purpose of adversely affecting a person of a particular race, religion, ethnicity [or other specified characteristic]." Both formulations imply that bias gives the perpetrator a reason to act, in contrast to the broader term "because of."

5. Bias Crimes and Defenses

The final issue concerning the relation of a specific-offense bias crime provision to the provisions of the M.P.C.'s general part is the interplay of bias crimes and defenses. Defenses are properly characterized as components of the general part of the criminal law because they apply in a similar manner to all specific offenses. There are not, for example, distinct insanity defenses for theft and arson. Defenses, appropriately, are found in the M.P.C.'s general part.¹⁰⁶

The issue of the interplay of bias crimes and defenses may be examined in the context of the following hypothetical. Imagine that a hiker, lost in the woods and desperately hungry and dehydrated, comes to a clearing where there are two small cabins. Because they are locked, he assumes that they have provisions or other useful items inside. Based on the appearance of one cabin, the hiker concludes that it is owned by a Native American, and believing that Native Americans should "stay on the

106. See *id.* arts. 3, 4 (Official Draft and Revised Comments 1985).

reservation," he chooses that cabin to break into and pillage. Assume that the hiker is aware that the biased nature of his act may be deeply offensive to the Native American owner of the cabin and have significant social repercussions. How should a possible defense of choice of evils here be evaluated?

Because bias crimes, considered as specific offenses, are "second-order" crimes, there are two possible approaches to analyzing this situation. First, one might assume that the first-order crime of burglary has been committed because of bias. Although racial animosity was not the sole motivation of the hiker's action, it arguably was a substantial enough factor behind the ransacking of the Native-American's cabin to conclude that the particular burglary occurred because of bias. One might then ask whether the hiker's prima facie liability for a bias-burglary can be defeated based on the choice of evils defense. Alternatively, one might ask whether the hiker has a choice of evils defense to the first-order crime of burglary, and if so, conclude that because there was no crime in the first place, he cannot be even prima facie liable for the second-order offense of committing a bias crime.

The possibility of different analyses, of course, does not entail the possibility of different outcomes. Whether a robbery is conceived of as a theft in the course of an assault or an assault in the course of a theft will not matter for purposes of determining whether a robbery has been committed. Nevertheless, whether the choice of evils defense is applied to the underlying offense of burglary or only to the bias offense may effect the liability of the defendant.¹⁰⁷ The substantive content of section 3.02, the

107. Here I assume that the choice of evils defense is not precluded per se by the presence of bias. It has been suggested that M.P.C. § 3.02 requires that the actor employ "a principle of selection that is reasonable in the circumstances," Kent Greenawalt, *A Vice of Its Virtues: The Perils of Precision in Criminal Codification, as Illustrated by Retreat, General Justification, and Dangerous Utterances*, 19 Rutgers L.J. 929, 938 (1988), or, at least, that in practice, such a finding would be required. *Id.* at 940-41. The requirement of a reasonable selection method, however, does not appear in the language of section 3.02. Furthermore, there is considerable academic debate whether, as a normative

M.P.C.'s choice of evil defense, does not vary from offense to offense. Nevertheless, in a given situation, it may preclude liability for some offenses but not others. Thus, in application, it is offense-specific. Section 3.02 provides that "[c]onduct which the actor believes to be necessary to avoid harm or evil to himself or to another is justifiable, provided that . . . the harm or evil sought to be avoided by such conduct is greater than *that sought to be prevented by the law defining the offense charged* . . ."¹⁰⁸ The harm sought to be avoided by the law defining burglary is the violation of a person's interest in security of her home and of her possessions. As discussed, although bias crime laws may be understood as based on notions of greater culpability for a given harm, treating them as a specific offense is more consistent with the understanding that they protect a unique social interest—here the interest in preventing secondary harms. Thus, for purposes of section 3.02, the evil sought to be prevented by "the law defining the offense charged" would be the evil of the predicate offense plus the evil of secondary harms.¹⁰⁹ This evil will be greater than

matter, justification defenses should only be available if the actor acted for the right reasons. See, e.g., Paul Robinson, *Competing Theories of Justification: Deeds v. Reasons*, in *Harm and Culpability* 45 (A.P. Simester and A.T.H. Smith, eds., 1996); Robert F. Schopp, *Justification Defenses and Just Convictions*, 24 *Pac. L.J.* 1233, 1267-82 (1993); George P. Fletcher, *Rethinking Criminal Law* § 7.4 (1975); Russell L. Christopher, *Unknowing Justification and the Logical Necessity of the Dadson Principle in Self-Defense*, 15 *Oxford J. Leg. Studies* 228 (1995); Brian Hogan, *The Dadson Principle*, *Crim. L. Rev.* 679 (1989). Whether bias in particular should always preclude a choice of evils defense is a substantive issue beyond the scope of this article. I note, however, that the argument for preclusion appears to rest on an enhanced-culpability theory of bias crimes, which is a matter of principle, rather than a secondary-harms theory of bias crimes, which rests on empirical generalizations. This section considers bias crimes as specific offenses associated with the particular social evil of secondary harms. Accordingly, the assumption that bias will not per se preclude the choice of evils defense is more consistent with the above discussion.

108. Model Penal Code § 3.02(1)(a) (Official Draft and Revised Comments 1985) (emphasis added).

109. M.P.C. § 3.02, if interpreted literally, would seem to require the harm sought to be avoided to be measured against the harm sought to be prevented by the law defining the offense charged in a manner that would not permit the aggregation of the harms associated with multiple offenses where a person was charge with multiple offenses. Thus, if a person in the course of a kidnapping

just the evil sought to be avoided by the predicate offense. Assuming bias crime laws are treated as specific offenses, how the choice of evils defense is applied—either to the underlying crime directly or to the bias crime only—therefore may matter.

If bias crimes were defined as “crimes committed because of bias,” the choice of evils defense likely would be applied without taking into account the secondary harms associated with bias crimes. Under the M.P.C., the elements of the offense of burglary include facts that negative a justification for the conduct, such as facts that establish a choice of evils defense.¹¹⁰ Strictly speaking, a burglary for which a defense exists is not a burglary at all, nor a crime, much less a possible bias crime. In order for the secondary harms associated with bias crimes to be taken into account, a bias crime provision would have to be formulated in terms of (1) the commission of prohibited conduct, or (2) the causing of prohibited results, (3) in specified attendant circumstances, (4) with the required type of culpability, without regard to the existence of facts that would negative a potential justification or excuse. Such a provision threatens to become unwieldy.

George Fletcher has bemoaned the fact that criminal law theory has no commonly accepted term to describe concisely such a collection of facts. He has suggested that the phrase “definition of the offense” be used to refer to all the elements of an offense but those necessary to preclude a defense from being established.¹¹¹ Adopting this

injures a person, destroys a building, and causes a riot, the question would be whether the evil he sought to avoid would outweigh the harm associated with each offenses considered individually. This result seems irrational because it would relieve from liability those who knowing cause more aggregate harm than they avoid. Fortunately, this issue is avoided in the case of bias crimes considered as specific offenses. The enhanced penalties associated with such crimes indicates that they are intended to prevent the underlying crime as much as the secondary harms that the biased commission of the underlying crime might cause.

110. Model Penal Code § 1.13(9)(d) (Official Draft and Revised Comments 1985).

111. See Fletcher, *supra* note 13, at 554 (proposing “definition” and rejecting “prima facie case” on the ground that the latter has a established evidentiary meaning).

terminology, a bias crime might be defined to occur where "because of bias a person acts in a manner establishing the definitional elements of a crime." In this manner, a defense to the predicate crime would not be relevant for determining bias crime liability, and the determination of bias crime liability would depend on whether the harm the person seeks to avoid is greater than the total harm (including the secondary harms) that he believes will result from his act. The hiker's knowledge of the effects of his biased action then might be taken into account in assessing his liability.

The fact that a bias crime provision may be drafted to make secondary harms relevant to the application of the choice of evil defense leaves open the question of whether this approach should be adopted. If one believed that bias crimes laws were not intended to prevent a distinct type of harm, but merely to punish more based on the increased culpability of the perpetrator for a given harm, this drafting approach would make no sense. There would be no possible difference in outcome to motivate the revision suggested above. The balancing of harms would come out the same. Likewise, this drafting option would be inappropriate if it were thought that there were significantly less severe secondary harms associated with those bias crimes based on a predicate crime for which there was a defense.

To return to the hypothetical presented at the beginning of this section, is it likely that the Native American would be less disturbed, and other Native Americans would feel less concerned, because the hiker was trying to save his own life? It might be argued, on one hand, that in this case, the hiker's bias in choosing the Native American's cabin would likely be masked by the surrounding circumstances. The hiker's conduct would only ambiguously manifest bias because of the possibility that his choice of which cabin to burglarize was random. On the other hand, the fact that the hiker damaged the cabin may be seen to imply that bias was the sole motive behind his conduct. His claim that he was also partially

motivated by hunger and thirst may sound hollow. Even if it is believed, the victim or his community may believe that bias which plays a role as a partial determinant of the hiker's actions is as insulting or threatening as bias that is the sole cause. Because there seems to be no persuasive reason to believe that the secondary harms in cases like these will be less than those where there are no defenses to the predicate crime, drafting bias crimes laws in terms of "the definitional elements of the offense" rather than "crimes" may be advisable.

Finally, if bias were employed as a sentencing factor, rather than an offense element, any defense to the predicate crime would preclude liability altogether, irrespective of the effect of secondary harms on the balance of evils. This may be a strong consideration in favor of treating bias as an offense element. On the other hand, because employing bias as a sentencing factor would, in this respect, be beneficial to the defendant relative to employing it as an offense element, the constitutional concerns about employing bias as a sentencing factor would be diminished.

III. CONCLUSION

The Model Penal Code deserves a model bias crime provision. Such a provision should manifest those virtues exemplified by the M.P.C. generally. It should be clear, precise, and capable of correctly resolving the full range of factual scenarios that it might be applied to. This article has examined various forms that an M.P.C. bias crime provision might take and the practical, constitutional, and substantive implications of these forms. In the course of this examination, a recurrent underlying issue has been: Do bias crimes deserve enhanced punishments because of the increased culpability of the perpetrator for the harm associated with the underlying crime, or because of the additional harms associated with bias crimes? The resolution of this theoretical issue bears upon the organizational question of whether a bias provision belongs

in the M.P.C.'s general culpability section or of whether it should be formulated as a specific offense. It also may bear upon the constitutional question of whether bias may be used as a sentencing factor determining the maximum available penalty. Finally, it bears upon the substantive questions of whether there should be bias crime liability in cases involving either complicity, divergent result, attempt, lesser culpability, or defenses. Assuming that the additional harms associated with bias crimes provide the best justification for bias crime laws, a second recurrent issue has been, when will these additional harms arise consistently enough to justify employing the perpetrator's bias as a proxy for them? Although the article has suggested answers to these recurrent issues, it has not done so dogmatically or conclusively. Rather, a variety of bias crime formulations have been offered in response to the various moral and empirical positions that might reasonably be held. In this way, it is hoped, a bias crime provision worthy of the Model Penal Code can best be developed.

POSTSCRIPT

On June 26, 2000, shortly before this article went to press, the Supreme Court decided *Apprendi v. New Jersey*.¹¹² Dividing 5-4, the Supreme Court struck down New Jersey's bias-crime sentencing law. The breakdown of the votes was foreshadowed by *Jones*¹¹³: Stevens, Scalia, Souter, Thomas and Ginsburg composed the majority; O'Connor, Rehnquist, Kennedy, and Breyer composed the minority.

Consistent with the expectations of the article, the Court in *Apprendi* did not commit itself to an extended substantive inquiry into what sentencing factors, by virtue of their nature and character, were "really" offense elements that had to be determined at trial. Nor did it

112. 120 S. Ct. 2348 (2000).

113. 526 U.S. 227 (1999), discussed supra notes 59-71 and accompanying text.

signal that it was ready to overturn well-established sentencing schemes, such as the Federal Sentencing Guidelines, on the ground that they allocated the finding of various sentence-determining facts to a court rather than a jury. Rather, the Court opted for a more limited approach. According to the Court, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."¹¹⁴ The New Jersey statute violated this rule, the Court found, because it permitted Apprendi, a defendant convicted of a second-degree offense, to be imprisoned for an additional ten to twenty years based on a trial court's finding of bias-motivation.

In invalidating the New Jersey sentencing statute on the ground it permitted a sentence beyond the "prescribed statutory maximum," the Supreme Court adopted what O'Connor in her dissent characterized with reasonable accuracy as a "formalist" approach to the review of sentencing enhancements.¹¹⁵ Whether a sentence is valid depends on whether it is authorized based only on the facts found by the jury, not whether the challenged sentencing scheme was fundamentally less fair to defendants or granted trial judges substantively greater sentencing discretion than alternative constitutionally permissible schemes. As discussed below, the Court did not hold unconstitutional any scheme that might reasonably be called a sentencing-based bias crime law.

By testing the validity of a sentencing scheme based on whether it permitted a sentence above the statutory maximum, the Supreme Court left open the possibility of two forms of bias-crime sentencing laws. The first form would impose a penalty on a defendant by establishing a mandatory-minimum penalty within the statutory range that would be triggered merely by a court's post-trial finding of bias. By staying with the statutory range, such

114. Apprendi, 120 S. Ct. at 2362-63

115. *Id.* at 2389.

mandatory-minimum schemes would be consistent with the Court's holding in *Apprendi*. Such a scheme, like that in *Apprendi*, would often, but not inevitably, operate to impose an enhanced penalty on bias criminals because of their motivation as found by the trial court. Take, for example, the case of a defendant convicted of an offense that normally carried a penalty of ten to twenty years. In such a case, a judge might be inclined to impose a sentence of fifteen years, based on, inter alia, her preponderance-of-the-evidence finding that the defendant acted based on bias. If a mandatory-minimum scheme were in effect, the judge might be required by statute to impose an eighteen year sentence on that defendant, effectively subjecting the defendant to a three-year penalty enhancement because of a judicial finding of bias. From the perspective of the defendant, such an enhancement would "feel" no different than one in which a judge imposed a sentence of eighteen years by finding bias motivation and invoking a sentence-extending bias crime provision to increase the defendant's sentence three years above its normal fifteen year maximum. In both cases, but for the operation of sentencing provisions triggered by a mere judge-made finding of bias, the defendant who otherwise would have received no more than the fifteen years would receive a sentence of eighteen years.

Mandatory-minimum sentencing schemes of this type were upheld in *McMillan v. Pennsylvania*,¹¹⁶ and the Court in *Apprendi* relied on *McMillan* without rejecting its specific holding with respect to mandatory minimum schemes.¹¹⁷ Because both sentence-extending schemes and mandatory-minimum schemes may have the effect of increasing a defendant's sentence, both potentially deter, incapacitate, and express society's condemnation of the conduct triggering the increased sentence. Without

116. 477 U.S. 79 (1986).

117. *Id.* at 2361 n.13. While explicitly declining to overrule *McMillan*, the Court stated that "we reserve for another day the question whether stare decisis considerations preclude reconsideration of its narrower holding [that mandatory-minimum sentencing laws are constitutional]." *Id.*

further argument, there is no reason to believe that sentencing schemes of the latter type triggered by a finding a bias would be less effective than those of the former type. Therefore, *Apprendi* leaves open at least one viable form of bias-crime sentencing law.

The second possible type of sentencing-based bias crime law is more controversial. As suggested earlier in this article¹¹⁸ and in O'Connor's dissent,¹¹⁹ a state could circumvent *Apprendi*'s restriction on maximum-extending sentencing statutes by enacting a statute that simultaneously (1) extended the maximum penalty available for an offense, and (2) instructed that lesser maximums be applied to all defendants but those who the sentencing judge found acted from bias. In effect, a defendant upon a jury finding of guilt may be told: "You are hereby convicted and will be sentenced to a term of five to twenty unless it is found you did not act from bias, in which case you will be sentenced to no more than ten." Such a statute would technically comply with *Apprendi*'s requirement that a defendant's sentence not exceed "the prescribed statutory maximum" because exactly the statutory maximum would be prescribed for those the court, at sentencing, finds to have acted from bias. If such a statute is objected to on the ground that it unconstitutionally employs conditional statutory maximums that are triggered by judicial finding, it may be replied that this "fault" afflicts any comprehensive sentencing scheme that limits a judge's sentencing discretion based on facts not found by a jury. In such cases, the defendant is effectively sentenced to a range of penalties conditioned upon a judge's finding of facts. The Federal Sentencing Guidelines are the all-too-obvious example of such a scheme. In light of the possibility of such a circumvention of *Apprendi*, the majority offered no more than the unhelpful statement that in such a case, "we would be required to question whether the revision

118. See *supra* notes 69-70 and accompanying text.

119. *Apprendi*, 120 S. Ct. at 2380.

was constitutional under this Court's prior cases" followed by the predictably opaque citation to *Mullaney* and *Patterson*.¹²⁰

By striking down a penal statute based on its incompatibility with the legislatively defined and potentially manipulable line between offense elements and sentencing factors, *Apprendi* is the most recent incarnation of *Mullaney*, which tentatively began to define the constitutional content of "offense elements." We will have to see what happens when the next *Patterson* comes along.

120. *Id.* at 2363 n.16. The majority also suggested that such a statute attempting to circumvent *Apprendi's* limits might be blocked by "structural democratic constraints [that] exist to discourage legislatures from enacting [generally disproportional] penal statutes." *Id.* This suggestion, however, is fairly met by O'Connor's retort that insofar as such a statute would be functionally equivalent to the one struck down under *Apprendi*, structural democratic constraints would prove no greater a problem to it than those overcome by the statute in *Apprendi*. *Id.* at 2389.