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Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes

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PUNISHING BIAS: AN EXAMINATION OF THE THEORETICAL FOUNDATIONS OF BIAS CRIME STATUTES

*Anthony M. Dillof**

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INTRODUCTION: THE PUZZLE OF BIAS CRIME STATUTES

Bias crimes—or, as they are sometimes called, “hate crimes”¹—are crimes committed because of the race, color, or religion of the victim. A house of worship is defaced, not as a random act of hooliganism, but because it is a place where Jews worship. A man is mugged, not because he appears wealthy or weak, but because he is Black. These are examples of bias crimes. Bias crime statutes increase the penalties for such crimes.

Recently a wave of bias crime statutes has swept across our country.² This wave may seem unsurprising. Our legal culture is permeated by the ideal of equality. The Equal Protection Clause of the Fourteenth Amendment enshrines equality as a central value in our Constitution. Civil rights laws prohibit private discrimination in a wide variety of contexts, such as employment, housing, and public education.³ Because bias crimes are acts committed based on factors such as race, color, or religion, bias crimes are arguably instances of discrimination. Moreover, because bias crimes are crimes, they seem the most extreme, hence most objectionable, instances of discrimina-

¹ “Bias crimes” is a more accurate term than “hate crimes.” The statutes under consideration likely apply to many criminal acts in which hate, understood as a particular subjective emotion, is not involved. For example, a White youth who attacks a Black in order to gain the admiration of the youth’s racist peers will be liable under these statutes even if he personally does not hate Blacks. See text accompanying *infra* notes 149-52. Likewise, the statutes under consideration do not apply to many criminal acts based on hate. For example, an employee who assaults his overbearing supervisor will not be liable under these statutes even if the assault was motivated by hate for the supervisor.

² The majority of states have enacted bias crime statutes. See *infra* notes 10-17. Furthermore, in 1994, Congress directed the United States Sentencing Commission to promulgate guidelines for enhancing penalties for bias crimes. See Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, § 280003, 108 Stat. 1796, 2096. Such guidelines were promulgated and are now effective. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a) (1995) (reproduced *infra* note 16). Additionally, some localities have taken measures in response to bias crimes. See James B. Jacobs, *Rethinking the War Against Hate Crimes: A New York City Perspective*, 11 CRIM. JUST. ETHICS 55, 55 (1992) (describing New York City Police unit for monitoring and investigating bias crimes).

³ See, e.g., 42 U.S.C. §§ 1973(a) (voting), 2000a(a) (public accommodations), 2000c-(a)(2) (public education), 2000d (federally funded programs), 2000e-2(a) (employment practices), 3605 (real-estate transactions), 6102 (age discrimination in federally funded programs) (1994).

tion. Bias crimes thus appear to offend the principle of equality that some have taken as underlying liberal political theory.⁴ The criminal law appropriately applies its sanctions to conduct that violates society's most fundamental principles. From this perspective, bias crime statutes seem appealing.

Viewed from another liberal perspective, however, bias crime statutes seem puzzling. Liberalism is associated with the ideal of freedom of thought.⁵ By implication, liberalism rejects the possibility of "thought crimes." Biased thought is surely repugnant. Yet thoughts themselves, we believe, even repugnant ones, usually should not be the basis of criminal sanctions. Of course, bias crime statutes do not punish pure thoughts; they punish biased thoughts only where those thoughts underlie a criminal act. The law in the absence of bias crime statutes, however, already punished the criminal act to the extent considered appropriate. The additional penalty imposed by bias crime statutes thus is directly a function of the additional biased thought. *How can thought itself make the crime worse and justify greater punishment?* This question exposes a core tension in liberalism between the ideals of equality of treatment and freedom of thought.

Traditional criminal law doctrine appears to offer an easy answer to this question. *Mens rea* is a securely established doctrine of the criminal law. Under *mens rea*, mental states are relevant to fixing punishment levels. Specifically, prohibited acts committed intentionally are punished more harshly than those committed merely knowingly, those committed knowingly more harshly than those committed merely recklessly, and so on. Whether an act is done intentionally, knowingly, or recklessly depends on the thoughts that underlie the act. The doctrine of *mens rea* appears to offer an unproblematic example of the relevance of thought to punishment. Indeed, more than being unproblematic, the doctrine of *mens rea* seems to show a necessary moral connection between thought and punishment.

Analogizing to *mens rea*, however, does not solve, but deepens, the puzzle of bias crime statutes. "Intentionally," "knowingly," and "recklessly" are broad, highly general categories for characterizing action on the basis of underlying mental states. Intentional acts, for example, may be based on a wide variety of values or ends. Likewise, if merely told that an individual acted recklessly, one would not know anything about the specific content of the individual's beliefs or values. In contrast, the mental element required for bias crimes is defined in terms of beliefs or values concerning such specific matters as race, color, and religion. Because of its content specificity, the mental

⁴ See RONALD DWORKIN, *A MATTER OF PRINCIPLE* ch. 9 (1985) ("Why Liberals Should Care About Equality").

⁵ See, e.g., JOHN STUART MILL, *ON LIBERTY* (1859), reprinted in *ON LIBERTY AND OTHER ESSAYS* 5 (1991); JOHN RAWLS, *POLITICAL LIBERALISM* 289-371 (1993).

element required for bias crimes appears different in kind from those traditionally relevant.⁶ Thus, the puzzle of bias crimes is this: the overt act is already punished; the underlying thought, to the extent biased, appears irrelevant to punishment.

Thus far, scholarly interest in bias crime statutes has focused largely on their constitutionality. In particular, the consistency of bias crime statutes and the First Amendment has been debated.⁷ Yet, wisely, neither the First Amendment nor the other provisions of the Constitution were intended to permit only the wisest laws to be enacted. Many possible laws resting on mistaken moral or factual foundations would be constitutional. Today, the constitutionality of bias crime statutes is largely settled.⁸ Questions concerning their ultimate wisdom and significance for liberalism, however, remain open. In particular, justifications of bias crime statutes in light of the tensions within liberalism and the puzzle presented above have received insufficient attention.

This Article has two goals. The first is to critically examine the theoretical foundations of bias crime statutes in order to understand and assess the lines along which they may be best justified. My primary focus shall be on the philosophical or moral issues that are raised by various potential justifications of bias crime statutes. To the extent relevant, I shall also consider some more practical issues of enforcement and deterrence. A clearer understanding of what bases exist for bias crime statutes, and what bases are illusory, will place our

⁶ The distinction between mental states traditionally relevant to the criminal law and those relevant under bias crime statutes may be analogized to a distinction in First Amendment doctrine. A statute prohibiting "racial statements" (*i.e.*, statements concerning racial matters) would clearly constitute a content regulation. A statute prohibiting "reckless statements" (*i.e.*, statements made with little aforethought) likely would not because a reckless statement could be made about anything. Bias crime statutes apply to racist, as opposed to reckless, action. In this manner, they appear as different in kind from traditional criminal statutes as content regulations differ from noncontent regulations.

⁷ The seminal work belongs to 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). See also David Goldberger, *Hate Crime Laws and Their Impact on the First Amendment*, 1992/1993 ANN. SURV. AM. L. 569; Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673 (1993); George G. Size & Glenn R. Britton, *Is There Hate Speech?: R.A.V. and Mitchell in the Context of First Amendment Jurisprudence*, 21 OHIO N.U. L. REV. 913 (1995); Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate and Animal Sacrifice*, 1993 SUP. CT. REV. 1; Eric J. Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 COLUM. L. REV. 178 (1993); Lisa S.L. Ho, Comment, *Substantive Penal Hate Crime Legislation: Toward Defining Constitutional Guidelines Following the R.A.V. v. City of St. Paul and Wisconsin v. Mitchell Decisions*, 34 SANTA CLARA L. REV. 711 (1994).

⁸ See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (upholding facial challenge to Wisconsin bias crime statute). Because *Mitchell* was brought as a facial challenge, "as applied" challenges remain possible, as do challenges based on state constitutions.

society's battle against the evils of bias on a surer, albeit narrower, footing. The second goal of the Article is to address some fundamental questions of criminal law. Besides providing a vehicle for combating a singularly disturbing phenomenon in our society, bias crime statutes provide a vehicle for examining such issues as the relevance to punishment of motives, motivations, and desires; the limits of the interests protectable through criminal law; and the relation between the terms of criminal statutes and the evils they are intended to address. The inquiry into bias crime statutes also illuminates the grounds for other laws in which bias is an element, such as employment discrimination and other civil rights laws.

The Article proceeds as follows: Part I briefly surveys the content and structure of bias crime statutes. Having identified the distinguishing features of bias crime statutes, Part II elaborates a framework for analyzing these statutes. In Part II, I argue that the penalties imposed by a criminal justice system, at a minimum, must be deserved by those they are inflicted on and that desert, in turn, is a function of (1) the gravity of the wrongdoing involved and (2) the wrongdoer's degree of culpability for that wrongdoing. Thus, all justifications for the increased penalties imposed by bias crime statutes can be analyzed as taking bias to be relevant to either gravity of wrongdoing or degree of culpability, two independent moral categories.

Part III examines possible justifications for bias crime statutes. Subpart III.A takes a first pass at bias crime statutes, construing them on the model of traditional criminal offenses. So construed, the bias element of the statutes appears unrelated to either wrongdoing or culpability, and thus unable to justify the increased penalties established by the statutes. Therefore, the examination of more novel theories is warranted.

In subpart III.B, alternative wrongdoing-based theories of bias crime statutes are considered. These theories cast a wider net to isolate the distinctive wrongdoing involved in bias crimes that justifies their greater punishment. Under such wrongdoing-based theories, a perpetrator's biased reason for acting may be considered a wrongful feature of the act itself or a proxy for some wrongful consequence of the act. I argue that considerations of autonomy and personhood preclude recognizing an interest in another's reasons for acting of the sort that might produce a wrongdoing above and beyond that of the underlying crime. I then examine the position that bias is a useful proxy for further wrongful consequences that often accompany bias crimes, such as psychological harm to the victim or fear and insecurity in the victim's community. This position I judge to present a potentially sound strategy for defending bias crime statutes. Nevertheless, I argue that there is no good rationale for the criminal law to employ bias as a

proxy of this type when the wrongful consequences could be better addressed through statutes which do not employ bias as a proxy.

Subpart III.C considers alternative culpability-based justifications of bias crime statutes. These theories would justify the enhanced penalties established by bias crime statutes on the ground that those who commit bias crimes are, in some sense, more culpable for the crime than those who commit crimes that are similar, but lack the bias element triggering bias crime statutes. I argue that bias, whether considered as an intention, motivation, or desire, cannot play the culpability-increasing role required to justify bias crime statutes. Although racism and other forms of bias are morally flawed views of persons, they fail to connect the bias criminal to his wrongdoing more than other bases for crime. On the basis of these inquiries into wrongdoing and culpability, I conclude that the theoretical foundations for bias crime statutes, though not indefensible, are shaky.

I. AN OVERVIEW OF BIAS CRIME STATUTES

Bias crime statutes are almost as varied in their scope, linguistic particulars, and circumstances of creation as the jurisdictions that have enacted them. There is no single formal or historical feature that a law must have in order to be properly called a bias crime statute. Nevertheless, some common characteristics allow bias crime statutes to be recognized as such and permit them to be discussed in general terms. One manner of describing bias crime statutes is as a family of statutes sharing a common ancestor. In 1981, the Anti-Defamation League of B'nai B'rith released a model statute establishing the offense of "Intimidation." This model statute provided:

Intimidation

A. A person commits the crime of intimidation if, *by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals*, he violates Section ____ of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault, and/or other statutorily proscribed criminal conduct).

B. Intimidation is a ____ misdemeanor/felony (the degree of the criminal liability should be at least *one degree more serious* than that imposed for commission of the offense).⁹

The critical features of this model statute are that (1) it includes an element concerning an actor's reason for committing a previously defined offense, and (2) it imposes a penalty that is an enhancement of the penalty for the previously defined offense.

⁹ STEVEN M. FREEMAN, HATE CRIMES STATUTES: A 1991 STATUS REPORT 4 (1991) (emphasis added).

On the basis of this model, many jurisdictions have enacted similarly worded statutes. Regarding the critical phrase of the model statute—"by reason of the actual or perceived race [etc.]"—different jurisdictions have used different locutions. The most common is the commission of a specified offense "because of race, [etc.]"¹⁰ Some jurisdictions have included a requirement of "maliciousness,"¹¹ but it

¹⁰ See COLO. REV. STAT. § 18-9-121(2) (Supp. 1995) (providing that "[a] person commits ethnic intimidation if, with the intent to intimidate or harass another person because of that person's race, color, religion, ancestry, or national origin," that person causes or places another in fear of personal injury or damage to property); IOWA CODE ANN. § 729A.2 (West 1993) (defining a bias crime as a crime "committed against a person or a person's property because of the person's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability"); MD. CODE ANN. CRIM. LAW § 470A (Supp. 1993) (providing that no person may "[h]arass or commit a crime upon a person or damage the . . . property of . . . [a] person because of that person's race, color, religious beliefs, or national origin"); MINN. STAT. ANN. § 609.2231(4) (West Supp. 1996) (criminalizing an assault committed "because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability . . . age, or national origin"); MO. REV. STAT. § 574.090(1) (Supp. 1993) (providing that "[a] person commits the crime of ethnic intimidation in the first degree if, by reason of any motive relating to the race, color, religion, or national origin of another individual or group of individuals," that person damages another's property above a set value or engages in certain unlawful uses of weapons); MONT. CODE ANN. § 45-5-221(1) (1993) (providing that "[a] person commits the offense of malicious intimidation or harassment when, because of another person's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities, he purposely or knowingly, with the intent to terrify, intimidate, threaten, harass, annoy or offend[,] causes bodily injury or damage to property"); N.Y. PENAL LAW § 240.31 (McKinney 1989) (enhancing the penalty for aggravated harassments committed "with intent to harass, annoy, threaten or alarm another person, because of the race, color, religion or national origin of such person"); N.C. GEN. STAT. § 14-401.14(a) (1993) (providing that a person commits ethnic intimidation if "because of race, color, religion, nationality, or country of origin, [the offender] assault[s] another person, or damage[s] or deface[s] the property of another person or threaten[s] to do any such act"); N.C. GEN. STAT. § 14-3(c) (1993) (enhancing the penalty for misdemeanors "committed because of the victim's race, color, religion, nationality, or country of origin"); N.D. CENT. CODE § 12.1-14-04(1-2) (1985) (providing that a person is guilty of a misdemeanor if he "[i]njures, intimidates, or interferes with another because of his sex, race, color, religion, or national origin in order to intimidate"); OR. REV. STAT. § 166.155 (1995) (providing that a person commits "the crime of intimidation in the second degree" if he intentionally injures, damages the property of, or intimidates another person "because of that person's perception of the other's race, color, religion, national origin or sexual orientation"); W. VA. CODE § 61-6-21 (1992) (providing that a person will be guilty of a felony if he does or attempts to threaten, injure, or intimidate another person "because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex"). The above citation was based on a survey of bias crime statutes compiled by Professor Frederick M. Lawrence. Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 337-38 n.74 (1994).

¹¹ See IDAHO CODE § 18-7902 (1987) (providing that a person commits "malicious harassment" when causing injury or property damage "maliciously and with the specific intent to intimidate or harass another person because of that person's race, color, religion, ancestry, or national origin"); MICH. COMP. LAWS ANN. § 750.147b (West 1991) (providing that a person commits "ethnic intimidation" if that person causes injury or property damage "maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin"); OKLA. STAT. tit. 21, § 850 (1991) (providing that a person

is unclear whether this requirement adds a substantive element. Simply committing most of the offenses that are predicates for bias crimes appears malicious. Furthermore, some jurisdictions have referred to "motivations" of different types.¹² Other jurisdictions have required that the crime be committed with "ill-will, hatred or bias."¹³ The most well-known statute in this family, reviewed and upheld by the Supreme Court in *Wisconsin v. Mitchell*,¹⁴ enhanced the penalty for specified crimes in which the actor "[i]ntentionally select[ed] the person against whom the crime . . . is committed . . . in whole or in part because of the actor's belief or perception regarding the race [etc.] of that person."¹⁵ A recently enacted federal statute employs similar language.¹⁶ Still others have adhered to the model statute's "by reason of" formulation.¹⁷ These subtly different formulations have the

commits "malicious intimidation or harassment because of race," if he "maliciously and with the specific intent to intimidate or harass another person because of that person's race [a]ssault[s] or batter[s] another person . . . [or] [d]amage[s] . . . any property of another person or . . . [t]hreaten[s], by word or act, to do any [of the above] acts"); S.D. CODIFIED LAWS § 22-19B-1 (Michie Supp. 1996) (criminalizing "[a]ctions constituting harassment" where a person "maliciously and with the specific intent to intimidate or harass another person because of that person's race, color, religion, ancestry or national origin . . . [c]ause[s] physical injury to another person . . . [or] [d]eface[s] any real or personal property of another person . . . [or] [d]amage[s] . . . any . . . property of another person or . . . [t]hreaten[s] by word or act, to do the acts prohibited"); WASH. REV. CODE § 9A.36.080 (1996) (providing that "[a] person is guilty of malicious harassment if he or she maliciously and intentionally commits one of the following acts because of his or her perception of the victim's race, color, religion, ancestry, national origin . . . [or] handicap . . . [and] [c]auses physical injury to . . . another person . . . [or] [t]hreatens a specific person . . . and places that person . . . in reasonable fear of harm"). The above citation was based on a survey of bias crime statutes compiled by Professor Frederick M. Lawrence, *supra* note 10, at 337 n.74.

¹² See MICH. COMP. LAWS ANN. § 28.257a (West 1994) (requiring the reporting of crimes "motivated by prejudice or bias based upon race, ethnic origin, religion, gender or sexual orientation"); VA. CODE ANN. § 8.01-42.1 (Michie 1992) (providing that an action for injunctive relief or civil damages, or both, shall lie against any person who intimidates, harasses, or injures another person, or vandalizes his real or personal property, "where such acts are motivated by racial, religious or ethnic animosity").

¹³ N.J. STAT. ANN. § 2C:44-3(e) (West 1995).

¹⁴ 508 U.S. 476 (1993).

¹⁵ WIS. STAT. ANN. § 939.645 (West 1996).

¹⁶ 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.

(*Id.*) (emphasis added).

¹⁷ See 720 ILL. COMP. STAT. 5/12-7.1 (West Supp. 1996) (providing that a person commits a hate crime when, "by reason of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual," that person commits certain specified crimes); MO. REV. STAT. § 574.090(1) (Supp. 1993) (providing that a person commits "the crime of ethnic intimidation in the first degree if, by

potential for spawning different interpretations and applications.¹⁸ Nevertheless, courts have not yet distinguished among them. Because I desire to speak generally about bias crime statutes, I shall focus on the most common formulation that, without more, prohibits acts undertaken "because of" race, etc. To the extent these terms are open to interpretation, I shall address alternative interpretations where relevant.

In addition to varying the language used to express the nature of the "because of" requirement, the statutes also vary the characteristics to which the requirement applies. While race, color, religion, and national ancestry are almost universally included, some statutes also include sex, disability, age, and sexual orientation.¹⁹ Similarly, statutes vary in the scope of the underlying acts or crimes that will, in the proper circumstances, give rise to the enhanced penalty. Broader statutes apply to all crimes, while narrower ones apply to, for example, only acts that cause or place another in fear of personal injury or property damage.²⁰ Because of the range of formulations, I will occasionally speak generally about "specified characteristics" and "specified underlying acts."

Finally, the penalty enhancement mechanism of different bias crime statutes may vary. These differences, however, are largely formal. Sometimes bias crime statutes simply upwardly shift the sentencing range for the underlying offense.²¹ Sometimes bias crime statutes create new offenses, the penalty for which may run consecutively with those for the underlying offense.²² Either way, the substantive effect is to increase penalties imposed or penalties to which defendants are exposed. Such increases may be substantial.²³

reason of any motive relating to the race, color, religion, or national origin of another individual or group of individuals," that person damages another's property above a set value or engages in certain unlawful uses of weapons); NEV. REV. STAT. § 207.185 (Supp. 1995) (providing that an aggravating factor of a misdemeanor is that the offense was committed "by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another person or group of persons"); OHIO REV. CODE ANN. § 2927.12 (Baldwin 1993) (providing that a person commits ethnic intimidation if he commits a parallel crime "by reason of the race, color, religion, or national origin of another person or group of persons").

¹⁸ See *infra* notes 149-52 and accompanying text.

¹⁹ See, e.g., MINN. STAT. ANN. § 609.2231(4) (West Supp. 1996).

²⁰ Compare U.S. SENTENCING GUIDELINES MANUAL § 3A1.1a(a) (1995) (not limiting scope of underlying offense), with COLO. REV. STAT. § 18-9-121(2) (Supp. 1995) (limiting underlying act to placing in fear of injury or property damage).

²¹ See, e.g., FLA. STAT. ANN. § 775.085 (West 1992); N.C. GEN. STAT. § 14-3(c) (1993); OHIO REV. CODE ANN. § 2927.12 (Baldwin 1992); WIS. STAT. ANN. § 939.645 (West 1996).

²² See, e.g., 720 ILL. COMP. STAT. 5/12-7.1 (West Supp. 1996); MO. REV. STAT. § 574.090(1)(2) (Supp. 1993); OR. REV. STAT. § 166.155(2) (1993); WASH. REV. CODE § 9A.36.080(7) (Supp. 1996).

²³ See, e.g., 720 ILL. COMP. STAT. 5/12-7.1 (West Supp. 1996) (increase of one to three years); MO. REV. STAT. § 574.090(1)(2) (Supp. 1993) (increase of up to seven years); OR. REV. STAT. § 166.155(2) (1993) (increase of up to five years); WASH. REV. CODE § 9A.36.080(7) (Supp.

In sum, for purposes of exposition, I shall take bias crime statutes to enhance the penalties for "specified acts" undertaken "because of" "specified characteristics," where the general content of these terms is understood as lying within the ranges described above.

II. THE WRONGDOING-CULPABILITY FRAMEWORK

In this Part, I develop the framework that will be used in assessing potential justifications of bias crime statutes. The framework is based on the concepts of wrongdoing and culpability. As discussed below, the wrongdoing-culpability framework provides a theoretical structure for understanding how the elements of offenses and defenses properly may bear on the penalties established by the criminal law.

Employing this framework to analyze bias crime statutes has three virtues. First, wrongdoing and culpability, the basic components of the wrongdoing-culpability framework, are explicitly moral concepts. Thus, analysis within this framework will facilitate an examination of the moral soundness of bias crime statutes. Second, the wrongdoing-culpability framework exposes the variety of ways that a feature of an act may be relevant either morally or with respect to the criminal law. Thus, the framework should be useful in generating theories concerning how bias crime statutes might be justified. Third, examining possible justifications of bias crime statutes within this framework will allow these justifications to be considered systematically.

This Article's analysis of bias crime statutes rests in part on the soundness and completeness of the wrongdoing-culpability framework. In particular, the analysis assumes that to the extent that bias crime statutes cannot be justified within the wrongdoing-culpability framework, they are unjustified. This approach to bias crime statutes thus places weight on the validity of the framework. Besides setting forth the wrongdoing-culpability framework, this Part seeks to demonstrate that the framework is clear and coherent, normatively appealing, descriptively consistent with the core of our criminal law system, and sufficiently explanatory to be resilient in the face of limited instances of nonconforming data. Thus, it is contended, the weight can be borne.

The following subparts place the wrongdoing-culpability framework within the larger constellation of moral theories, explain the concepts of wrongdoing and culpability, and show how the framework explicates existing criminal law.

1996) (increase up to five years). The Federal Sentencing Guidelines provide for a three-level penalty increase, which, in rough terms, is equal to approximately three years. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A—Sentencing Table (1995).

A. Three Theories of Punishment

The wrongdoing-culpability framework considers the criminal law from the perspective of morality. There are three basic categories of moral theories concerning the justification for establishing criminal sanctions: utilitarianism, retributivism, and hybrid (or mixed) theories. According to utilitarian theories, criminal sanctions should be established only where they would confer some net benefit or desirable consequence upon society at large, such as the protection of citizens from harm.²⁴ Under this view, sanctions may be justified on the grounds that they deter (generally or specifically), incapacitate, reinforce social norms, satisfy a desire for revenge, or rehabilitate, where rehabilitation is understood as eliminating the propensity to engage in crime rather than improving the character of the criminal for its own sake. According to retributivism, establishing sanctions for a class of acts is justified only where the sanction is, in some sense, deserved by the individuals who engage in the acts. Under this view, the social effects that follow from the sanctions are irrelevant. Sanctions are justified by being an appropriate response to the offense itself. Sanctions respect a wrongdoer's right to punishment, prevent the gaining of an unfair advantage, or give wrongdoers their due.²⁵ Alternatively, under retributivism, sanctions may be understood as restoring the moral order that the wrongdoers have breached.²⁶ Finally, hybrid theories combine the justification requirements of both utilitarianism and retributivism. According to hybrid theories, neither social utility nor considerations of desert alone are sufficient to justify punishing individuals. Rather, sanctions may be imposed only where they both confer some net benefit on society and are deserved by the actor in light of the offense itself.²⁷

For our purposes, the critical question will be whether bias crime statutes punish within the limits established by retributivism. Although I shall not argue for it at length, the ability of utilitarianism to account plausibly for the wide range of substantive and procedural rights afforded by our current criminal justice system is dubious.²⁸

²⁴ See MARK TUNICK, PUNISHMENT: THEORY AND PRACTICE 69-84 (1992); H.L.A. Hart, *Murder and Principles of Punishment: England and the United States*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 54, 72-86 (1968); Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 351-53 (1983).

²⁵ See TUNICK, *supra* note 24, at 84-106; John Cottingham, *Varieties of Retributivism*, 29 PHIL. Q. 238 (1979) (distinguishing different brands of retributivism).

²⁶ See GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 416-18 (1978); Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTERS, AND THE EMOTIONS 179 (Ferdinand Schoeman ed., 1987); Greenawalt, *supra* note 24, at 347.

²⁷ See Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L.J. 1059, 1062 & nn.4-8 (1992); Greenawalt, *supra* note 24, at 354-57.

²⁸ See, e.g., H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, in CONTEMPORARY UTILITARIANISM 239 (Michael D. Bayles ed., 1968); Michael Seidman, *Soldiers, Martyrs, and*

The criticisms that undermine utilitarianism generally apply with particular force in the context of the criminal justice system. Utilitarianism has been faulted for lacking principles about how benefits and burdens are to be distributed over individuals. Distributional considerations are particularly relevant in the context of criminal justice because the burdens imposed are potentially so harsh. For example, utilitarianism would recommend such counter-intuitive practices as punishing minor offenses severely and convicting those known to be innocent if sufficient deterrence was achieved. Absent some requirement of desert, utilitarianism, to its discredit, results in individuals being used as mere means to an end.²⁹ If bias crime statutes are to be justified, then they must be justified under retributive or hybrid theories. These two sets of theories, however, collapse to one on the assumption that the first requirement of the hybrid theories—the net social benefit requirement—is satisfied. I am willing to make this assumption in light of the increased deterrent and incapacitation effects that usually accompany increased penalties. If the first requirement of hybrid theories is thus satisfied, the only remaining question for hybrid theories with respect to bias crime statutes is the question posed by retributive theories: Do those whom bias crimes statutes punish deserve to have their punishments enhanced? This question of desert shall be the primary, though not exclusive, focus of this Article.

B. *Wrongdoing and Culpability Underlie Desert*

The concepts of wrongdoing and culpability underlie the normative concept of desert, and hence the retributive theories of punishment against which bias crime statutes will be measured. Retributive theories come in two stripes: objective and subjective. Under objective theories, the punishment that an actor deserves may be analyzed as a function of the wrongdoing engaged in by the actor and the actor's culpability for that wrongdoing.³⁰ Wrongdoing is acting in a

Criminals: Utilitarian Theory and the Problem of Crime Control, 94 YALE L.J. 315 (1994); Andrew Von Hirsch, *Desert*, in PHILOSOPHY OF LAW 573 (Joel Feinberg & Hyman Gross eds., 2d ed. 1980).

²⁹ The principle that individuals should not be treated merely as a means to an end is associated with Kant. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 100 (L. Beck trans., 1959). Kant himself may not have thought that laws, to merit our adherence, must incorporate this principle. See Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1540-43, 1558-60 (1996). Nevertheless, intuitively the principle's appeal is strong in the area of punishment for criminal acts.

³⁰ See R.A. DUFF, INTENTION, AGENCY & CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 103 (1990); FLETCHER, *supra* note 26, at 454-59; Heidi Hurd, *What in the World is Wrong*, 5 J. CONTEMP. LEG. ISSUES 157, 158 (1994); Frederick M. Lawrence, *supra* note 10, at 354 (citing ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 64-67 (1985)); Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEG. ISSUES 237, 237 (1994).

manner that violates moral norms concerning conduct. If Abe took Bob's umbrella without permission, Abe would have engaged in wrongdoing because he would have violated the moral norm, "Do not cause another to be deprived of property without permission." Wrongfulness reflects the moral quality of an act violating a norm. The greater the harm, and under some theories, the greater the act's proximity to harm, the greater the wrongfulness.³¹ Wrongfulness is clearly a foundational moral concept. It is based on the notion that our freedom is bound by norms of conduct. Furthermore, wrongfulness captures the intuition embedded in our grammar that one is punished *for* something. The "something" is the wrongdoing. The concept of wrongdoing is consistent with a wide range of ethical theories because the concept itself carries no implications concerning what the proper norms of conduct are.

Under objective retributive theories, desert is not simply a matter of wrongdoing. There also must be culpability. Here "culpability" means something like "accountability" or "responsibility" for the wrongdoing.³² The basic intuition underlying culpability is that it is unfair to punish someone for engaging in a wrongdoing, such as causing an injury to another, unless in light of certain features of the wrongdoer, she can be held accountable or responsible for the wrongdoing. The wrongdoing must somehow reflect on the wrongdoer who would be punished for the wrongdoing. For example, we would not think that punishment was proper for an actor who injured another as a result of coercion by a third person. In contrast to norms of conduct, which are first-order principles for guiding for an actor's behavior, principles of culpability are second-order principles for evaluating the actor in light of her behavior, its conformity with the norms of conduct, and other factors.

Under objective retributive theories, two well-recognized conditions give rise to culpability for wrongdoing. These conditions concern the actor's attitude—broadly construed—toward the

³¹ See FLETCHER, *supra* note 26, at 473.

³² To avoid confusion, I shall adopt the convention of using the term "culpability" to refer to moral culpability. When I wish to refer to culpability in the sense of satisfying the culpability conditions of a generic or particular penal statute, I shall use the term "legal culpability."

Furthermore, my use of "culpable" should be distinguished from a second, equally common, use of the term. Often, it is said that because of greater accountability for a given wrongdoing, an actor is more culpable, i.e., blameworthy or deserving of greater punishment. As used in this latter sense, "culpable" is very close to "deserving of punishment." Hence, under this use of "culpability," a wrongdoing-culpability theory of punishment becomes a theory that employs a concept ("culpability") very close in meaning to one ("punishment") that it seeks to explicate. Adopting this alternative use of "culpability" would require describing the "wrongdoing-culpability theory of punishment" as the "wrongdoing-accountability theory of culpability." My use of "culpability" appears more consistent with the relevant literature. See FLETCHER, *supra* note 26, at 495 (using "culpable" synonymously with "accountable for a wrongdoing"). But see Christine Sistare, *Agent Motives and the Criminal Law*, 13 Soc. TH. & PRAC. 303, 307 (1987).

wrongdoing. The first culpability-creating attitude is intending. An actor is culpable for his intentional wrongdoing. For example, because causing a death is a wrongdoing, an actor will be culpable for causing the death if he did so intentionally.³³ The second attitude giving rise to culpability is believing, or more generally, assignment of likelihood to a state of affairs. Even if an actor does not intend to engage in wrongdoing, she may be culpable if she believed she was so engaged, or at least if she assigned a sufficiently high likelihood to the possibility that she was so engaged. Beliefs may vary depending on the degree of confidence with which the beliefs are held. The more confident an actor is that his acts involve wrongdoing, the more culpable the actor will be (assuming that culpability is not predicated on intent). For example, an actor who was certain that his act would cause a death is more culpable for the death than the actor who merely thought it somewhat likely that his act would cause a death. Negligence, understood as an attitude of carelessness toward the consequences of one's actions, is also commonly recognized as a culpability-creating condition.³⁴

In contrast to objective versions, subjective versions of retributivism focus on mentally represented, rather than actual, wrongdoings.³⁵ The subjectivist assesses the desert of an actor by considering the wrongdoing the actor intended to engage in, believed she was engaging in, or should have believed she was engaging in, regardless of

³³ In the course of this Article, I use "intentionally" so that *P* intentionally causes *C* if and only if *P* intends to cause *C*. Thus, as I shall use it, "intentionally" is equivalent to the awkward construction "intendingly." Although this use of "intentionally" may be narrower than countenanced by ordinary usage, see DUFF, *supra* note 30, at 77-78, it is useful where confusion is not created.

³⁴ Negligence is not an actual propositional attitude as are intending and believing. Negligence, however, may be thought of as a counterfactual propositional attitude because a negligent actor is one who, if he were reasonable, would have been aware of the risk of his act being wrongful and acted otherwise. Loosely, the negligent actor is attributed the beliefs he would have had if he were reasonable, and his culpability is assessed accordingly. For example, Abe would be (morally) culpable of negligently taking Bob's umbrella where Abe (1) did not know the umbrella was Bob's, (2) would have known this if he had been reasonable, and (3) on the assumption that if he had known this, would be considered culpable for taking the umbrella.

There are alternative conceptions of criminal negligence. Indeed, the nature of criminal negligence and the degree to which it properly supports liability have long been debated. See, e.g., Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in the Criminal Law*, 10 SOC. PHIL. POL'Y (1994); Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 635-43 (1963); H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 136 (1968); Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. L. ISSUES 365 (1994).

³⁵ Cf. Michael S. Moore, *Prima Facie Moral Responsibility*, 76 B.U. L. REV. 319, 321 (1996) ("Culpability could thus be said to be wrongdoing in a sense. Namely culpability is wrongdoing in the possible world created by our representational states. Wrongdoing itself, by contrast, is wrongdoing in the actual world, not in a possible world."). For an example of subjective retributivism, see Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEG. ISSUES 1 (1994).

whether the wrongdoing actually transpired. Culpability for this possible wrongdoing is established by whether it was intended, believed in, or merely should have been believed in, in order of decreasing culpability. In general, objective and subjective theories of retribution will prescribe the same punishment when the possible wrongdoing that is the object of the actor's culpable attitude is the wrongdoing that the actor actually commits. Objectivists and subjectivists, however, divide over cases where the actor's beliefs or intents about what will happen differ from what actually happens.³⁶

Although these objective and subjective theories of retribution may differ concerning the punishment deserved by persons in certain situations, they share the same fundamental concepts of analysis: wrongdoing and culpability. Strictly speaking, under subjectivism, there need not be an actual wrongdoing in order for punishment to be deserved. But we may say that both objective and subjective theories analyze situations of punishment in terms of the wrongfulness of a state of affairs (whether actual or represented) and conditions of culpability (intended, believed likely, etc.) with respect to that state of affairs.³⁷ Furthermore, under both objective and subjective theories, wrongdoing and culpability are conceptually distinct components for determining desert. As noted, wrongdoing is based on norms of conduct that should guide actors; culpability is based on principles for evaluating the actor for the conduct at issue. Although there may be cases in which it is not clear whether a particular fact is relevant to assessing wrongdoing or culpability, there is a clear distinction between asserting that the fact is relevant to one or another. Likewise, at this stage of the inquiry into bias crime statutes, we cannot rule out that a particular fact may be relevant for both wrongdoing and culpability, depending on what the proper substantive norms for wrongdoing are and what the proper principles for evaluating the actor are. In this case, one fact would be morally significant for two reasons. Nevertheless, even if it turns out that they share common elements, the categories of wrongdoing and culpability are conceptually distinct and so may be investigated independently.

³⁶ This division is the root of the so-called problem of moral luck. See Sanford H. Kadish, *Foreword: Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 680 n.5 (citing extensive literature).

³⁷ See Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 5 J. CONTEMP. LEG. ISSUES 299, 299 (1994) ("[W]hile the occurrence of the harm or evil may not be important to the subjectivist, the nature of the harm or evil intended or risked is important to determine the degree of the actor's culpability."). In my discussion of bias crimes, I shall generally not distinguish between objective and subjective theories of punishment. I assume that where issues of moral luck do not arise, arguments explicitly stated in terms of one theory could be restated in terms of the other.

C. *Wrongdoing and Culpability Underlie the Criminal Law*

Besides underlying the normative concept of desert, wrongdoing and culpability provide a framework for organizing the enormous body of rules, doctrines, and principles comprising substantive criminal law. On its surface, criminal law appears to divide into two categories: offenses, that body of law that prohibits conduct subject to punishment, and defenses, that body of law that negates or mitigates punishment. The wrongdoing-culpability framework replaces this dichotomy with the deeper one of norms of conduct (defining wrongdoing) and principles of evaluation (defining culpability).

Under both objective and subjective versions of retributivism, the moral concepts of wrongdoing, culpability, and desert neatly map onto and explain the legal concepts of prohibited conduct, legal culpability, and liability. The wrongdoing-culpability theory thus provides a framework for analyzing the elements of criminal offenses. Under the Model Penal Code, for example, the acts that are required to commit an offense (also known as the "actus reus") are acts that typically violate moral norms and so constitute wrongdoings. Furthermore, the Model Penal Code requires that to be liable for committing a prohibited act, the actor must act purposely, knowingly, recklessly, or negligently.³⁸ The Model Penal Code refers to these states as "kinds of culpability" (also known as "mens rea").³⁹ The types of culpability required under the Model Penal Code thus generally correspond to those culpability-producing attitudes identified in the wrongdoing-culpability theory.

The wrongdoing-culpability theory, besides providing a framework for conceptualizing offenses, also provides a framework for conceptualizing defenses. Defenses are understood as negating either the wrongfulness of the prohibited act or the culpability of the actor for the wrongful act. Those that negate wrongfulness are called justifications; those that negate culpability for a wrongful action are called excuses. An example of the former is self-defense.⁴⁰ Pursuant to this defense, the wrongfulness associated with the use of force is deemed negated by the greater benefit of preventing an unlawful attack. The actor is still responsible for doing what he did; other circumstances or

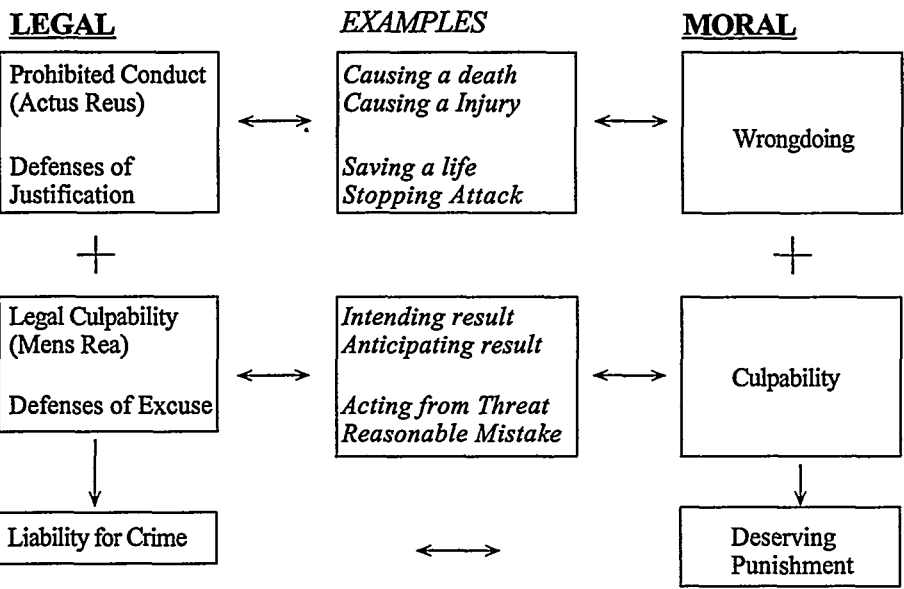
³⁸ MODEL PENAL CODE § 2.02(1)-(2) (1962).

³⁹ Not every offense in the Model Penal Code is explicitly formulated in terms of one of these four categories of legal culpability. For example, regarding the offense of rape, rather than using any of these terms, the Code requires that the perpetrator "compel[] [his victim] to submit by force or by threat" to intercourse. *Id.* § 213.1(a). This phrase can, however, be construed as "employ force or threat for the purpose of" having intercourse. Thus, the offense of rape carries with it the culpability associated with purposefulness or pursuant to § 2.02(3), recklessness.

⁴⁰ *Id.* § 3.04 (1962). See Paul H. Robinson, *Competing Theories of Justification: Deeds v. Reasons*, in HARM AND CULPABILITY 45, 52-54 (A.P. Simester & A.T.H. Smith eds., 1996) (discussing objective nature of Model Penal Code's self-defense doctrine).

consequences, however, have cleansed the doing of its wrongfulness. The duress defense is an example of an excuse. A person who acts under duress is not liable for an intended wrongdoing because, even if the doing was ultimately wrongful, she is deemed not responsible, and so not culpable, for her wrongdoing. Duress, however, does not negate the wrongfulness of the act.⁴¹

A comparison of the moral and legal terms under discussion is illustrated in the chart below:



The chart is intended to illustrate the similar contours of the wrongdoing-culpability framework and the criminal law, rather than imply a point-by-point correspondence of the two systems. Such a correspondence is not to be expected due to many “real world” concerns that our criminal justice system must respond to, such as the limits of the system to implement fine distinctions with consistency. Nevertheless, on a more abstract level, a similarity of structures is discernable. This similarity supports the contention that besides underlying our concept of desert, the concepts of wrongdoing and culpability underlie the positive criminal law. Thus, they provide a prime facie plausible framework for examining bias crime statutes.

⁴¹ Although the general correspondence between justification and wrongdoing, on the one hand, and excuse and culpability, on the other, is widely acknowledged, the details of the demarcation are debated. See, e.g., Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

III. BIAS CRIME STATUTES ANALYZED WITHIN THE WRONGDOING-CULPABILITY FRAMEWORK

Bias crime statutes enjoy broad support. Liberals view bias crime statutes as a means to fight bigotry; conservatives see bias crime statutes as an opportunity to "get tough on crime." The enhancement of penalties for bias crimes may be one of the few things on which liberals and conservatives can agree.⁴² Yet though their support may be broad, the bases for justifying bias crime statutes are narrow. Based on the previous part, only two such bases exist: one relating to wrongdoing and one relating to culpability. Specifically, for the increased penalties established by bias crimes statutes to be justified, bias crimes must involve either (1) greater wrongdoing than that found in crimes that are similar but which lack the bias element triggering bias crime statutes ("nonbias crimes"), or (2) with respect to a common wrongdoing, greater culpability for that wrongdoing than that found in nonbias crimes. The challenge of justifying bias crime statutes is to demonstrate how acting "because of" a specified characteristic increases wrongdoing or culpability in such a way.

This part undertakes a systematic examination of possible bases for justifying bias crime statutes based on the concepts of wrongdoing and culpability. Subpart III.A takes a first pass at bias crime statutes, interpreting them under the model of traditional criminal offenses. The purpose of this subpart is to show that a straightforward interpretation of bias crime statutes fails to yield a plausible theory of increased wrongdoing or culpability. Thus, the examination of more novel interpretations of bias crime statutes is warranted. This examination occurs in subparts III.B and III.C. These subparts, comprising the bulk of the Article, consider justifications of bias crime statutes based on increased wrongdoing and increased culpability, respectively. Based on their analysis, this Article concludes the connection between bias crimes and increased wrongdoing or culpability is problematic. Thus, although not wholly defective, the foundations of bias crime statutes are judged to be much shakier than generally appreciated.

A. *Why Bias Crime Statutes Cannot Be Construed Conventionally*

This subpart takes a first pass at bias crime statutes. Bias crime statutes are, to the extent possible, construed as written and analyzed in terms of the standard canon of concepts of the criminal law. This approach, perhaps surprisingly, results in an interpretation of bias crime statutes according to which the enhanced penalties they impose

⁴² See David Chang, *Beyond Uncompromising Positions: Hate Crimes Legislation and the Common Ground Between Conservative Republicans and Gay Rights Advocates*, 21 FORDHAM URB. L.J. 1097 (1994).

are unjustified. Moreover, this conclusion rests in part on the very principle of equality affirmed by defenders of bias crime statutes.

Construing bias crime statutes as typical criminal offenses is made difficult by their use of the term "because of." The "because of" locution is not a common element in the definition of criminal offenses. Acting "because of," however, appears closely related to acting with a certain type of intention. Intentions are in the standard stock of criminal law concepts. If Joe commits an assault against a person *because the person is Jewish*, Joe has committed a bias crime. In such a case, we would say that Joe *intends to assault a person who is Jewish*. This last statement, however, is ambiguous. Under one interpretation, it may merely mean that Joe intends to assault a person and that person happens to be Jewish. Let us put aside this weak sense of intends to assault a person who is Jewish. The critical feature of the crime making it a bias crime appears to be that the victim's Jewishness was within the scope of Joe's intention. For Joe to commit a bias crime, not only must he have an intended victim who is Jewish, but he must also have intended that his victim be Jewish.⁴³

Generalizing from this example, bias crime statutes may be thought of as general schemata for establishing enhanced penalties for acts committed with a particular set of intentions. Those intentions ("bias intentions") would be intentions to commit acts of the form:

Injuring a Black	Killing a Black	Robbing from a Black
Injuring a White	Killing a White	Robbing from a White
Injuring a Jew	Killing a Jew	Robbing from a Jew
...

In each of these instances, the race, religion, or other specified characteristic is included as part of the description of the action that the actor intends to commit. Bias crime statutes thus appear to differ from those creating the underlying offenses (assault, murder, etc.) by virtue of identifying a special category of intentions to be punished more harshly than those that might accompany the underlying offense in a nonbias case.

Although the above rendering of bias crime statutes appears plausible, the rendering makes bias crime statutes substantively unjustified. Bias intentions are different from, but not worse than, the intentions underlying nonbias crimes. Compare a bias crime against a Black and a similar crime in which bias is not involved. The bias crim-

⁴³ One cannot, of course, intend that a particular person, *P*, be Jewish. A person cannot "intend" that a fact be the case unless she believes that she has some control over the occurrence of the fact. For example, a person cannot intend that it will stop raining. A criminal, however, has control over whom he will victimize and, in that sense, can intend that the indefinite person who will be his victim be Jewish. In this sense, a criminal can intend his victim to be Jewish. See MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR THE CRIMINAL LAW* 202-05 (1993) (discussing intending attendant circumstances).

inal intends to, say, "inflict wrongdoing *W* on a Black," and the nonbias criminal simply intends to "inflict wrongdoing *W* (on an indefinite person)." As discussed previously, intentions establish the scope of a person's legal and moral culpability—a person is culpable for what he intends. Based on their intentions, the bias criminal will be culpable exactly for inflicting wrongdoing *W* on a Black, and the nonbias criminal will be culpable exactly for inflicting wrongdoing *W* on an indefinite person.⁴⁴ Inflicting wrongdoing *W* on a Black and on an indefinite person, however, are types of wrongdoing of equal gravity: the gravity associated with wrongdoing *W*. Thus, although the perpetrator of a bias crime, by virtue of his intention, is highly culpable for an act such as "inflicting wrongdoing *W* on a Black" and the perpetrator of a nonbias crime does not have that level of culpability for such an act, these differing culpabilities do not justify different degrees of punishment. Rather, both perpetrators deserve the same punishment because they have the same degree of culpability (that associated with intentionality) for wrongdoings of the same gravity (inflicting wrongdoing *W* on a Black and inflicting the same wrongdoing on an indefinite person).

The above argument may seem to presume its conclusion. The gravity of a wrongdoing, *W*, it may be thought, cannot always be defined independently of the object of the wrongdoing. After all, punching a person is a greater wrongdoing than punching a pillow. The object of the wrongdoing, however, is only significant insofar as it may be ascribed special rights or entitlements. It is a greater wrong to punch a person than a pillow because persons have a higher moral status than pillows. In contrast, as a general matter, all persons have an equal right to be free from physical harm and other sorts of wrongdoing; none may claim a superior status. Although there may be limited exceptions (saints, innocent children, etc.), exceptions should not be a function of race, color, or religion. This claim follows from the

⁴⁴ Here I employ a "fine-grained" theory of intentions. According to this theory, intentions are individualized based on whether the person holding the intentions would recognize the meaning of the propositional objects of the intentions to be the same. For example, if a person took the expression "unmarried man" to mean the same as "bachelor," then in intending to meet an unmarried man, the person would also intend to meet a bachelor. In contrast, if the person took the expression "fortunate man" not to mean "bachelor," then if he intended to meet a bachelor, he would not intend to meet a fortunate man, even if he believed that all bachelors and only bachelors were fortunate. See generally Michael S. Moore, *Intention and Mens Rea*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY* 245, 253-62 (1987) (discussing strengths and weaknesses of different theories of intentions). Thus, in the context of bias crimes, a perpetrator who intended to assault a greedy person would not intend to assault a Jew even if the perpetrator believed that in assaulting a greedy person he would be assaulting a Jew (assuming that the perpetrator did not take being Jewish as a criterion for greediness). By adopting a fine-grained theory of intentions, I do not vouch for the ultimate coherence of the theory. Rather, I adopt it to identify my use of the term "intention," believing that any incoherence does not infect the contexts in which I use the term.

principle of equality that as all are created equal, race, religion, and national origin are morally irrelevant. Accordingly, it is no greater (or lesser) wrongdoing to steal from a Black than a White and no greater (or lesser) wrongdoing to punch a Jew than a gentile. The bias criminal, of course, denies this principle, believing it is less of a wrongdoing to transgress against members of a certain group. Paradoxically, the very principle of equality he denies—and that supporters of bias crime statutes usually affirm—protects the bias criminal from enhanced punishment for the transgression.

In response, it may be contended that there are limited exceptions to the general principle of equality invoked above. One might believe, for example, that Blacks who happen to live today have a special moral status because they once were subject to slavery and oppression. On this basis, it may be argued, Blacks have particularly strong rights to life, liberty, and the pursuit of happiness. These rights may support special claims to public educational resources or government contracts. Under this “affirmative action” theory of bias crime statutes, when these rights to life, liberty, and the pursuit of happiness are intentionally violated, the violator becomes culpable for a particularly great wrongdoing, which justifies the enhanced penalties bias crime statutes impose. Similarly, it may be argued that Blacks are particularly vulnerable to wrongdoing because the same wrongdoing, in some sense, is a greater wrongdoing when imposed on Blacks.

Such theories, however, have two faults. First, according to these theories, it would be justified to enhance the punishment for a person who merely knowingly assaulted a Black, because that person would also be culpable for the particularly great wrongdoing of assaulting a Black. Yet it is counterintuitive that a mugger who decides to attack the first person who comes along, and before engaging in the mugging, sees that the person is Black, should thereby be subjected to a harsher penalty. Second, such a theory could not account for the fact that bias crime statutes apply to crimes committed because of *every* race, color or religion. It is logically impossible that members of all races and religions have particularly strong rights or be particularly vulnerable, just as it is logically impossible that everybody be above average. Such an “affirmative action” theory therefore, even if it were plausible with respect to Blacks, could not justify the broad reach of bias crime statutes over crimes committed against those of every race, religion, etc. Defenders of bias crime statutes rarely argue that penalty enhancements are justified for bias crimes against members of certain groups and are unjustified in other cases.⁴⁵

⁴⁵ It has been argued even if the primary rationale for bias crime statutes is the greater wrong bias crimes inflict on ethnic and other minorities, the broad reach of bias crime statutes to bias-motivated crimes against nonminorities is nonetheless justified. According to this argument, the Equal Protection Clause’s prohibition on racial and other classifications requires that bias

In sum, construing bias crime statutes under the traditional model of criminal offenses fails to yield a sound interpretation. This model assumes (1) the "because of" element of bias crime statutes can be interpreted as criminalizing intentions of a particular sort, and (2) intentions determine the scope of the wrongdoing for which the actor is culpable. The model concludes that bias crime statutes are unjustified because there is no greater wrongdoing within the scope of the criminalized intention. This conclusion, however, may seem unpersuasive. Rather than accept it, one might decide that the traditional criminal law model of offenses is too restrictive. To justify bias crime statutes, a more novel understanding of the "because of" element, the wrongdoing at issue, or the type of culpability involved must be found. The next subpart begins this project by examining wrongdoings arguably associated with bias crimes, but not necessarily within the scope of so-called bias intentions. Thus, the next subpart (as well as the one after it concerning theories of greater culpability) starts afresh on the problem of justifying bias crime statutes.

B. Problems with Theories of Greater Wrongdoing

This subpart considers and criticizes wrongdoing-based theories of bias crime statutes. According to these theories, the wrongdoing justifying the penalties attached to bias crimes is not just the wrongdoing associated with the underlying nonbias offense committed by the bias criminal. Rather, bias crimes involve an increased or additional wrongdoing.

The conclusion that bias is relevant for wrongdoing would have implications beyond the primary one of providing a theoretical foundation for bias crime statutes. One implication would be for the scope of accomplice liability for bias crimes. Consider the following hypothetical: Mob Boss wants to retaliate against a rival gang by killing one of its members. Mob Boss must choose between assigning the task to Earl or Fred. Earl is an anti-Semite and will look for a Jewish member of the rival gang to kill. In contrast, Fred will simply kill the first member of the rival gang whom he encounters. Mob Boss, knowing the routines of the members of the rival gang, knows that the first gang member either Earl or Fred will encounter will be Jewish, and so

crime statutes not be limited in scope to crimes where the victim is a minority. See Grannis, *supra* note 7, at 224-25. If, however, perpetrators of bias crimes on nonminorities do not deserve to have their penalties enhanced, the Equal Protection Clause should not be construed to require it. Not punishing those who do not deserve to be punished seems a compelling state interest. A statute, unlike all existing bias crime statutes, which applied to only bias crimes against minorities would be narrowly tailored to achieve this end because it would punish exactly the group that deserved it—those who commit bias crimes against minorities. Thus, justifications for existing bias crime statutes, which apply to minority and nonminority victims alike, cannot be backed into through reliance on the Equal Protection Clause.

knows that whomever he chooses for the assignment will kill a Jewish member of the rival gang. Mob Boss, however, is wholly indifferent as to which member of the gang is killed and whether that person is Jewish. Assume that Earl is convicted of committing a bias crime on the ground that he killed "because of religion." As a matter of morality, not positive law, should Mob Boss be punished more severely for choosing Earl? On the one hand, if bias crimes entail greater wrongdoing, as opposed to greater culpability for a given wrongdoing, Mob Boss should be punished more severely. Mob Boss, in choosing Earl, would be responsible for the greater wrongdoing Earl committed because Mob Boss knew that Earl would engage in such a wrongdoing. On the other hand, if bias crimes merely entail greater culpability for a given wrongdoing, Mob Boss should not be punished more severely. The wrongdoing for which Mob Boss is culpable, the killing of a member of a rival gang, is not greater than usual, and there is no reason to hold Mob Boss particularly culpable since he did not act because of religious bias.⁴⁶

This subpart focuses on two wrongdoing-based theories of bias crime statutes. According to these theories, bias crime statutes are justified because, in contrast to nonbias crimes, they (1) violate a person's right not to be discriminatorily harmed, or (2) result in secondary harms such as feelings of apprehension in the victim's community. I conclude that although both theories are suggestive, only the second plausibly accounts for the greater wrongdoing of bias crimes. The assumption that bias crime statutes rest on a theory of secondary harms, however, renders bias crime statutes susceptible to the criticism that they do not address these harms as effectively as alternative statutes that do not employ bias as an element.

1. Theories Based on the Right Not To Be Discriminatorily Harmed.—The right not to be discriminatorily harmed is a theoretical entity which, if sound, would imply the greater wrongdoing of bias crimes. Such a right would play for bias crimes a role analogous to that which a person's right not to be physically injured plays for assault. Just as an assault is an instance of wrongdoing because it violates a person's right not to be physically injured, so a bias crime would constitute a distinctive wrongdoing because it would violate a person's right not to be discriminatorily harmed.

Two clarifications should be made concerning the right not to be discriminatorily harmed. First, the right not to be discriminatorily

⁴⁶ Cf. *Wilson v. People*, 87 P.2d 5, 6-8 (Col. 1939) (discussing whether a person may be liable for burglary as an accomplice where that person aids in the commission of burglary by principal, but lacks mental state of intending that a theft be completed). Both *Wilson* and bias crime statutes raise the question whether certain mental states should be thought of as part of the *actus reus*, which may be attributed to an accomplice, or *mens rea*, which is personal to the actor.

harmed is intended to be a right over and above the general right not to be harmed. In this sense, the right not to be discriminatorily harmed is different in kind from, say, the right not to be harmed on Monday. Although a person may be said to have a right not to be harmed on Monday, such a statement is best understood as merely asserting a right that is an aspect of, not an addition to, the general right not to be harmed. Similarly, a person may be said to have a right not to have her rights violated. Yet such a statement should not be construed to imply that an incident of trespassing violates a right to exclusive possession of property and the additional right of not having that right violated. Like these ersatz rights, the right not to be discriminatorily harmed can only be violated if another right is also violated. In this respect, the right not to be discriminatorily harmed would differ from most other rights. However, unlike the violation of the ersatz rights above, the violation of the right not to be discriminatorily harmed is taken to carry independent moral weight.⁴⁷

Second, the right not to be discriminatorily harmed is intended to be distinct from such rights as the right not to be offended or humiliated.⁴⁸ Such rights might be violated as a consequence of a person's learning that he has been harmed because of his race or other specified characteristic. It is possible, however, that the victim of a bias crime may not learn that she has been the victim of discrimination and so no offense or humiliation would occur. The right under consideration here is intended to be one that is violated whenever there is a bias crime: a right not to be discriminatorily harmed *per se*.

The existence of a right not to be discriminatorily harmed has intuitive appeal for some.⁴⁹ Many people feel that discrimination is

⁴⁷ The interest in not being discriminatorily injured, insulted, etc., may be said to "supervene" on the interests in not being injured, insulted, etc. A type of property, *A*, supervenes on another, *B*, if and only if the *A*-properties that a thing has are wholly dependent of the *B*-properties of the thing, yet the *A*-properties are not reducible to the *B*-properties. For example, some philosophers believe that mental states supervene on physical states because, even though mental states are not physical states, the physical states that a person is in wholly determine the mental states that the person is in. See *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 778-79 (Robert Audi ed., 1995).

⁴⁸ A possible justification of bias crime statutes based on such an interest is considered in section III.B.3., *infra*.

⁴⁹ Intuitions vary concerning whether there is an interest in not being harmed discriminatorily, over and above the interest in not being harmed. Compare Frances M. Kamm, *Philosophy of Punishment Enhancement*, 1992/1993 ANN. SURV. AM. L. 629, 631 ("It was certainly not worse for the white person that he was injured because he was white."), with Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 512-14 (1992) ("A harm inflicted with a serious mental state sometimes inherently inflicts a greater harm to a victim. . . . The relevance of mental states to the victim's harm should not be overstated. When the basic harm is very serious, it is doubtful that the additional insult alters the utilitarian calculus."), and John A. Powell *Rights Talk/Free Speech and Equality*, 1992/1993 ANN. SURV. AM. L. 587, 590-91 (finding it undeniable that harms committed because of bias are qualitatively different than otherwise similar harms), and James Weinstein, *First Amendment Challenges to Hate Crime Legislation: Where's the*

wrong and that the wrong is a wrong against the victim of the discrimination. Such a view may be suggested by employment discrimination laws. Because the law generally does not recognize a right to employment, and consequential offense or humiliation need not be shown, the wrong of employment discrimination appears to be a violation of the right not to be discriminatorily harmed. In the following subsections, I will argue that there is no good moral basis for recognizing a right not to be discriminatorily harmed. Furthermore, this conclusion does not threaten the soundness of civil antidiscrimination laws, such as employment discrimination laws, which can be reconceptualized as resting on a different right or otherwise distinguished.

a. Interest in others' thoughts.—The right not to be discriminatorily harmed, although intuitively appealing for some, is also somewhat mysterious. It may be difficult to see how violating a right discriminatorily can constitute a wrongdoing over and above the violation of the underlying right. The alternative picture of the evil of discrimination is easily understood. Under this picture, when a person acts, he must abide by the moral principles that govern the situation: Where a promise is at stake, he must act in ways that respect the promise; where limited resources must be divided, they must be divided based on the appropriate factors of need, right, and so on; when dealing with another, persons should act in ways that reciprocate the ways that they have been dealt with. All of these situations involve basic moral principles. These principles will usually identify factors that will indicate what options are open to the actor. In general, acting on the basis of race and the other specified characteristics will lead an actor to behave inconsistently with the moral principles because race, etc., will not be a relevant factor. For example, failing to fulfill a promise because the promisee is Asian will generally lead to the unjustifiable breaking of a promise because race has nothing to do with the conditions under which promises may be broken. Acting on a discriminatory basis therefore produces wrongdoing only because it leads to acts inconsistent with basic moral principles. Thus, the putative impropriety of discrimination may be accounted for without recognizing a wrong in biased action over and above that of violating the basic moral principles.⁵⁰

The way to avoid the above picture of discrimination is by straightforwardly thinking of the right not to be discriminatorily

Speech?, CRIM. JUST. ETHICS 6, 9 (Fall/Summer 1992) (“[B]eating 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.”).

⁵⁰ See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 217-44 (1986) (discussing the limited content of egalitarian theories); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 548-77 (1989) (arguing that equality is not a distinct substantive norm).

harmed as resting on a protectable interest in the thoughts of another. Under this conceptualization, engaging in a bias assault is like stealing a person's cane and hitting him with it: not only has the perpetrator violated the person's interest in bodily integrity, but the perpetrator has done it in a way that treads on another's interest in controlling his personal property. In the case of a bias assault, the additional interest is not in personal property like a cane, but in the perpetrator's thoughts.⁵¹ Conceptualizing the distinctive wrongdoing of bias crimes as resting on a protected interest in the thoughts of another is a purely analytic move intended to bring the substantive moral issues into focus. Although there may be other ways of framing the issue, the same moral issues will ultimately have to be faced.

Recognizing a protectable interest in the thoughts of others of the type necessary to support bias crime statutes requires that two hurdles be cleared. The first is the "what you don't know, can't hurt you" objection. According to this objection, a person can only have an interest in that which produces an effect on her; that which has no effect cannot implicate an interest. Thoughts fall into the latter category of things that can have no effects on others. Thoughts are paradigmatically private things. We think of them as distinct from their contingent physical manifestations, such as a voluntary movement or an involuntary blush or smile. So conceived, thoughts can have no effect on others, although their physical manifestations might. Is it irrational to be concerned with things that do not affect you? Surely not. In many cases, a person's most intense interests will include interests in the welfare of others. Parents care deeply about the lives of their children. A person may fervently wish to end or ameliorate starvation in Africa. Such interests are independent of whether the others' welfare ever produces an effect on, or even becomes known to, the person holding the interest.

Furthermore, the criminal law recognizes people's interests in matters that neither affect them nor are derived from the interests of others who are directly affected. The criminal law prohibits the abuse of corpses, the violation of privacy (which is commonly done through wiretaps that the victim is unaware of), cruelty to animals, and desecration of venerated symbols.⁵² All of these crimes prohibit conduct without any requirement that any direct affects be produced on any

⁵¹ The grammar of "discriminatorily harmed" tends to mask this conceptualization of bias crimes as a crime of thought. "Discriminatorily harmed" appears to refer to being subject to a particular type of *conduct* like being "quietly burglarized" or "quickly mugged." Nevertheless, what distinguishes harms committed discriminatorily from other harms is exactly the thought that lies behind them. Likewise, formulations of bias crime statutes in terms of victim "selection," see *supra* notes 14-15 and the accompanying text, tend to suggest that a particular type of conduct—selection—is at issue. But what distinguishes selection from other types of conduct is the mental state of the selector.

⁵² See MODEL PENAL CODE §§ 251.10, 250.12, 250.11, 250.9 (1962).

“victim”; it is no defense that any of these acts occurred in perfect privacy. Although, of course, the perpetrator will know that the crime has been committed, it is not the perpetrator’s interests that are considered impaired. Furthermore, although the crime must of course be discovered before it can be prosecuted, the discovery is not an element of the crime. The privacy of thoughts is no per se bar to recognizing an interest in the thoughts of another.

This brings us to the second hurdle, which will prove near insurmountable. In order to establish a protectable interest, a person must show that a matter she is concerned with is properly viewed as *her* concern, rather than somebody else’s. This will be more difficult in cases where the matter does not directly affect her. People often care deeply about what opinion others have of them and want others to think well of them, even if they are never to learn of the opinion. People may care more about these unknown opinions than whether a corpse is abused or a symbol denigrated. In these latter cases, the perpetrator has no claim to the use of the corpse or symbol and so the society’s concern with these matters governs. In contrast, with respect to thoughts, the natural tendency is to see them as the concern of the thinker, rather than the object of the thought. An interest in the thoughts of others is generally not recognized: If another thinks poorly of us despite our best efforts, we must live with that fact.

These intuitions concerning thoughts are supported by Professor Feinberg’s general analysis of the concept of interest. Feinberg states, “[I]t does not seem likely that wants, even strong wants, are *sufficient* to create interests.”⁵³ Feinberg gives the example of a baseball fan who, despite his powerful desire that the Dodgers win the pennant, has no interest in their winning. Feinberg contrasts this case with that of a baseball fan who has placed a wager on whether the Dodgers will win the pennant. The difference according to Feinberg is captured by the concept of a “stake.”⁵⁴ Feinberg opines that it is widely true that:

if [the concern] is to be the ground of an interest . . . [it] should be capable of promotion by human efforts, particularly by the efforts of the person whose want it is. . . . Without that special relation to personal effort that converts a mere want into an objective, it is not likely that the appropriate sort of “investment” can be made that is needed to create a “stake” in the outcome.⁵⁵

Feinberg’s analysis of interest as based on the notion of a “stake” or “investment” is supported by one aspect of the law’s treatment of thoughts of others. Through the tort of defamation, the law recognizes a limited interest in the thoughts of others. An action for defamation has traditionally been viewed as protecting “the interest of a

⁵³ JOEL FEINBERG, HARM TO OTHERS 42 (1984).

⁵⁴ *Id.* at 34 (“One’s interests, then, consist of all those things in which one has a stake . . .”).

⁵⁵ *Id.* at 44.

person in his reputation."⁵⁶ A person's reputation is nothing more than what others think of him—the thoughts of others reified. Why should the law recognize such an interest? A person has some stake in these opinions because, through her work to establish her good name, she is indirectly responsible for them. A person who disturbs these opinions through deception or carelessness cannot claim an equivalent stake. Honest work supports a claim superior to one based on dishonest or accidental influence. A plaintiff, of course, cannot successfully assert an action in defamation against a person or class for negligently arriving at an improperly low opinion of the plaintiff. The interest in reputation does not extend that far. By deliberating, the opiner directly produces the opinion and so has a stake in it that trumps any claim that the object of the opinion may have. Thus, the law of defamation is generally in accord with Feinberg's analysis of interest.

With respect to bias, the victim lacks a significant stake, and so interest, in the attitudes of the bigot. Few individuals can claim responsibility for the reputation of their group. Although society as a whole, through its efforts to eliminate prejudice, may have some interest in the thoughts of bigots, this interest also cannot trump the interests of the bigots, who take ultimate responsibility for their views.⁵⁷ Bigotry involves the erroneous assessment of the worth and dignity of a large class of persons. In moral matters, we have made a particularly strong investment of ourselves. Our ability to appreciate, grapple with, and take positions on moral issues is a defining characteristic of our autonomy.⁵⁸ Our conclusions on moral issues, for better or worse, define who we are. In refusing to recognize an interest in the thoughts of others,⁵⁹ the law affirms our conception of personhood—

⁵⁶ LAURENCE H. ELDREDGE, *THE LAW OF DEFAMATION* 2 (1978).

⁵⁷ Any conception of bigotry that places the responsibility for it elsewhere would undermine the conception of bias crimes involving punishment for discriminatorily causing harm. If the bigot is not responsible for it, he should not be punished for it.

⁵⁸ See JOEL FEINBERG, *HARM TO SELF* 36-37 (1986) (discussing importance of moral autonomy); Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, *CRIM. JUST. ETHICS*, Summer/Fall 1992, at 29, 32 ("[A]bsent governmental respect for the sanctity of an individual's thought processes, any meaningful individual self-realization is impossible.").

⁵⁹ The First Amendment properly protects freedom of thought. See *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 114 S. Ct. 2445, 2458 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977) (state may not require citizens to display state motto "Live Free or Die" on their license plates); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (asserting the right to receive and process ideas is part of First Amendment); *American Communication Ass'n v. Douds*, 339 U.S. 382, 408 (1950); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629, 642 (1943) (protecting religious beliefs

the understanding that we are distinct individuals with particular claims to our lives, thoughts, and identities.

Moreover, even where thoughts lead to actions affecting others, we generally do not believe that others acquire an interest in the actor's thoughts. Consider, for example, a person who refuses to consider someone as a potential spouse solely on the basis of the person's race.⁶⁰ Many would view such a refusal as manifesting bad character. Spouse selection, however, involves determining with whom one will enter into the most intimate of relationships. Most would not think such refusal merited punishment as violating another's interest in being considered as a potential spouse. Their reaction would more likely be, "I disapprove, but it's your business." Similarly, if a person were to choose the charities she donated to based on racial or other considerations (the United Negro College Fund versus the Native American Rights Fund), we would not think punishment was warranted. We might think that the donator would be more praiseworthy if bigotry had not played a role in determining the recipient. We believe, however, that a person may be beneficent for the reasons she chooses. Thus, just as pure thoughts do not violate the interests of others, neither do thoughts leading to actions that do not impose harms.

With respect to bias crimes, the crucial question is whether the victim should somehow gain a protectable interest in the perpetrator's thoughts because these thoughts lead to a harmful act against the victim. It is instructive that tort law declines to view an interest in thoughts as being created in this way. Damages in tort may be compensatory or punitive. The compensatory damages a plaintiff is entitled to reflect the extent to which her interests have been impaired. In core torts, compensatory damages do not depend on motivation. For example, a person who received a black eye as a result of another's negligence would be entitled to the same compensatory damages as a person who received the black eye as a result of an intentional battery. The principal rationale for suing in battery, and bearing the burden of proving the additional element of intent, is the availability of punitive damages.⁶¹ Punitive damages, however, are generally not thought of

from being undermined by requiring pledge of allegiance to be taken); *United States v. Schimmer*, 279 U.S. 644, 654 (1929) ("If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought.") (Holmes, J., dissenting).

⁶⁰ By "solely," I mean without regard to future possible consequences based on the racism of others, such as potential ostracism and stigmatization that our society may impose on both interracial couples and their children.

⁶¹ Punitive damages are frequently appropriate for intentional battery and rarely for negligence. See W. PAGE KEETON, ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 40-41 (5th ed. 1984).

as compensating the plaintiff for the violation of an interest.⁶² Rather, the purpose of punitive damages is, as the name implies, to punish.⁶³ Punitive damages are appropriate for conduct based on malice, evil motivations, or outrageous circumstances.⁶⁴ As a matter of positive tort law, bias motivation would seem an appropriate ground for punitive damages. Thus, in tort, bias motivation, like intentionality generally, does not reflect the existence of a distinct interest the violation of which is to be compensated, but rather it reflects an assessment of the appropriate punishment of the tortfeasor based perhaps on some notion of heightened culpability.⁶⁵ In any case, tort law does not support the hypothesis that a victim acquires an interest in the thoughts causing a wrongdoing against him.

Our intuitions about whether we should recognize an interest in bias motivations that cause harm are not completely settled. There are admittedly conflicting possible conceptualizations of the place of motivations in bias crimes. Under one conceptualization, a bias crime is seen as involving only the perpetrator's act entering the victim's sphere of interests with the perpetrator's thoughts staying outside and behind with the perpetrator. Under a second, a bias crime is seen as involving a perpetrator's thought entering with his act into his victim's sphere of interests where it is properly subject to objection by the victim. Analogies to stakes and investments may not tell the whole story. It is true that often we identify what is ours with what we have invested ourselves in. If a person builds a cabin and it is destroyed, he may feel that he has lost more than if a cabin that was given to him were destroyed. Yet besides identifying with what we produce, we also identify with what has produced us. If her childhood home is destroyed, a person may feel that part of herself has vanished. From this perspective, where a person's life has been altered by, say, a violent, crippling attack, we may feel that the motivation giving rise to the attack has more to do with the victim's life than the attacker's.

In many areas of morality, difficult questions will arise and the most that can be achieved through analysis is an understanding of why they are difficult. With respect to the generic bias crime, the balance of considerations seem to favor the view that the perpetrator's motivations remain the perpetrator's. Those who violate the rights of others are still autonomous individuals who, in violating the rights of

⁶² One indication that punitive damages are not viewed as compensatory is that they are generally taxed as income, as opposed to tort awards for lost earnings, which are not taxed. See Note, *An Economic Analysis of the Plaintiff's Economic Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900, 1917 (1992). Only compensatory awards should not be taxed because the nature of compensation is to return a person to the status quo, not produce an increase in wealth to which society might assert a claim.

⁶³ *Id.* at 1900-11.

⁶⁴ KEETON, *supra* note 61, at 9-10.

⁶⁵ Whether bias is properly thought relevant to culpability is discussed *infra* in subpart III.B.

others, have exposed themselves to punishment for the wrongfulness of their acts, not for the thoughts underlying these acts. They have a stake, hence an interest in their thoughts; others can only confess to their preference not to have been the subject of a bias crime, as opposed to another crime the same in all other respects. Even when racism, anti-Semitism, and other forms of bigotry have impinged on our lives, we should recognize that we still have no claim on the bigot's thoughts. This respect is not based on the value of bigotry, but the value of the bigot as a person whose moral beliefs, though profoundly wrong, are still his. Sanctity of thought prevails.

Granting that we generally do not have interests in the thoughts of others leads to what might be a controversial conclusion: Discrimination is not intrinsically or per se wrong; at most, it only tends to produce wrongdoing. The following subsection examines civil antidiscrimination laws in light of this conclusion.

b. Civil antidiscrimination laws.—On the basis of the foregoing claims about the protectable interests of others, the justification of civil antidiscrimination laws may seem problematic. Bias crime statutes and civil antidiscrimination laws are closely related. Civil antidiscrimination laws share the defining feature of bias crime statutes: the prohibition of conduct engaged in “because of” (or alternative locution) a specified characteristic.⁶⁶ Furthermore, the Supreme Court has recognized the similarity of the two types of laws. In *Wisconsin v. Mitchell*, the Supreme Court cited the analogy between presumptively constitutional civil antidiscrimination laws and the challenged bias crime statutes as a ground for upholding the latter.⁶⁷ Similarly, those who have defended bias crime statutes have appealed to civil antidiscrimination laws as evidencing our society's recognition of a general interest in not being the subject of discrimination. They argue that the wrong that occurs when a person is fired based on race is the wrong of being subject to discrimination.⁶⁸ Such a theory is undoubtedly suggested by the remedial structure of such laws as Title VII, which allows a plaintiff to recover wages that she would have received but for the apparent wrong of discrimination. If not for this, what wrong is being remedied? I have argued that a general interest in not being

⁶⁶ See, e.g., 42 U.S.C. §§ 1973(a) (voting: “on account of”), 2000a(a) (public accommodations: “on the ground of”), 2000c-6(a)(2) (public education: “by reason of”), 2000d (federally funded programs: “on the ground of”), 2000e-2(a) (employment practices: “because of”), 3605 (real-estate transactions: “because of”), 6102 (age discrimination: “on the basis of”) (1994).

⁶⁷ 508 U.S. 576 (1993). One commentator suggests that this analogy was the true impetus of the Court's decision. See Richard Cordray, *Free Speech and the Thought We Hate*, 21 OHIO N.U. L. REV. 871, 884 (1995).

⁶⁸ See, e.g., Weinstein, *supra* note 49, at 14; Cordray, *supra* note 67, at 884 (arguing that intentional selection is a separate wrongful act distinct from innocent conduct of hiring and firing).

subjected to discrimination would imply an inappropriate interest in the freedom of thought of others. Below I offer two theories of antidiscrimination laws that do not rest on a general right not to be subject to discrimination. These theories do not represent the standard understanding of antidiscrimination laws. Nevertheless, they may represent a sounder understanding. They also illustrate that objecting to bias crime statutes on the grounds discussed in the previous section does not entail a wholesale rejection of our nation's antidiscrimination laws.

Civil antidiscrimination laws need not be understood as resting on a general right to be free from intentional discrimination. Under the first theory I suggest, they may be understood as resting on a general interest in employment if sufficiently qualified. In our society, employment is not considered a luxury, but a necessity of life. Although unemployment insurance is available, dependency on such insurance is generally regarded like reliance on medical insurance: a departure from the normal state of well-being. Furthermore, in our society, the baseline expectations are to be hired if sufficiently qualified relative to the application pool and to be retained as an employee if competent, assuming that maintaining the position is economically justified for the employer. When these legitimate and natural economic expectations are defeated, a person may be characterized as having suffered a harm, rather than as not having received a benefit. Thus, *all* instances of unreasonable hiring and firing appear to violate harm-avoiding norms of conduct of the type the law traditionally enforces. The harm underlying employment discrimination laws, I suggest, is not in being the victim of racial motivation per se, but in being deprived of the legitimately expected employment opportunity that necessarily accompanies being the victim of racial discrimination.⁶⁹

Why then should not all objectively unjustified employment practices be prohibited on the ground that they deprive a person of a legitimately expected employment opportunity? The explanation lies not

⁶⁹ A theory of prohibiting employment discrimination that does not rest on a general interest in being free from discrimination is supported by Title VII jurisprudence. Title VII prohibits so-called "disparate impact" discrimination as well as intentional discrimination. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs*, the Supreme Court held that requiring a high school diploma as a condition of employment could violate Title VII if the requirement was not related to job performance. Plaintiffs were not required to show that the employer intended or even was aware that the requirement have a disparate impact. Rather, the Supreme Court held that, under Title VII, job applicants had a right to be free from arbitrary barriers to employment that fell particularly heavily on groups defined by the Title VII classifications. *Id.* at 431. It was irrelevant whether thoughts of discrimination produced the arbitrary barrier. Although this nonthought-related justification was offered in the context of disparate impact discrimination, it would suffice to justify the prohibition of intentional discrimination. Intentional discrimination is simply a subclass of disparate impact discrimination because all intentional discrimination has a disparate impact on the group intentionally discriminated against.

in the lack of harm in the general case of an unjust firing or failure to hire, but in the unacceptably high enforcement costs of prohibiting such a harm. A common rationale for not recognizing a tort of wrongful discharge or unjustified failure to hire is the potential for the courts and businesses to be overrun with lawsuits brought by unhappy applicants and disgruntled former employees.⁷⁰ Relative to other alleged unreasonable bases for hiring and firing, allegations of discrimination because of race or other specified characteristics have a high a priori likelihood of being true. In our society, the prohibited categories of discrimination are likely the most common forms of unreasonable employment practices. Other putatively common forms, such as personal animosity, are only large because they aggregate bias (a frequent cause of personal animosity) and a range of other less-probable unreasonable bases, such as irrational dislikes of objectively acceptable attitudes, manners, or appearances. In other words, race and other specified characteristics are the features that persons are most likely to be unreasonable about. To allow types of employment claims other than those alleging bias discrimination would be to allow claims that carry greater costs in the form of meritless lawsuits. Thus, an available justification for prohibiting discriminatory employment practices while permitting other unreasonable employment practices is not that the former incorporate the additional harm of discrimination, but that the latter bear disproportionately high enforcement costs.

In sum, pursuant to the account I have been sketching, the difference between bias crime statutes and other antidiscrimination laws, such as Title VII, is that bias crime statutes enhance a penalty for an act that is already punished commensurate with its wrong. The penalties that civil antidiscrimination laws assign to acts of discrimination are appropriate given the wrongful nature of the acts, but the acts are not wrongful by virtue of the discrimination. They are just more worthy of being prohibited because of their relatively low enforcement costs. Under this view, bias crime statutes would be analogous to unemployment discrimination laws only under the following circumstances: First, it would have to be shown that the general penalties for all crimes were artificially lowered so that there was general "underpunishment" of crime relative to desert; second, bias crime statutes

⁷⁰ See *Kumpf v. Steinhaus*, 779 F.2d 1323, 1326 (7th Cir. 1985) ("Employment at will . . . keeps debates about business matters out of the hands of courts."); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 965-67 (1984); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination: Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1144 (1989) ("[R]eplacing the at-will rule with some form of governmental review of dismissal decisions will be costly."); Grannis, *supra* note 7, at 219 ("Being fired or not hired is harmful to the individual. Nonetheless, such harmful employment actions are tolerated because they are necessary to business."); see also RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW*, 206-07 (4th ed. 1992) (defending the efficiency of at-will employment).

merely enhanced the penalty for crimes to a level appropriate for the punishment of the underlying crime; third, there was an enforcement-based rationale, as opposed to a desert-based rationale, for why bias crimes, and not other crimes, were being punished at the appropriate level.

It is doubtful that these elements could be shown. For example, our society has a general interest in increasing the punishment level for crimes to their desert-based maximum in order to create the maximum deterrent effect. To the extent we have not, this may be explained by limits on available prison space and the costs of incarceration. These two factors that would justify underpunishment, however, apply with equal force to bias crimes: those who commit bias crimes cost as much to incarcerate and deplete the limited amount of prison space as much as nonbias criminals.

There is an alternative way of conceptualizing civil antidiscrimination laws so that they do not rest on a general right in not being discriminatorily harmed. I have urged that we should not understand ourselves as having an interest in the thoughts of others. Nevertheless, such interests may be created or transferred just as interests in other things may be. One mechanism for acquiring interests is through promise. We ordinarily should not think of ourselves as harmed by the low esteem in which we may be held by another, even if we would greatly prefer it otherwise. Theoretically, however, one person may promise another to consider him in the best light. In such a case, action manifesting a failure to do so would provide evidence that the promise had been broken and the promisor had wronged the promisee. Vows to love, honor, and respect of the type exchanged in a marriage ceremony perhaps present a more realistic example of this type of interest in the thoughts of another acquired through promise.

Explicit promises not to discriminate are rare. Besides explicit promises, however, there are tacit ones and, more distantly, hypothetical ones. The general obligation to obey the law, for example, may be thought to rest on such a tacit or hypothetical promise. On such a view, the acceptance of the benefits of society constitutes the acceptance of an agreement to obey the laws.⁷¹ In this light, the Equal Protection Clause's prohibition on state action based on racial animus is easy to justify: individuals may be generally free to discriminate, but by accepting the power of government office, they tacitly or hypothetically waived their freedom to exercise this power discriminatorily. Civil antidiscrimination laws regulate paradigmatically socially constituted spheres of activity such as schools, public accommodations, and

⁷¹ See A.J. SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATION* 83-100 (1979) (arguing Locke held this view); H.L.A. Hart, *Are There Any Natural Rights?* in *THEORY OF RIGHTS* 84-87 (J. Waldron, ed., 1984). But see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 90-96 (1974) (criticizing the view).

the market, where more than a minimum number of persons are involved.⁷² These institutions only exist through the mutual participation of a significant number of people and the background conditions established by the state. Entering into these activities, a person may be thought to have done so on the condition, tacitly or hypothetically agreed to, that the activities would not be conducted discriminatorily. On this account, civil antidiscrimination laws properly reflect the interest in the thoughts of others that accompany these socially constituted activities.

In contrast, crime, besides being an antisocial activity, is also an asocial activity. It is not that crime does not involve others; the existence of an identifiable person other than the perpetrator who is harmed is an element of most crimes. Nor is crime's asocial nature premised on the notion that the relation between perpetrator and victim is a private or intimate one such that considerations of privacy and autonomy protect it from government interference. There is no relationship with which government interference is more appropriate.⁷³ Rather, crime is asocial in the sense that it is unintelligible to think of criminals as entering into agreements with either their victims or society at large to perpetrate crimes in only a nondiscriminatory way. Criminal activity takes place beyond the pale of society. Such activities are paradigmatically unregulated and unlicensed behavior. Indeed, only because criminal activity could take place in a pure state of nature would people, on some accounts, be justified leaving that state.⁷⁴ It makes no sense to think of criminals agreeing to select their victims in a nondiscriminatory way because criminals do not agree—even implicitly or hypothetically—with their victims or society to anything. Thus, unlike the activities regulated by civil antidiscrimination laws, bias crime statutes apply to activities in which no amount of freedom of thought has been waived.

On the basis of the preceding views of civil antidiscrimination laws, it may be conceded that discrimination is generally not a wrong in itself of the sort that might support bias crime statutes, but nevertheless discrimination is properly prohibited by civil antidiscrimination laws.

2. *Theories Based on Secondary Harms.*—A second approach to bias crime statutes identifies the relevant wrongdoing as the causing of

⁷² See 42 U.S.C. §§ 2000a(b)(1) (public accommodations), 2000e (employment), 3604(B)(2) (fair housing) (1994).

⁷³ Analogies between the private aspect of kissing and the private aspect of punching are misplaced. Cf. Susan Gellman, *Hate Crime Laws Are Thought Crime Laws*, 1992/1993 ANN. SURV. AM. L. 509, 526 ("The State could not constitutionally require persons to offer kisses on an equal opportunity basis. Punches are certainly less pleasant, but they are no less private.").

⁷⁴ See THOMAS HOBBS, *LEVIATHAN* 80 (Crawford B. MacPherson ed., Penguin Books 1968) (1651).

"secondary harms." Where an underlying offense is committed because of bias, additional harms to the individual victim, the victim's community, and society often ensue. Professor Lawrence, for example, has identified "a heightened sense of vulnerability"⁷⁵ and "depression or withdrawal, as well as feelings of anxiety and helplessness and a profound sense of isolation"⁷⁶ as part of the emotional and psychological ills suffered by the victims of bias crimes. Regarding the victim's community, its members "perceive [the bias] crime as if it were an attack on themselves" and "experience reactions of actual threat."⁷⁷ Moreover, bias crimes "may ignite intercommunity tensions that may be of high intensity and of long-standing duration."⁷⁸ Finally, bias crimes decrease our society's respect for the individual, violate the egalitarian ideal that supports our culture, and deprive our society of the contributions of those who have withdrawn because of bias crimes.⁷⁹ These harms may be called secondary harms because they ordinarily could not occur without the primary harm produced by the underlying crime. On the basis of these secondary harms, Lawrence argues that the principle of proportionality justifies punishing bias crimes more severely than underlying crimes.⁸⁰

The central difficulty with identifying the greater wrongdoing in bias crimes with the secondary harms described above is that bias crime statutes do not directly enhance the penalty for crimes involving that wrongdoing. Rather than directly requiring that a secondary harm occur, bias crime statutes enhance penalties when the underlying crime is committed because of a specified characteristic. Acting because of a specified characteristic thus is employed as a proxy (or surrogate) for the occurrence of the secondary harms that are advanced as justifying the penalty enhancement of bias crime statutes. In this section, I assume that the causing of secondary harms is wrongful⁸¹ and consider the appropriateness of using thoughts, such as bias

⁷⁵ Lawrence, *supra* note 10, at 343.

⁷⁶ *Id.*

⁷⁷ *Id.* at 346.

⁷⁸ *Id.*

⁷⁹ *Id.* at 347.

⁸⁰ *Id.* at 348-68; see also Lawrence Crocker, *Hate Crime Statutes: Just, Constitutional, Wise?*, 1992/1993 ANN. SURV. AM. L. 485, 486 ("The distinct emotional harm to the particular victim, and the harm felt by members of the victim's group are therefore at the heart of the matter.").

⁸¹ Although I shall not pursue it, an independent issue is whether causing secondary harms is wrongful and should be prohibited by the criminal law. An argument against this prohibition might rest on an analogy between bias crimes and homosexuality. I and many others believe that homosexual conduct should be legal. It is not that we necessarily approve of homosexuality or think that it is a "good" which outweighs, in a utilitarian sense, the alleged evils that flow from it. Rather, we think that persons have the right to determine with whom they will have sex and this right trumps the interests of others in not being offended or living in a society that has a marginally greater degree of social cohesion. Cf. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 9-20 (1965) (arguing homosexuality may lead to the corruption of youth and the loss of

motivation, as a proxy for such wrongdoing. I conclude that, although the issue is far from clear, there are sound reasons to doubt the appropriateness of employing bias in such a way.

a. Proxies in the criminal law.—In the criminal law, proxies are the exceptions rather than the rule. With respect to the paradigm criminal offenses, such as murder, assault, endangerment, arson, and robbery, proxies are not employed. Rather, the causing of the harm justifying the punishment is an element of the offense. “Causing the death of another human being”—the wrongdoing that justifies the enormous penalties for murder—is explicitly incorporated into the definition of murder.⁸² Likewise for the range of inchoate and accessory offenses, the relevant harm is explicitly stated in the either incomplete or entered into underlying offense.⁸³

Admittedly, there are borderline cases in which it will be difficult to determine whether an element of an offense identifies a factor directly relevant to wrongdoing or culpability, is being used as a proxy, or both. Consider the role of age in the criminal law. Being below a fixed age may be understood as a proxy for lack of maturity or responsibility, and so exempts a person from the scope of the penal code.⁸⁴ Nevertheless, age may be alternatively understood as itself relevant to culpability pursuant to the normative principles that (1) persons over a certain age should be mature enough to be responsible for their acts (even if they in fact are not), and (2) persons under a certain age deserve a certain span of years during which to develop outside of the destructive reaches of the criminal justice system and should not be penalized for achieving maturity early. More peripheral offenses, such as prostitution, abuse of corpse, desecration of venerated objects, or wagering on official action,⁸⁵ while arguably involving large measures of intrinsic wrongdoing, also are understandable in terms of secondary social harms with which the offenses are associated. In general, the more debatable and peripheral the offense, the more nu-

the community's moral cohesiveness). Similarly, one might argue that relevant principles of freedom of thought trump individuals' interests in avoiding the secondary harms that bias crimes produce. Cf. Jeffrie G. Murphy, *The State's Interest in Retribution*, 5 J. CONTEMP. LEG. ISSUES 283, 287 n.12 (1994) (“The harm of hate crimes . . . is in part a function of the degrading and humiliating message conveyed by the conduct. Thus such crimes may be in tension with the liberal commitment to freedom of thought and expression.”).

⁸² See, e.g., MODEL PENAL CODE § 210.1 (1962).

⁸³ For intent-based retributivists, it is sufficient that the harm merely be intended by the perpetrator. For harm-based retributivists, the harm is made more proximate by the attempt, agreement, or other act triggering the inchoate offense. In both cases, however, the relevant harm can be found by examining the face of the relevant offenses.

⁸⁴ See, e.g., MODEL PENAL CODE § 4.10 (1962).

⁸⁵ See, e.g., *id.* §§ 243.2, 250.9, 250.10, 251.2.

merous the alternative justifications advanced that might support it.⁸⁶ Not all of the harms underlying these manifold justifications commonly will be contained in the face of the offense. Such offenses, however, are not counterexamples to the general rule that where the relevant wrongdoing is clearly identified, the wrongdoing is explicitly prohibited.

Where proxies are understood as being used, the validity of their use is often questioned. The felony-murder rule is commonly understood as employing the participation in a felony as a proxy for the intent to kill.⁸⁷ Strict liability offenses, such as adulteration of food, statutory rape, and selling alcohol to minors, are often construed as employing circumstances as proxies for intent or recklessness.⁸⁸ However, the felony-murder rule has been the subject of continuing scholarly scorn.⁸⁹ Strict liability offenses are few, carry limited sanctions, and are subject to constitutional limitations.⁹⁰ Possession offenses also have been viewed skeptically.⁹¹ State courts have struck down a variety of laws that criminalize behavior that is not intrinsically harmful but is perceived as correlated with social harms.⁹² The use of proxies undoubtedly makes for ease and efficiency in prosecution because the prosecutor need only prove the existence of the proxy, not what it is a proxy for. Yet when used without sufficient justification, they have, to borrow Bertrand Russell's comparison of faith and reason, all the advantages of theft over honest toil.⁹³

⁸⁶ See FEINBERG, *supra* note 53, at 13 ("Often the consequences of lewdness, homosexuality, drug-taking, or gambling are said to be harmful to others in some very subtle way, or produced by some partially concealed or indirect causal process. So much confusion has resulted from these allegations that it has become far from evident just which crimes now on the books satisfy the harm principle and which do not.").

⁸⁷ See MODEL PENAL CODE § 210.2 cmt. 6 (1962) ("One who kills in the course of armed robbery is almost certainly guilty of murder in the form of intentional or extremely reckless homicide without need of any special doctrine.").

⁸⁸ Cf. Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 653 (1984).

⁸⁹ See James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1431 n.9 (1994) (citing sources).

⁹⁰ See 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 3.8(b) (1986).

⁹¹ See FLETCHER *supra* note 26, at 197-205 (finding possessory offenses more consistent with positivism than desert-based theories of criminal law); MOORE, *supra* note 44, at 22 ("In either case, we do not really punish possession because that state is bad or harmful, but only as a proxy for past acts (which we can't prove) or as a proxy for propensities for future acts (which we can't punish because they haven't yet happened) . . . Faced openly, impatience (for future crimes) and inability to prove guilt (for past crimes) are not comfortable rationales for criminalizing conduct.").

⁹² See LAFAVE, *supra* note 90, at 217-18 (curfews, possession of knives, possession of syringes, selling of magazines without covers).

⁹³ See also CHARLES T. MCCORMICK, *HANDBOOK ON LAW OF EVIDENCE* 811 (2d ed. 1972) ("The urge for simplifying the task of the prosecutor in certain cases by requiring the defendant to go forward with evidence on some of the issuable facts is balanced by the very real fear that

The criminal law's presumption against employing proxies rests on the related grounds of overinclusiveness and underinclusiveness. Offenses employing proxies are overinclusive because they allow for punishment in cases where the proxy, but not the harm itself, is present. Such punishment is at least *prima facie* inappropriate because, all things equal, a person should not be punished based on a harm that has not occurred. Furthermore, where an offense is not defined in terms of even risking the justificatory harm, a person could be subject to punishment even if the likelihood of that harm had not been increased. Overinclusiveness thus may improperly penalize individuals who fall within the excess coverage of the statute. Overinclusiveness also yields little benefit for society because society has no interest in punishing or deterring those who have neither done nor risked wrongs. Offenses that employ proxies are also objectionable as underinclusive. Society at large may object to underinclusive statutes because those who should be incarcerated because of their wrongful acts, but are not within the scope of the statute, will not be incarcerated. Similarly, those who should be deterred from committing wrongful acts, but who are not within the scope of the statute, will not be. Furthermore, persons whose wrongdoings fall within the scope of the statute may raise objections based on fairness: why should they be subject to sanctions where others similarly situated with respect to the justificatory harm are not? Although this latter objection may not be strong enough to justify not applying the statute at all, it is nevertheless an objectionable feature of the statute.

Criteria are needed to determine when it is appropriate for the criminal law to use proxies. Some criteria will be too weak. For example, in order for the use of a proxy to be valid, it is not enough that there be a positive correlation being the proxy and the object of the proxy. It has been asserted that penalty enhancement for bias crimes is justified because the injuries produced by bias crimes are more severe than those produced by an "average crime."⁹⁴ Bias crimes thus positively correlate with increased harm relative to the baseline of average crimes. Yet if a positive correlation of this sort were to justify proxies, then it would have to be explained why the multitude of other positive correlations between events and harms do not give rise to enhancement statutes. For example, studies may show that injuries are more severe where produced by assaults committed, for example, on Saturday night, on nights other than Saturday, by spouses, by non-

going too far in this direction may result in substituting an inquisitorial procedure for our traditional accusatorial system.").

⁹⁴ See, e.g., Cordray, *supra* note 67, at 875 ("A third reason why it may be appropriate to enhance the penalty for such crimes across the board is that often the harm perpetrated in any particular such crime is more extensive and more severe than the harm perpetrated in an 'average' crime.").

spouses, by men, by women, when the perpetrator is intoxicated, or when sober. Yet we are not tempted to enact statutes that enhance penalties based on the presence of such factors. Rather, in the case of assaults, most jurisdictions employ aggravated assault statutes that are drafted expressly in terms of "serious bodily injury"⁹⁵—the underlying harm. The reason that classes of wrongdoing should not be assigned sanctions based on the average wrongfulness of the class members is that the wrongdoing-culpability theory of punishment is a theory of punishment for individuals, not classes. If all class members are punished based on the average wrongfulness of the class members, and if the wrongfulness of class members varies widely, then many in the class will receive more punishment than deserved and many will receive less. Only when a class consists of wrongdoings of relatively similar magnitude will punishment based on "average wrongfulness" be appropriate.

In determining whether a proxy is validly employed, we should ask, at a minimum, whether its use results in outcomes with less over-inclusiveness and underinclusiveness than the outcomes that would be generated by employing statutes explicitly drafted in terms of the object of the proxy.⁹⁶ Examples of statutes explicitly drafted in terms of secondary harms rather than bias motivations include those that enhance the penalties where "[o]ffender acted with intent to inflict psychological injury on victim,"⁹⁷ "[o]ffender recklessly created terror within a definable community," or "[o]ffender acted in manner likely to provoke retaliatory crimes."⁹⁸ These statutes could also be drafted more broadly in terms of negligently risking the causing of secondary harms. Another possibility is a statute modeled on the federal provision that enhances the penalties "[i]f the defendant knew or should have known that a victim of the offense was particularly susceptible to

⁹⁵ See, e.g., MODEL PENAL CODE § 211.1(2)(a) (1962).

⁹⁶ See Kevin Cole, *The Voodoo We Do*, 5 J. CONTEMP. LEG. ISSUES 31, 38 (1994) ("In assessing the case for [statutes proscribing conduct that does not invariably result in harm], care must be taken to avoid justifying the restraint based on benefits that could be realized by a more focused restraint on liberty."). For an illuminating discussion of the problem of proxies generally, see Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151 (1995).

⁹⁷ Cf. U.S. SENTENCING GUIDELINES MANUAL § 5K2.3 (1996) (providing for penalty enhancements in such cases).

⁹⁸ Gellman provides various versions of laws that explicitly target crimes based on their secondary effects. See Gellman, *supra* note 73, at 511; see also Paul H. Robinson, *Hate Crimes: Crimes of Motive, Character, or Group Terror?*, 1992/1993 ANN. SURV. AM. L. 605, 615. In my discussion, I do not consider the possibility of alternative proxies for secondary harms. For example, a statute enhancing the penalty for crimes in which the criminal and victim were of different races, or in which places or worship were defaced, might be thought to better capture acts with secondary harms than do current bias crime statutes.

the crime”⁹⁹ I shall refer to statutes of these types as “secondary harm statutes” because they are explicitly drafted in terms of the secondary harms advanced as justifying bias crime statutes. Framing the question of the validity of using a proxy in terms of whether it is more effective than a statute explicitly employing the proxy object implicitly shifts the question of the justification of bias crime statutes from “Are they justifiable where the alternative is having no statute at all concerning secondary harms?” to “Are they justifiable where the alternative may include adopting other statutes that address secondary harms?” This shift, however, is legitimate because there is no reason to believe that legislatures are limited to bias crime statutes, as traditionally drafted, or nothing.

b. Relative overinclusiveness and underinclusiveness.—With respect to overinclusiveness, secondary harm statutes have a slight edge over bias crime statutes. Bias crime statutes are overinclusive because there will be cases where a crime is committed based on bias, but no secondary harms ensue. Some of these cases will occur when the bias motivation is not apparent—for example, the damaging of a car or other property, which appears to be a random act of vandalism, but is really a random bias crime; or a dispute concerning a matter which escalates into a brawl because of the racial animosity of one of the participants, but which appears to be based entirely on the original matter. In these cases, there will be no secondary harms. Another scenario would be where the perpetrator has determined to commit the crime regardless of who the victim is, but among potential victims makes his selection because of some specified characteristic. Consider for example, a con man who enjoys deceiving individuals of a particular race or religion.¹⁰⁰ In such scenarios, the bias motivation is cloaked by the motivation for the underlying crime. There also will be cases where bias motivation is present and obvious, but no secondary harms occur simply because the victim cares little about the motiva-

⁹⁹ U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (1996). The Sentencing Guidelines provide for cases where the victim is both known to be more vulnerable—and so potentially within the scope of the above-quoted provision—and where the perpetrator acts because of the victim’s race, etc. — and so is potentially within the scope of the federal bias crime statute, *id.* at § 3A1.1(a). In such cases, the perpetrator’s sentence is enhanced according to only the bias crime statute, which is a greater enhancement than that provided by the vulnerability provision. *Id.* cmt. n.3. This result is consistent with understanding bias crime statutes as using bias as a proxy for greater vulnerability of the victim. The greater enhancement under the bias crime provision may be explained based on the fact that the perpetrator of a bias crime must select his victim intentionally, whereas the vulnerability provision is satisfied by merely knowing of vulnerability.

¹⁰⁰ Professor Greenawalt considers such scenarios and opines that the perpetrator would be guilty of committing the crimes “by reason” of a specified characteristic. See Kent Greenawalt, *Reflections on Justifications for Defining Crimes by the Category of Victim*, 1992/1993 ANN. SURV. AM. L. 617, 618-19.

tion of her attacker and the nature of the attack receives little publicity.¹⁰¹

In contrast, there is virtually no chance that secondary harm statutes will produce overinclusiveness. Those who violate such statutes will, by definition, have caused, or risked causing, secondary harms. Of course, there is always the possibility in practice of a jury finding secondary harms when none have occurred. But the requirement of proof beyond a reasonable doubt should substantially diminish the number of such convictions. In any case, the possibility of erroneous conviction due to mistaken jury findings is always present. For example, although not noted above, there are hypothetical cases of bias crime convictions where the underlying crime was not motivated by bias, much less productive of secondary harms. The overinclusiveness based on generic jury error for secondary harm statutes and the overinclusiveness based on generic jury error for bias crime statutes can be assumed to cancel each other out. The cases of bias motivation without secondary harms, discussed in the preceding paragraph, however, remain. Thus, the overinclusiveness of bias crime statutes, although modest, is likely greater than that of secondary harm statutes.

Turning to underinclusiveness, we may identify two categories of cases in which bias crime statutes will be underinclusive. The first category consists of cases where, even with perfect fact-finding, there will be underinclusiveness. In this first category are cases of persons who intentionally cause or risk secondary harms, but do not commit any underlying crime, and so will not be liable for committing a bias crime. Examples of such cases include a hatemonger who spreads rumors that a nonbias crime was committed from bias and so fans the flames

¹⁰¹ The degree of overinclusiveness and underinclusiveness of bias crime statutes will of course depend on how they are interpreted. Professor Lawrence, who believes that bias crime statutes are justified because of secondary harms, argues that such statutes will be more defensible if construed narrowly to require racial animus. Lawrence, *supra* note 10, at 376-80. The result of such a narrowing naturally would be not only to decrease overinclusiveness, but also to increase underinclusiveness. This is so because the class of discriminatory selection crimes, which would be entirely eliminated from the scope of bias crime statutes, contains both instances where there are secondary harms and instances where there are none. Because individuals are less offended by discriminatory selection bias crimes, such crimes will have a lesser tendency to produce secondary harms committed compared to racial animus bias crimes. Nevertheless, they will have some tendency. First, discriminatory selection bias crimes and racial animus crimes are equally likely to produce fear and intimidation. For example, a person may be equally reluctant to enter a neighborhood when believing those of her religion are considered easy marks for local criminals as when believing those of her religion are disliked. Furthermore, discriminatory selection bias crimes are likely considered by some to be somewhat intrinsically offensive, even if less than racial animus crimes. Finally, discriminatory selection bias crimes will produce secondary harms where individuals or communities have mistakenly construed instances of discriminatory selection as instances of racial animus. Whether eliminating discriminatory selection crimes from the scope of bias crime statutes will improve them turns in large part on whether one is more troubled by overinclusion or underinclusion.

of hostility in a community; or a member of a terrorist group associated with a nationality or religion who takes "credit" for an act of violence that his group did not commit. A more pedestrian example would be the otherwise lawful use of racial or other epithets or symbolism that would wound the listener and the listener's community. Because there is generally no underlying crime of hateful speech, there would be no liability under a bias crime statute. Furthermore, persons who cause or risk secondary harms by committing the underlying crime, but do not act from bias, will also not be liable under bias crime statutes. Such persons will typically be involved in scenarios in which the true nonbias motivation of the crime (personal animosity, general hotheadedness, or unrelated emotional disturbances) is not readily apparent to the public, but the perpetrator and victim happen to be members of groups that are historically hostile to each other. For example, a mugging of a Jew by a Black in New York City could cause, or at least risk, secondary harms even if the mugging in fact was merely motivated by greed; the vandalism or burglary of any house of worship may produce secondary harms even where the vandalism or burglary was not bias-motivated; or an attack on a member of a particular group committed as a rite of passage into a gang or committed as a result of other types of peer pressure would produce secondary harms but not be bias crimes, assuming that the perpetrator must be acting from personal bias.¹⁰²

The second category of underinclusive cases will be those that result from jury error. In such cases, the underlying crime was motivated by bias and secondary harms ensued, but the existence of bias cannot be proven. The complexity of proving motive has been described as a "fundamental vice" of all bias crime statutes.¹⁰³ Prosecution under such statutes often will require substantial testimony concerning a wide range of background matters normally not at issue in criminal proceedings.¹⁰⁴ Furthermore, requiring that the accused be found to be a racist, anti-Semite, or bigot may inject controversial elements into the jury room, making unanimity difficult to achieve.¹⁰⁵ With respect to all these scenarios, a prosecutor concerned with punishing and deterring secondary harms might prefer a statute that sim-

¹⁰² See *infra* notes 149-50 and accompanying text for a discussion of the requirement of personal animus.

¹⁰³ Robert R. Riggs, *Punishing the Politically Incorrect Offender Through "Bias Motive" Enhancements: Compelling Necessity or First Amendment Folly?*, 21 OHIO N.U. L. REV. 945, 952 (1995).

¹⁰⁴ *Id.* at 953 (identifying testimony from character witnesses; testimony concerning past expressions of intolerance, testimony concerning significance of hairstyle, tattoos, clothing, etc; testimony concerning ideology of associates; and psychological testimony concerning "motivating thought").

¹⁰⁵ See James B. Jacobs, *Implementing Hate Crime Legislation Symbolism and Crime Control*, 1992/1993 ANN. SURV. AM. L. 541, 549-50.

ply prohibited all conduct causing or risking them, rather than a statute that required proving that the underlying criminal act was committed because of a specified characteristic.

Secondary harm statutes do not suffer from the first category of underinclusiveness; by definition, with perfect fact-finding, there will be no cases in which secondary harms have been produced, yet there will be no liability under secondary harm statutes. Secondary harm statutes, however, raise concerns of underinclusiveness of the second type: those based on juror error. Even if prosecutors are able to establish that a crime was motivated by bias, they may be unable to prove beyond a reasonable doubt that secondary harms were risked or ensued. Juries, however, are often presented with evidence of motivation in order to infer other facts. Juries could be asked to find that the defendant's acts created secondary harms on the basis of the fact that the defendant acted from bias. Those who support bias crime statutes based a theory of secondary harms should believe that the inference from bias motivation to secondary harms is readily made.

Using motivation to establish the existence of secondary harms, however, might be thought to raise particular difficulties. Juries undoubtedly are unaccustomed to ascertaining such diffuse facts as whether a particular community felt vicariously victimized by an attack on one of its members or whether a particular crime wore away at the fabric of its society. They may be unsure what the marginal effects on society might be of a particular bias crime, and so acquit. Yet it is unclear whether more accurate results would be had if the determination was taken from their hands and they were given bias to employ as a proxy for secondary harms. How confident are we that bias-motivated crimes produce secondary harms? And to the extent that we may be confident, why believe that juries will generally be less so? We are not necessarily better situated epistemically than a jury. Our common sense opinions about the way crimes are perceived and affect different communities are the very same opinions that juries would rely on if asked to determine if secondary harms were caused by the accused.

In response, it may be argued that we are better situated than the average jury to make determinations about the existence of secondary harms because of subtle forms of bias infecting juries. Jurors, it may be feared, will identify with the perpetrator on some level, discount the humiliation felt by the victim, or be blind to the effects of the crime on the victim's community. Thus, such bias will prevent jurors from making the inferences to secondary harms that we recognize the evidence objectively supports. Bias, however, does not blind one to the existence of secondary harms. Indeed, part of the case for bias crime statutes rests on the claim that bias criminals generally are aware of, and should be held accountable for, the secondary harms

they create. Furthermore, reluctance to draw the inferences required to convict is equally present where the prosecution must show the existence of bias as where it must show the existence of secondary harms. Equally important, it is not clear that juries will suffer from the biases hypothesized above. Where the accused has been portrayed as holding views that are strongly condemned by society, jurors may be willing to stretch to make a finding necessary for conviction.¹⁰⁶ Finally, to the extent that there were grounds to doubt the fact-finding abilities of juries with respect to secondary harms, these abilities could be shored up through the use of rebuttable presumptions rather than proxies.¹⁰⁷

The jury's ability to determine the existence of secondary harms, however, may not be a crucial issue. Another alternative to existing bias crime statutes could be drafted on the model of burglary. Just as burglary is often defined as "an unlawful entry into a building with the purpose to commit a crime therein,"¹⁰⁸ so a bias crime statute might provide for penalty enhancement where, "unlawful conduct is undertaken with the purpose to cause [secondary harms, however defined] thereby."¹⁰⁹ Such a statute would avoid the use of bias motivation as a proxy, yet make it unnecessary for a jury to engage in fact-finding concerning the existence of secondary harms. Instead, juries would merely be required to make findings regarding intent. Here, again, the issue is not so much whether juries, if posed this question, would sometimes err. Rather, the question is whether employing an intent-to-cause-secondary-harms standard would be a more effective means of identifying those who are responsible for secondary harms than ap-

¹⁰⁶ See Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 101-02 (1991) (suggesting that if, in the absence of the felony-murder rule, juries were asked to determine whether the defendant-felons intended the killing, they would be likely to rely on common sense opinions concerning felons' characters "with a vengeance, attributing significance to them beyond their actual probative value").

¹⁰⁷ Rebuttable presumptions are generally to be preferred to proxies because they are at least somewhat responsive to evidence. See Robinson, *supra* note 88, at 656 ("A rule that creates a presumption of a required element under circumstances that suggest that the element is present but cannot be proven . . . can sometimes impute the element where the presumption is not in fact warranted. Such errors may be an inherent cost of all evidentiary shortcuts, but certainly they should be minimized where possible. Thus, we should prefer rebuttable presumptions to conclusive presumptions."). Indeed, with respect to weapon possession offenses, the drafters of the Model Penal Code opted for the use of a rebuttable presumption of possession for criminal purpose rather than complete elimination of a criminal intent requirement. See MODEL PENAL CODE §§ 5.06, 5.07 (1962).

¹⁰⁸ See, e.g., N.Y. PENAL CODE § 140.25 (1996) ("A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein . . .").

¹⁰⁹ See Robinson, *supra* note 98, at 605 ("A promising alternative [to bias crime statutes] is the criminalization of conduct that is intended to cause (or risk) intimidation or terror of an identifiable group."). A law could also require that the secondary harms merely be negligently or recklessly caused.

plying a bias-based standard.¹¹⁰ Consider the not uncommon case of a racial epithet used in the course of a brawl. Rather than asking a jury to decide whether the defendant engaged in the brawl because of race or whether the defendant's racism was inflamed in the course of the brawl, it could more directly be asked whether in using the epithet the defendant intended to humiliate or to wound the dignity of the victim. If so, the determination that an enhanced sentence is appropriate might be reached without considering the issue of whether the brawl was racially motivated.

The preceding arguments suggest that bias crime statutes may result in greater underinclusiveness than alternative statutes. Nevertheless, this conclusion cannot be characterized as more than speculative. It is clearly an empirical question as to whether statutes employing bias motivation as a proxy, statutes explicitly drafted in terms of secondary harms, or some other alternative will be more effective in punishing and convicting those responsible for secondary harms. This empirical question, however, has no clear answer. We have no data concerning the effectiveness of actual bias crime statutes in targeting those who cause secondary harms. By limiting its inquiry to the existence of bias, the criminal justice system can only presume a correlation. Indeed, we cannot even check the accuracy of a jury's fact-finding regarding the existence of bias because the criminal justice system is currently our best means of ascertaining the truth in these matters.¹¹¹ We know even less about the potential effectiveness of some of the hypothetical statutes suggested above that are drafted in terms of secondary effects. In general, the uncertainty with respect to underinclusiveness will be greater than that with respect to overinclusiveness. Because of the likelihood of greater absolute amounts of underinclusiveness, a potential exists for greatly different amounts of underinclusiveness.

In sum, based on the preceding considerations, bias crime statutes' use of motivation as a proxy for bias appears insufficiently justified. Bias crime statutes have a greater potential than secondary harm statutes for being overinclusive (*e.g.*, for punishing those who have neither caused nor risked secondary harms). In evaluating a criminal statute, overinclusiveness will usually be a more significant factor than

¹¹⁰ With respect to bias crime statutes, Professor Greenawalt has suggested that they may be understood as using bias motivation as a proxy: "[T]he disfavored motivations ordinarily connect to . . . results that are hard to ascertain but are particularly harmful. . . . [Intentions to humiliate and intimidate] may sometimes be too subtle to make required elements of a crime." Greenawalt, *supra* note 98, at 624. Greenawalt adds, "[a] somewhat troubling feature of this argument is the indirect aim at the really troublesome intentions, but . . . such an indirect aim is sometimes appropriate in criminal prohibitions." *Id.*

¹¹¹ Regarding the deterrent effects of bias crime statutes, the data thus far is inconclusive. See Project, *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL'Y 29, 64 (1995).

underinclusiveness. This is so because, by general consensus, it is worse to punish those who should not be punished than to permit those who should be punished to escape. Nevertheless, because the potential overinclusiveness of bias crime statutes is only modest, their overinclusiveness is not a compelling factor. With respect to underinclusiveness, secondary harm statutes also have a slight, if speculative, advantage. The issue with respect to underinclusiveness, however, is more difficult to assess because of the greater empirical uncertainties involved.

c. Other considerations.—In the face of the empirical uncertainty identified above, it may be appropriate to invoke three presumptions concerning the use of proxies. All three caution against their use.

First, in choosing between statutes drafted in terms of the relevant wrongdoing and those employing proxies, the burden of justification should be on the latter. As a matter of methodology, we begin by identifying the wrongdoing that we seek to address. Having done so, we confront the infinite number of potential proxies that might be employed for the wrongdoing and require some justification for choosing among them. Lacking any, we by default employ the wrongdoing itself to avoid arbitrariness.

Second, the use of proxies explicitly commits the law, at the level of drafting, to underinclusion and overinclusion. When proxies are used, the criminal law on its face, and in its correct operation, punishes some who do not deserve to be punished. Due to such phenomena as jury error, the criminal justice system will inevitably punish those who do not deserve to be punished. Nevertheless, the government appears to commit itself to this result self-consciously by employing proxies. If those who do not deserve to be punished are to be, it seems better that this occur as the result of inevitable failures of the criminal justice system, rather than as the result of intentionally created aspects of it. We may say that the use of proxies creates a higher degree of culpability (intentionally versus knowingly) for the punishment of those who do not deserve to be punished.

Third, although the primary function of the criminal law may be to deter potential criminals or punish in accordance with desert, the criminal law also serves an educational function. Society's most strongly held values underlie the criminal law. Criminal statutes are the most direct and public expression of these values.¹¹² This educational function is undercut when the law uses proxies, instead of incorporating the wrongs that underlie the prohibition in the face of the statute. The public will usually accept the law at face value because it

¹¹² See, e.g., Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 98-104 (1970).

is the face of the law that the public is obliged to obey. Hence proxies are presumably disfavored. As relevant here, statutes drafted in terms of secondary effects would appropriately convey to the public the gravity of such harms. In contrast, bias crime statutes, as currently formulated, send the message that acting because of certain reasons is so improper as to be punishable. As argued in the previous section, however, this is not the best moral theory.¹¹³ Although the race or other specified characteristic of a person generally should not be relevant to how a person is treated, acting on such a basis should not be considered a form of wrongdoing. To maintain otherwise would be detrimental to our respect for the autonomy and sanctity of thought. Thus, the antidiscrimination message that bias crime statutes convey, while a worthy message, is conveyed too powerfully. It overwhelms other equally important social norms.

Defending bias crime statutes based on their secondary effects is a popular approach because it avoids the more controversial moral issues raised by bias crime statutes discussed in the previous section. Nevertheless, the presumptive considerations discussed above cast doubt on the merits of bias crime statutes as currently drafted. Thus, it may be asked whether such approaches based on the alleged secondary consequences of bias crimes are anything more than rationalizations for more intuitive objections to bias crimes. Professor Lawrence, for example, admits that "[t]he rhetoric surrounding the enactment of bias crime law suggests that most supporters of such legislation espouse a thoroughly deontological [nonconsequentialist] justification for the enhanced punishment of racially motivated violence."¹¹⁴ These supporters would probably object to the secondary-harm theory that bias crimes are wrongful because they tend to deeply offend their victims or members of the victim's community. Rather, these supporters of bias crime statutes would contend that bias crimes are deeply offensive to the victim and the victim's community because of some independently wrongful aspect. A justification of bias crime statutes based on secondary harms would be strongest if, contrary to the arguments of section III.B.1, a more forceful case could be made for the independent wrongfulness of discrimination.

¹¹³ See *supra* section III.B.1.

¹¹⁴ See Lawrence, *supra* note 10, at 365 (citing 139 CONG. REC. S12176 (daily ed. Oct. 6, 1993) (statements of chief sponsor of federal bias crime statute)); see also Grannis, *supra* note 7, at 222 (1993) ("Penalty-enhancement statutes reflect a judgment by society that it is particularly morally egregious to assault someone on account of their race."); Redish, *supra*, note 58, at 29 ("On a purely moral or emotional level, the concept of sentence enhancement for crimes motivated by racial or religious hatred possesses substantial appeal to many.") (footnote omitted).

C. *Problems with Theories of Greater Culpability*

Wrongdoing-based theories of bias crime statutes rely on questionable claims to others' thoughts or the contingencies of secondary harms. Such theories, we may feel do not tell the full story of our willingness to subject bias criminals to greater penalties. Culpability-based justifications for bias crime statutes offer an alternative approach to justifying bias crime statutes. We believe the murderer should receive a harsher sentence than the drunk driver who kills not because the murderer has caused more harm, but because of the murderer's greater culpability for the harm.¹¹⁵ Likewise, we may be tempted to say that bias criminals, even if they have not caused a distinctive harm by their acts, are more culpable for the harm they have caused than other criminals. Bias criminals have acted based on particularly repugnant beliefs or values. This fact, it may be argued, leads to an enhanced culpability justifying greater punishment.

This subpart of the Article considers culpability-based justifications of bias crime statutes and identifies their failings. Section 1 gives some reasons why as a theoretical matter culpability-based justifications of bias crime statutes are plausible and attractive. Section 2 suggests that bias crime statutes may be understood as criminalizing motivations concerning race and other specified characteristics, and explicates the concept of motivation in terms of belief and desires. Based on this understanding of motivation, sections 3 and 4 examine two theories of how acting based on bias motivations might lead to greater culpability for the wrongdoing at issue. These sections find that although motivations may be relevant to culpability in some cases, bias motivations will generally not be relevant to culpability. Hence, culpability-based justifications of bias crime statutes are judged unsatisfactory.

1. *The Appeal of Culpability-Based Justifications.*—There are two *prima facie* reasons for thinking that culpability-based justifications of bias crime statutes would be more successful than those based on wrongdoing. First, thoughts, such as intentions and beliefs, are traditionally understood as bearing on a person's culpability for a wrongdoing. We usually identify the wrongdoing at issue by employing a description of the act that excludes the actor's thoughts (beyond those implicit in a movement being an action). Without reference to Jim's thoughts, we may say that Jim moved his fist through the air until it contacted and broke John's nose—a wrongdoing. Including different subjective aspects of the act in our description, we may say that Jim, in breaking John's nose, premeditatedly attacked John, or acted for his own protection, or was stretching his cramped arm, or was acting to

¹¹⁵ For a discussion of the distinction between wrongdoing and culpability, see subpart II.B.

fulfill a request of John's, or acquiesced to Joe's threat. These descriptions with implicit subjective components concerning thoughts, beliefs, motives, and so on, are the ones relevant to assessing culpability. They indicate whether the act was intentional, excusable, accidental, or made under duress. Whether a person acts "because of" a specified characteristic is, loosely speaking, a matter of the person's thoughts. Accordingly, it is plausible to think that the thought-based "because of" element of bias crime statutes is relevant to assessing culpability.

Second, placing bias on the culpability side of the wrongdoing-culpability framework avoids the problems of wrongdoing-based justifications. With culpability-based justifications, bias may be understood as directly relevant to desert—rather than merely being a proxy—without implying an interest in the thoughts of another. Thus, the problem of thought-crimes does not arise. As discussed earlier,¹¹⁶ while norms concerning wrongdoing are addressed to the actor, principles of evaluation relevant to culpability are addressed to those who would judge the actor. For example, in order to comply with the law, it is sufficient that Abe know the legal norm "Don't take property without permission." A court would not find Abe criminally liable for taking Bob's umbrella without permission if Abe merely did so carelessly. However, just as the insane do not need to know that they will not be held liable, Abe need not be aware of the evaluation principle in the criminal law that carelessly committing a wrongdoing is less culpable than intentionally committing a wrongdoing.¹¹⁷ In general, by telling courts to punish wrongdoings committed intentionally more harshly than those committed recklessly, and telling courts not to punish at all wrongdoing committed while insane, the government is not instructing citizens to engage in their wrongdoings recklessly rather than intentionally, and ideally while insane. Thus, thoughts of one type (reckless or insane) are not promoted over those of another type

¹¹⁶ See *supra* note 32 and accompanying text.

¹¹⁷ Of course, in deciding whether he should employ care in trying to select his umbrella, Abe might be interested in the degree to which he might be subject to criminal sanction if it is proven that he carelessly selected Bob's umbrella. In this way, knowledge of legal principles of evaluation may be relevant to self-interested persons deciding whether to avoid wrongdoing recognized by the criminal law. Nevertheless, the distinction between norms of conduct addressed to citizens and principles of evaluation addressed to courts is sound. The former concern wrongdoing and must be known before citizens can comply with them. In contrast, principles of evaluation concern culpability and do not need to be known by law-abiding citizens. Rather, these principles are only one set of a great many facts about the world that a self-interested citizen might wish to know when choosing a course of conduct. Other relevant facts might be the likelihood of capture, the ability of defense lawyers to win an acquittal, and the psychological guilt associated with committing crimes. Unlike norms of conduct, principles of evaluation have no unique role in maintaining social order. For a discussion of the implications for criminal law of the distinction between norms of conduct and principles of evaluation, see Meir Dan-Cohen, *Decisional Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

(rational and deliberate). By making thoughts relevant to culpability, the government is trying merely to punish persons fairly, not to assert an interest in thoughts.

2. *An Analysis of Motivation.*—Culpability-based justifications seem promising. In order to evaluate such justifications, however, a reasonably precise understanding is needed of what type of thought acting “because of” involves. Bias crime statutes do not define what acting “because of” is. Nevertheless, it is natural to describe them as criminalizing motivations because those who act “because of” race or other specified characteristics may be said to be motivated by considerations of race or those specified characteristics. The relevance of motivations to the criminal law, however, is controversial. In this section, I explicate the concept of motivation and identify a relatively trivial way in which motivation is relevant in the criminal law.

Questions regarding the nature of motivations and whether they should be relevant to the criminal law have generated copious commentary. According to one tradition, motivations are interlocking desire-belief pairs that cause actions.¹¹⁸ This tradition is consistent with the common usage of “motivation.” For example, we may say that Gladys’s motivation in drinking the beverage was her *desire* to quench her thirst and the *belief* that doing so would quench her thirst. In general, a motivation for an action *A* will comprise the desire for a result and the belief that the actor’s engaging in *A* will be conducive to the achievement of that result.¹¹⁹ Furthermore, for an actor to perform an act *A* because of a motivation, not only must the actor have the appropriate interlocking beliefs and desires to perform *A*, but *A* must also be caused by those beliefs and desires.¹²⁰ For example, even

¹¹⁸ See JEROME HALL, *GENERAL PRINCIPLES OF THE CRIMINAL LAW* 89-91 (2d ed. 1947); MOORE, *supra* note 43, at 136-37; Donald Davidson, *Actions, Reasons, and Causes*, [LX] J. PHIL. 685, 685-86 (1963) (using the term “primary reason” rather than “motive”); Hurd, *supra* note 29, at 170; Sistare, *supra* note 32, at 324 n.1 (citing other proponents of this view).

According to an alternative tradition, motivations are simply a species of intention. They are identical with what might be called “ulterior” (or “further”) intentions. See, e.g., LAFAYE, *supra* note 90, § 3.6(a) (1986); GLANSVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 48-50 (2d ed. 1961); Grannis, *supra* note 7, at 190; Jeffrie G. Murphy, *Bias Crimes: What Do Haters Deserve?*, 11 CRIM. JUS. ETHICS 20, 21 (Summer/Fall 1992); see *supra* Sistare, *supra* note 32, at 324 n.1 (1987) (citing sources). Those who hold this view typically take motivations to be intentions ulterior to those the criminal law is concerned with. By definition, motivations cannot lead to greater culpability. See LAFAYE, *supra* note 90, at 228, 229; WILLIAMS, *supra*, at 49; Grannis, *supra* note 7, at 190. This analysis of motivations has little to recommend it for the purpose of investigating the justifiability of bias crime statutes. First, motivations are defined in a manner that appears to decide the issue of their relevance in advance. Second, the position that bias crime statutes criminalize a type of intention was considered early and rejected in subpart III.A because it failed to yield a plausible justification for bias crime statutes.

¹¹⁹ See Alfred R. Mele, *Effective Reasons and Intrinsically Motivated Actions*, 48 PHIL. & PHENOMENOLOGICAL RES., 722, 722 (1988).

¹²⁰ Davidson, *supra* note 118, at 691.

if Gladys, in drinking the beverage, both desired to quench her thirst and believed that drinking the beverage would quench her thirst, we would not say she was motivated by these beliefs and desires if (1) Gladys happened to be an actor who desired to follow the script calling for her to drink and believed drinking would follow the script, and (2) but for these beliefs and desires concerning the script, she would not have drunk the beverage. In this case, her motivation would have been the beliefs and desires concerning the requirements of the script.

Motivations, defined in this manner, are distinct from intentions in two respects. First, in contrast to our intentions, our beliefs and desires are not a result of a direct act of will or free choice. When we choose what acts to perform, we thereby establish our intentions. Thus, although our intentions are not the immediate objects of our choice, they are created by the willful act of choosing. In contrast, beliefs and desires ordinarily cannot be created simply through an act of will. A person may want to believe that $2+2=5$, but outside of Orwell's *1984*,¹²¹ this is not within his power to bring about directly. Likewise, a person may think it laudable to have certain desires, such as the desire to work for world peace. If she lacks that desire, however, she cannot change this simply through an act of will.¹²²

Second, in contrast to our motivations, our intentions may not be in direct conflict. Desires and beliefs are usually developed independently. Thus, it is possible to have desires that are not simultaneously satisfiable relative to sets of beliefs. In such cases, we say our motivations, like opposing forces, conflict. For example, where Harry has a motivation to stay at home (the desire to watch *Seinfeld* and the belief that it will be on TV) and a motivation to go out (the desire to see friends and the belief they will be at the restaurant), Harry's motivations directly conflict. In contrast, intentions cannot be in direct conflict: Harry cannot both intend to stay at home and intend to go out.¹²³

¹²¹ See GEORGE ORWELL, *1984* at 211-15 (1949).

¹²² We may act in ways to influence the development of our beliefs and desires, see John J. Jenkins, *Motive and Intention*, 15 PHIL. Q. 155, 160 (1965), such as by going to church regularly or reading up on a topic. Such a process, however, has an instrumental, rather than a direct, effect on beliefs and desires. For instance, through a direct act of will I raise my hand; I do not think in terms of contracting my arm muscle to cause my hand to raise. Although I may also cause the elevator I am in to rise, I do not do this through a direct act of will, but only instrumentally through the movement of my hand. Likewise the influence I have on my beliefs and desires through such activities as church-going is merely instrumental. See Michael Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827, 878-83 (1989).

¹²³ It is possible for one to have incompatible intentions (i.e., intentions to achieve goals that exclude each other's realization) and not realize they are incompatible. For example, one might intend to become President and intend to live a relaxed, private life without knowing that the position will entail a busy life with little privacy. In this case, however, the intentions do not actually conflict (in the sense that motivations might) because their incompatibility is not appreciated. Appreciating the incompatibility of one's motivations does not preclude conflict, but

The foregoing observations implicitly follow from a well-known picture of the process of practical reasoning.¹²⁴ Deciding what to do is very roughly a matter of weighing one's desires against the background of one's beliefs and determining which actions will lead to the greatest satisfaction of these intrinsic desires. Desires discounted by our belief that they will be fulfilled are the weights that are put on each side of the scale when determining what our intentions shall be. Intentions, in turn, are the outcome of the weighing. They are formed based on motivations and are the immediate causes of actions. Thus, there is a close connection, but not identity, between motivations and intentions. Although a motivation to do *A* may result in an intention to do *A*, it need not. The motivation may be suppressed or overridden.¹²⁵

The preceding analysis of motivation yields an uninteresting answer to the general question whether motivations are relevant to criminal law. One trivial way that motivations might be relevant is by giving rise to intentions that support culpability. Because intending a wrongdoing undeniably creates culpability for the wrongdoing, the motivations that make the wrongdoing intentional also create culpability, albeit indirectly. For example, if Hal starts the fire based on his desire to burn down the building, then Hal has burned down the building intentionally and is culpable for it. Indeed, based on this connection between motivations and intentions, criminal offenses could be formulated in terms of motivations rather than intentions. Instead of defining murder as the intentional causing of the death of another person, murder could be defined as causing the death of another person based on the motivation that the other person die. Thus there is nothing *per se* improper about "criminalizing motivations."

The above analysis does not answer the question whether bias crimes involve greater culpability for a wrongdoing than similar crimes that do not involve bias. Motivations have been shown relevant insofar as they give rise to intentions, and intentions are clearly relevant to culpability. All crimes, however, involve intentional action and many crimes involve intended wrongdoings. For a culpability-based theory of bias crime statutes to succeed, it must show how the perpetrator of even a crime of intentional wrongdoing, such as assault, can be more culpable when he acts from bias than he would be otherwise. A theory of bias-enhanced culpability is needed.

engenders it. In contrast, when one appreciates the inconsistency of one's intentions, one brackets the intentions until the conflict is resolved in the underlying motivations.

¹²⁴ See MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR THE CRIMINAL LAW* 144 (1993).

¹²⁵ *Id.*

3. *Bias Motivations Do Not Produce Particularly Firm Intentions.*—One way that motivations might be thought to enhance culpability for an intentional wrongdoing is through the quality of intentions that they can give rise to. Although the intentional character of an act is generally not regarded as a matter of degree (an act is either intended or not), the weighing process leading to the formation of the intention may either firmly or weakly recommend the act. This recommendation is based on whether the desires and beliefs supporting the action and the desires and beliefs counseling against the action are relatively balanced or one-sided. A person thus may adopt a course of action either enthusiastically or half-heartedly based on his motivations. We might be tempted to hold a person more culpable for a wrongdoing where the person has intentionally and enthusiastically committed the wrongdoing than where the person has intentionally but half-heartedly committed the wrongdoing. Similarly, a person's weighing of beliefs and desires may either be hasty or well-considered depending on the thoroughness with which the person's beliefs and desires are considered, relative to the nature of the beliefs and desires at issue. Complicated reasons and repressed desires may require greater consideration. We can imagine holding a person more culpable where the weighing was well-considered than where it was tentative. Indeed, the heightened culpability assigned in many jurisdictions to premeditated murder may reflect the judgment that intentions that are well-considered render a person more culpable.¹²⁶

There seems to be no reason to believe that bias motivations give rise to firmly held intentions of the type discussed above. As with any crime, bias crimes are committed by a range of persons. Some will be firmly committed to engaging in the underlying crime because of the strength of their bias motivation; the threat of criminal sanctions will not pose a significant counterweight to action. Other bias criminals will be at the margin; their bias motivation will barely overcome their fear of sanctions. Some motivations for crime likely only exist with great intensity, for example, the need to obtain narcotics. Other motivations, such as greed, personal animosity, lust, and general hostility, are matters of degree, likely occurring across the population in relatively smooth, bell-shaped distributions. Bias, akin to personal animus and general hostility, likely falls within this second category of motivations. Thus, one would expect a relatively bell-shaped distribu-

¹²⁶ Our inclination to recognize culpability-increasing and culpability-mitigating forms of intentionality may be based on the desire for punishment to fit the criminal as well as the crime. We may have doubts about the appropriateness of sending a person to prison for many years on the basis of an out-of-character, spur-of-the-moment, regretted, but nonetheless intentional, act. It is possible that an intentional act will not be representative of the full personality of the criminal; nevertheless, this full personality will bear the weight of the punishment. There are, as always, possible utilitarian justifications for practices such as punishing premeditated murders more harshly. These possible justifications, however, do not exclude culpability-based ones.

tion of marginally, moderately, and strongly committed bias criminals. There is no reason to expect that the latter would predominate in bias crimes more than strongly committed criminals predominate in other types of crimes.¹²⁷

Likewise, there is no reason to believe that bias criminals, by virtue of acting based on the desire to harm a victim of a certain type, act on particularly well-considered desires and beliefs. Again, as with other crimes, there is a range of scenarios in which the intention to commit a bias crime is formed. Undoubtedly, there are instances where bias attacks are the product of sinister planning and simmering hatred. Yet on many occasions, racial or other forms of intolerance may flare and erupt into violence. Bias itself is a deep-rooted motivation. But the criminal intentions that it gives rise to are qualitatively as varied as the intentions to commit nonbias crimes. Thus, bias does not produce intentions with qualitative characteristics that justify enhanced penalties on culpability grounds.

4. Bias Motivations Do Not Particularly Connect to Wrongdoing.—This section considers a distinct theory of how a person's motivation for an intentional wrongdoing can affect her culpability for the wrongdoing. The first subsection isolates an example of motivations mattering apart from the intentions they give rise to; the second develops a theory of why these motivations matter; the third subsection applies the theory to bias crimes and concludes that even under this theory they do not involve greater culpability than nonbias crimes; the fourth subsection responds to some possible counter-arguments.

a. Where motivations increase culpability.—One difficulty in examining the significance of motivations is based on their close association with intentions. Contrary to claims of commentators,¹²⁸

¹²⁷ For this reason, justifications of bias crime statutes that are based on considerations of general deterrence, *see, e.g.*, Kevin N. Ainsworth, *Targeting Conduct: A Constitutional Method of Penalizing Hate*, 20 FORDHAM URB. L.J. 669, 685 (1993); Lawrence, *supra* note 10, at 377, must be viewed skeptically. Although those who commit crimes because of bias by definition have different motivations from those who commit crimes for other reasons, there is no ground for believing that the existence of this reason justifies "plac[ing] a heavier weight on the deterrence side of the scale." *Id.* There is also no reason to believe that the average biased criminal is more committed to his crime than other criminals are to theirs. Bias is simply a different—not necessarily an additional or more powerful—motivation for crime.

With respect to specific deterrence, Professor Tribe offers that "a race-based assault motivated by racial bigotry might similarly be thought to be more indicative of further dangerousness than is an otherwise identical assault which is not so motivated." Tribe, *supra* note 7, at 14. Tribe, however, advances few grounds for accepting this hypothesis of greater future dangerousness and appears primarily to raise it for the sake of argument.

¹²⁸ *See* Douglas N. Husak, *Motive and Criminal Liability*, CRIM. JUST. ETHICS, Winter/Spring 1989, at 3, 4, 10-11 (providing other hypotheticals—structurally similar to the mercy killing hypothetical—which raises the issue regarding the requirement of justificatory intent to revoke an

the basic example provided below does not show the relevance of motivations in any way beyond the intentions they give rise to. A further elaboration, however, provides a true example of motivations mattering.

The basic example concerns mercy killing. Consider two cases, 1 and 2, in which a nephew kills his uncle who is terminally ill, is suffering great pain, and wishes to die. In each case, the uncle's will provides a substantial inheritance for the nephew. In case 1, Nephew-1 is motivated solely by the desire to end Uncle's great suffering. In case 2, Nephew-2 is motivated solely by the desire for a hastened possession of his inheritance. Only Nephew-1, it is felt, may be entitled to have his punishment mitigated.

The mercy killing example merely shows the relevance of motivations in defining the scope of the intended consequences that will be relevant to assessing desert. The difference between the nephews is that Nephew-1 intended to kill Uncle and to alleviate Uncle's suffering and only knew that his receipt of his inheritance would be hastened. In contrast, Nephew-2, intending to kill Uncle and hasten the receipt of his inheritance, merely knew that he would alleviate Uncle's suffering. Alleviating Uncle's pain is a "rightdoing,"¹²⁹ that somewhat offsets the wrong of the killing. Thus, the doing Nephew-1 intended—killing and alleviating—was less wrong than the doing Nephew-2 intended—killing and collecting.¹³⁰ Motivation is only relevant because it defines the intentions relevant to determining desert.¹³¹

A further hypothetical, however, illustrates how motivations may be relevant, over and above the consequences they make intended. In case 3, Uncle's will provides that in the event Uncle becomes termi-

excuse or justification defense); Murphy, *supra* note 118, at 20-22; Sistare, *supra* note 32, at 312-14.

¹²⁹ "Rightdoing" is the opposite of wrongdoing. Rightdoing is roughly causing, or making more proximate, some benefit to society.

¹³⁰ Professor Alexander fails to take this point into account when he asserts, "Increasing punishment for, say, assault because it is committed with a bigoted motive is no more problematic than decreasing the punishment for homicide because it is committed out of mercy," Larry Alexander, *The ADL Hate Crime Statute and the First Amendment*, CRIM. JUST. ETHICS, Summer/Fall 1992, 49, 49. When a homicide is committed out of mercy, the perpetrator's intent is to cause an objective benefit—the ending of pain—not usually associated with homicide. When an assault is committed from bigoted motive, the perpetrator is not necessarily intending to cause a harm beyond that normally associated with assault.

¹³¹ This perspective on motivations suggests no path for justifying bias crime statutes, contrary to the views of some commentators. A perpetrator of a bias mugging may intend that his victim be white and know that his victim is wealthy. In contrast, a mugger not acting from bias, intends that his victim be wealthy, but merely knows that his victim is white. This distinction, however, does not make a difference on the assumption, examined earlier, *see supra* notes 45-46 and accompanying text, that the victimization of a white is no greater a wrongdoing than the victimization of a person of another classification, such as a wealthy person. Although what the perpetrators intend and know of are different, what they intend is equally wrongful, as is what they know they will do.

nally ill and in pain, whoever shall terminate his life and thereby alleviate his suffering shall receive an inheritance bonus.¹³² Nephew-3 kills Uncle intending to alleviate his suffering solely in order to take advantage of this provision of the will. We are not inclined to mitigate Nephew-3's punishment, as we are Nephew-1's. Nephew-1 is the mercy killer; Nephew-3 is just a greedy person taking advantage of a convenient will provision. There seems no morally relevant difference between him and Nephew-2 who also was a greedy person who took advantage of a convenient will provision. Like Nephew-2, but unlike Nephew-1, Nephew-3 deserves full punishment.

The difference between Nephew-1 and Nephew-3 cannot be explained by appeal to intended wrongdoings and rightdoings. Nephew-3, as Nephew-1, kills Uncle intending to alleviate his suffering (a prerequisite for collecting the inheritance bonus). Although Nephew-3 also intends, unlike Nephew-1, to collect an inheritance bonus, there is no wrongdoing per se involved in receiving the bonus because under the terms of the will, Nephew-3 is entitled to it.¹³³ Thus, the net wrongfulness of Nephew-1's and Nephew-3's intended wrongdoings and rightdoings (killing and alleviating pain) are equal. The sole differences between Nephew-1 and Nephew-3 are in their underlying motivations.

b. Why motivations increase culpability.—The above hypotheticals suggest that motivations matter because intrinsically desiring a wrongdoing or rightdoing matters. Looking to the belief-desire pairs that motivated their actions, we may say that alleviating pain was an intrinsic desire for Nephew-1; for Nephew-3 it was only an instrumental desire. Nephew-1, in contrast to Nephew-3, is believed to deserve more credit for alleviating Uncle's suffering because he intrinsically desired to end the suffering, rather than desiring it as a means to obtaining an inheritance bonus.¹³⁴

¹³² Assume that this provision would be enforceable in the relevant jurisdiction. Mercy killings would, however, still be considered murders. The jurisdiction just lacks a doctrine of void-as-contrary-to-public-policy.

¹³³ Notice that there is also no rightdoing involved in receiving the bonus. Although Nephew-3 benefits from the bonus, the benefit to the wrongdoer is generally not taken into account in assessing punishment, unless the benefit is the avoidance of evil. See MODEL PENAL CODE § 3.02 (Choice of Evils) (1962).

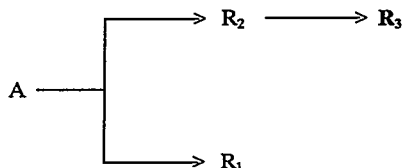
¹³⁴ The notion of intrinsic wants may appear suspect or inherently slippery. Nevertheless, I believe it is serviceable. First, it is clear that we have intrinsic wants. If we did not, then there could be no wants at all because extrinsic wants are dependent on there being intrinsic wants that can be advanced. The real question is whether intrinsic wants can be identified in a nonarbitrary way. Cannot any desire be redescribed so that it is only instrumental relative to a more ulterior desire? For example, the desire for money is really only the desire for what money can buy, which is really only the desire for the use of what money can buy, which is really only the desire for the pleasure of what the use . . . , ad infinitum. I view intrinsic desires as contingent psychological features that may vary from person to person or may change over time. Intrinsic

The moral relevance of the distinction between intrinsically desiring a result and merely intending a result (i.e., instrumentally desiring the result) can be illuminated by comparing it with the moral distinction between knowingness and intentionality.¹³⁵ This latter distinction has been most fully investigated in the context of the Doctrine of Double Effect (DDE). The DDE is an ethical doctrine usually traced to Thomas Aquinas.¹³⁶ As the doctrine is classically understood, four conditions must be met in order to justify an act foreseeably resulting in harm to another: (1) the intended final end must be good; (2) the intended means to it must be morally acceptable; (3) the foreseen harm must not itself be intended; and (4) the good end must be proportional to the foreseen harm.¹³⁷ For our purposes the critical condi-

desires have no essential objects. For instance, some people may want money for its own sake, such as to become millionaires, while others may want it for the pleasure it may bring. See FEINBERG, *supra* note 53, at 43 ("[V]ery few of us have interests in contented states of mind or in avoiding disappointments as such. Rather, our interests and desires both are typically aimed at external things, not internal states."). Furthermore, it is common for people to establish subjectively intermediate goals as ultimate ones in order to better focus their energies. Becoming President is raised to an intrinsic desire so that doubts about its ultimate desirability will not interfere with the long haul of campaigning. The content of an individual's intrinsic beliefs can usually be explored through counterfactuals. For example, would she have sacrificed her marriage for her career in politics if she had known that she would get no pleasure from her fame? The answer to such questions will generally be no less determinate than the answer to other counterfactuals concerning human behavior.

The notion of intrinsic desire is no more problematic than the notion of intention. Precise identification of intention may create theoretical problems. Did Jim start the fire with the intent to destroy the building, or may he raise the defense to the charge of arson that he (1) merely intended that the insurance company believe the building had been destroyed, and (2) knew that the building would be destroyed? Cf. DUFF, *supra* note 30, at 89-92 (1990) (discussing the difficulty of distinguishing knowledge from intentions). In some cases, we may neither want nor be able to draw fine distinctions between closely related intentions and closely related intrinsic desires. Nevertheless, the concepts are sound enough to bear a reasonable amount of moral weight.

¹³⁵ The relationship between knowing a result will occur, intending the result, and intrinsically desiring the result is illustrated by the diagram below. Three results are known to follow from act A: R₁, R₂ and R₃. Assume that R₃ is intrinsically desired. Therefore, R₂ will be intended. Because R₁ is neither intrinsically desired, nor part of a causal chain leading to an intrinsically desired result, R₁ is merely a known result.



¹³⁶ See THOMAS AQUINAS, *SUMMA THEOLOGICA*, II-II, Q. 64, art. 7 (Marcus Lefebure ed., Blackfriars 1975).

¹³⁷ See Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF., 334, 334 n.3 (1989). Sometimes the conditions are advanced as being necessary and sometimes as being both necessary and sufficient. Compare, Nancy Davis, *The Doctrine of Double Effect: Problems of Interpretation*, 65 PAC. PHIL. Q. 107, 121 n.8 (1984), with

tion is (3). A typical example illustrating the operation of this condition is that it is morally permissible to bomb a munitions factory to hasten the end of a war even if it is foreseen that civilians will inevitably be killed by errant bombs. It is not, however, morally permissible to drop bombs on civilians in order to hasten the end of the war by breaking the morale of the enemy.¹³⁸ According to DDE, the difference is that in the case of the munitions bombing, the civilian deaths are merely foreseen, while in the morale bombing the deaths are intended. Thus, DDE draws a distinction between knowing a result will occur and intending that the result will occur.

DDE is controversial. Much of the discussion of DDE has been bottom-up, that is, assessing the doctrine's ability to account for our intuitions about a range of scenarios involving intended or known harms. The so-called "Trolley Problem" and its innumerable variants are examples of scenarios intended to elicit these intuitions and reveal their complexity.¹³⁹ Principles other than DDE have been argued to better explain this moral data.¹⁴⁰ Thus, defenders of DDE have also sought to justify it top-down, that is, based on more general principles or considerations. Thomas Nagel has attempted to explain the peculiar offensiveness of intending, as opposed to merely foreseeing, evil along the following lines:

[T]o aim at evil, even as a means, is to have one's action guided by evil. One must be prepared to adjust it to insure the production of evil But the essence of evil is that it should *repel* us. . . . So when we aim at evil we are swimming head-on against the normative current. . . . [T]here is also something to be said about the point of view of the victim.

. . . .

. . . The victim feels outrage when he is deliberately harmed even for the greater good of others, not simply because of the quantity of the harm but because of the assault on his value of my actions guided by his evil.¹⁴¹

Joseph M. Boyle, Jr., *Towards Understanding the Principle of Double Effect*, 90 *ETHICS* 527, 528 (1980).

¹³⁸ For other typical examples, see Gerald Dworkin, *Intention, Foreseeability, and Responsibility*, in *RESPONSIBILITY, CHARACTER AND THE EMOTIONS* 338, 339 (Ferdinand Schoeman ed., 1987).

¹³⁹ The "trolley problem" generically describes situations in which certain conduct (e.g., bombing) with the same ultimate objective (e.g., ending the war) is accepted in some contexts (e.g., bombing munitions factories) and not others (e.g., bombing civilians). See Eric Rakowski, *Taking and Saving Lives*, 93 *COLUM. L. REV.* 1063, 1064 n.1 (1993) (collecting literature on the trolley problem); see also Simons, *supra* note 49, at 554 n.276 (generally collecting literature on DDE).

¹⁴⁰ See, e.g., Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, in *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 19-32 (1978) (advancing distinction between positive and negative duties as better accounting for our intuitions).

¹⁴¹ THOMAS NAGEL, *THE VIEW FROM NOWHERE*, 181-84 (1986).

Shelly Kagan, reviewing possible justifications for the distinction between intending and foreseeing evil, has distinguished between "the thought . . . that the agent is *aiming* at evil [and] the idea . . . that such an agent *uses* the person whose harm he intends."¹⁴² Likewise, Warren Quinn has written, "What seems specifically amiss in relations of [intending harm] is the particular way in which victims enter into an agent's strategic thinking. . . . He sees them as material to be strategically shaped or framed by his agency."¹⁴³ Charles Fried discusses the greater evil associated with intentional wrongs in terms of "mak[ing] [the] harm a part of our projects,"¹⁴⁴ as opposed to a mere side-effect.¹⁴⁵

To the extent these explanations of the moral distinction between intended and merely foreseen results have force,¹⁴⁶ they apply equally to the distinction between intrinsically desired and merely intended results. When a person intrinsically desires a wrongdoing, not only is evil a guide marker for the person (as it would be for a person who merely intended the evil as a means to some other end), it is actually her target. Similarly, the wrong to the victim is not merely a contingent means to the wrongdoer's end, but the wrong is the essence of the wrongdoer's end. Likewise, the victim is not merely a contingent part of the wrongdoer's project, but an essential part. In short, where a person is motivated by an intrinsic desire to bring about the harm underlying the wrongdoing, the person most identifies with and becomes maximally responsible for that wrongdoing.

I do not claim that intrinsically desiring a result is a condition that substantially increases culpability over merely intending a result. Indeed, the Model Penal Code only irregularly assigns a higher penalty level to crimes of intentional wrongs than to crimes of knowing wrongs.¹⁴⁷ Nevertheless, because of the general consensus that inten-

¹⁴² SHELLEY KAGAN, *THE LIMITS OF MORALITY* 166 (1989).

¹⁴³ Quinn, *supra* note 137, at 348 (footnote omitted).

¹⁴⁴ CHARLES FRIED, *RIGHT AND WRONG* 29 (1978) (footnote omitted).

¹⁴⁵ Although these writers do not speak specifically in terms of culpability or wrongdoing, it is reasonable to construe them as attributing to the actor greater culpability for a given wrongdoing. Nagel, for example, states that "it is no worse *for the victim* to be killed or injured deliberately than . . . as an unavoidable side effect." NAGEL, *supra* note 141, 178 (1986). He, agreeing with Thomas Scanlon, observes that a rescuer would have no reason to try to save the potential murder victim rather than the potential victim of a merely foreseen killing. *Id.* But cf. Dworkin, *supra* note 138, at 346 (claiming DDE goes to act evaluation, not agent evaluation, but denying a sharp distinction between the two).

¹⁴⁶ See DUFF, *supra* note 30, at 109-10 (asserting that on a consequentialist view, distinction between knowingness and intentionality would not matter); Dworkin, *supra* note 138, at 348-50 (questioning persuasiveness of these accounts); Hart, *supra* note 34, at 122-25 (questioning coherence of distinction between knowingly and intentionally caused results). See generally Moore, *supra* note 30, at 247 (noting position of various philosophers).

¹⁴⁷ Among those offenses in which a distinction is drawn are: kidnaping, compare MODEL PENAL CODE § 212.1 (establishing first degree felony for unlawfully confining another person for

tional wrongdoing is more culpable than knowing wrongdoing, and because of the structural similarity of the knowing/intending and intending/intrinsically-desiring distinctions, I believe it is reasonable to understand motivations as increasing culpability for a wrongdoing over that associated with merely intending the wrongdoing when the motivation includes the intrinsic desire for the wrongdoing. Thus, we have a plausible theory of the theoretical relevance of motivations to the criminal law.¹⁴⁸

c. *Intrinsic desire and bias.*—Although, as discussed above, motivations may increase culpability, it is difficult to justify bias crime statutes, even narrowly construed, on these grounds.

When narrowly interpreted, bias crime statutes require the presence of a particular type of intrinsic desire. Professor Lawrence has distinguished between a racial animus model and a discriminatory selection model of bias crimes.¹⁴⁹ As its name implies, under the racial animus model, bias crimes are crimes in which racial animus or hostility toward the victim's group is a substantial factor motivating the underlying crime. Although racial animus¹⁵⁰ comes in many shades, it is roughly the desire that ill befall those of the target race or that those of the target race be absent from the racist's sphere of interest. Racial animus should be described as an intrinsic desire (as opposed to an instrumental desire) because an individual who acts from racial ani-

the purpose, *inter alia*, of interfering with governmental function) with § 212.2 (establishing third degree felony for knowingly restraining another unlawfully); § 215.5 (criminal coercion); § 213.5 (indecent exposure); § 220.1 (arson). Among those offenses in which a distinction is not drawn are: § 210.2 (murder); § 211.0 (assault); § 211.3 (making terrorist threats); § 220.2 (causing or risking a catastrophe). There is likely no essential distinction between those crimes where intent makes a difference in penalty and those where it does not. In all cases, the drafters of the Model Penal Code may have believed that acting intentionally is worse, but because of the limited number of penalty grades, only sometimes did the increase in desert justify an increase in penalty grade.

¹⁴⁸ Some have argued that it cannot be wrong to act upon certain motivations because wrongfulness implies choice (under the principle of "ought implies can"), and we cannot choose our motivations. See Duff *supra* note 30, at 154-55; Hurd, *supra* note 30, at 169-70; Moore, *supra* note 124, at 878-82. Whether these arguments are sound, however, is not at issue here. It may be relevant to desert whether a wrongdoing-related factor, such as the vulnerability of the victim, was chosen. It is not, however, relevant to desert whether a culpability-related factor was chosen. A factor over which an actor has no control may properly be relevant to the actor's culpability for a wrongdoing. For example, criminals do not choose to be sane or insane, but sanity bears critically on their culpability. Likewise, to be culpable for an intended wrongdoing, a person need not choose to intend the wrongdoing (whatever that might mean). Principles of culpability are not norms to be followed if one "can," but principles for assessing desert based upon the violation of a norm. Thus, it is irrelevant for culpability that motivations might not be chosen.

¹⁴⁹ See Lawrence, *supra* note 10, at 326-42.

¹⁵⁰ There is no general term for all the analogues to racial animus with respect to the various characteristics specified in bias crime statutes. Accordingly, in this part of my discussion, I shall employ racial animus as a representative instance of other analogous motivations.

mus would be gratified if no further consequences ensued beyond the harm to or removal of the targeted group. Crimes of racial animus are clearly within the scope of bias crime statutes.

Under the discriminatory selection model, racial animus is not required. All that is required is that the victim's race play some role in the decision to commit the crime against the victim.¹⁵¹ For example, Mike is a mugger who mugs Blacks simply because he believes that the police are less likely to vigorously investigate muggings of Blacks. Mike feels no animus towards Blacks, but Mike's belief concerning Blacks has played a role in the reasoning that led to his intention to assault Blacks. It is less clear whether assaults without racial animus are also within the scope of the majority of bias crime statutes that employ the "because of" formulation.¹⁵² Discriminatory selection (in the absence of racial animus) will require a belief concerning race (such as that the police will not vigorously investigate the muggings of Blacks). Thus, depending on the interpretation a bias crime statute receives, the specified characteristic will be required to enter into the perpetrator's reasoning at the level of intrinsic desire or merely belief.

Clearly there is no reason to believe that bias crimes involving mere discriminatory selection will be crimes where wrongdoing is intrinsically desired. Muggers such as Mike, for example, generally have no intrinsic desire that their victims suffer a loss; they merely wish to gain and take from others as a means to that intrinsically desired end. Moreover, even if construed to require racial animus, bias crimes would not always involve heightened culpability because the intrinsic desire involved is not of the right sort. All acts, hence all crimes, are ultimately motivated by some intrinsic desire. Not all crimes, however, involve increased culpability based on intrinsic desires. As discussed above, the type of intrinsic desire that increases culpability is the intrinsic desire to engage in wrongdoing. Some perpetrators of bias crimes undoubtedly act because of the intrinsic desire to harm a member of a particular race.¹⁵³ Some perpetrators who act from racial animus, however, desire to harm their victims for instrumental reasons. Consider a resident of an all-white neighborhood who throws a brick through the window of the newly arrived Black family to cause the family to leave the neighborhood. The brick thrower

¹⁵¹ See Lawrence, *supra* note 10, at 333-34.

¹⁵² See *id.* at 339-40 ("Because of bias crime statutes—either in the simple form or with the additional element of maliciousness—evade easy classification as either racial animus or discriminatory selection laws. . . . Moreover, few of these laws have received definitive judicial construction."). But cf. Tribe, *supra* note 7, at 8 ("[I]t is by no means a requirement of hate crime laws that the defendant be bigoted or act upon his or her bigotry.").

¹⁵³ Although he employs a different chain of reasoning and only endorses the conclusion tentatively, Professor Murphy appears to reach a similar substantive conclusion concerning the justification for punishing some bias crimes more than some crimes not motivated by the intrinsic desire for wrongdoing. See Murphy, *supra* note 81, at 296 n.37, 297.

feels animus towards Blacks: he genuinely dislikes them and does not want to associate with them. Although the brick thrower dislikes Blacks, he might not dislike them enough to intrinsically desire to harm the new family. He simply wants them to live elsewhere (a morally neutral end), and if he could accomplish the result in a way not involving wrongdoing (a payment), he would do so. Thus, even bias crimes based on racial animus do not necessarily involve an intrinsic desire for wrongdoing.

Furthermore, to the extent that bias crimes involve heightened culpability based on intrinsic desires, they do not appear to warrant the enhanced penalties that bias crime statutes establish. Although a racist might commit a bias crime based on the intrinsic desire to harm his victim, so might others. Many crimes are based on personally directed hate and hostility. Persons who commit such crimes generally intrinsically desire the harm they have caused. Perpetrators of bias crimes will act no more culpably than such persons. The standard regimes of penal provisions establish penalty ranges that are considered sufficiently harsh to punish the common criminal acting from intrinsic desires. Judges are believed to be competent to impose the appropriate sentence on the common criminal acting from intrinsic desires. Because the standard regime of penal provisions can accommodate intrinsically desired crimes in general, there appears to be no need for statutes establishing enhanced penalties for criminals acting on bias-related intrinsic desires in particular. In sum, the problem with attempting to justify bias crime statutes on a theory of greater culpability is that to the extent that greater punishments are warranted in cases of racial animus, it is because of the "animus," not the "racial."

d. Untangling bias and culpability.—The preceding discussion helps bring into focus the difficulty of building a theory of greater culpability based on bias. When examined closely, bias appears unlike factors relevant to culpability. Intent and awareness of consequences are paradigm examples of culpability-determining factors. Closely associated factors, perhaps expressed at a higher level of abstractness, include strength of commitment, appreciation of results, and degree of free agency. Concepts like "race" and "religion" have no unique position among these factors. Specifically, acting from bias does not seem to *connect* one to a wrong in the way these other factors can. Consider, for example, a fire that destroys another's property. The following are at least candidates for establishing a connection between the fire and the actor: hoping that such a fire might occur, agreeing to join a plot to start such a fire, becoming sexually aroused by the fire, or ignoring the risk inherent in the fire. These connections suggest that the actor might be held culpable for the fire. The same could be said if "explosion" or "robbery" were substituted for "fire." In these

examples, the terms "the fire," "explosion," and "robbery" are not doing any general connecting work. The concepts of hoping, etc., are the general concepts connecting the actor to the wrongdoing. In contrast, if an actor has set a fire "because of race," there is no additional connection between the setting of the fire and the actor, compared to an actor who has set the fire for another reason.

In response to the above argument, it may be contended that if the wrongdoing is described not as "causing a fire" but as "the burning of an Asian person's store," then acting because of the store's being owned by an Asian person appears to connect the actor to the wrongdoing; the motivation matches or corresponds to the wrong. But such an argument assumes that the race of the owner of the store is relevant to wrongfulness because if it were not, the racial motivation would not connect the actor to a wrong, but merely to a morally irrelevant aspect of the fire. The race of the owner, however, is not directly relevant to the wrongfulness of the act.¹⁵⁴ Stealing from a Jew is as wrong as stealing from a Gentile. As discussed earlier,¹⁵⁵ such factors as race and religion do not increase or decrease one's rights or importance. In sum, we may say that because stealing from a person of type *X* is not a particularly wrongful theft, the motivation to steal for a person of type *X* cannot be a particularly culpable motivation.¹⁵⁶

An alternative response is simply that the notion of culpability that I have been relying on is too narrow. Even if assaulting a person because of race does not connect the actor to the assault more closely, the actor is still more culpable for it. Some vague notion of "connection" to the wrong is not the beginning and end of culpability. Rather, it may be contended, the presence of, reliance on, and manifestation of an immoral view is the basis of culpability. When the view is particularly morally abhorrent, such as in the case of racism and other forms of bigotry, the culpability is increased proportionately.¹⁵⁷

Even on this wider view of culpability, it is unclear how bias in particular increases culpability. The moral significance of racism, as a

¹⁵⁴ The significance of the indirect relevance, or correlation, of race and wrongfulness is discussed *supra* in subpart III.A.

¹⁵⁵ See *supra* notes 44-45 and accompanying text.

¹⁵⁶ See Hurd, *supra* note 30, at 169 ("The bottom line is that any non-question begging attempt to specify the motivations upon which one can and cannot act will inevitably appeal to a theory of right action . . ."); Moore, *supra* note 35, at 320 ("Between wrongdoing and culpability, the conceptually primary notion is thus wrongdoing, for it is the content of our norms of obligations, which norms define wrongdoing, that tell us what it is culpable to believe or intend.").

¹⁵⁷ Professor Lawrence, for example, endorses the position "that the culpability associated with bias crimes makes these crimes more serious than parallel crimes." Lawrence, *supra* note 10, at 365. Lawrence suggests that a bias criminal is particularly culpable because his motivation "violates the equality principle, one of the most deeply held tenets in our legal system and our culture." *Id.*

particular instance of an ideology violating the equality principle, is unclear. Racism is a mistaken view insofar as it holds that the worth of individuals—a profoundly important moral matter—is tied to their race. Yet any form of egoism in which the actor believes that he is more entitled to property, respect, or consideration than others is similarly mistaken about the worth of others. Likewise, where an actor has come to believe that a particular individual has some unique feature or has engaged in some unique activity that would permit her to be harmed, and that belief is false, the belief is also a profound moral mistake, even though it happens to apply to only one person. Along the continuum between general disrespect for all others and specific disrespect for a single individual, racism and other forms of group-based intolerance occupy no position making them uniquely abhorrent. Indeed, because anti-Asian intolerance seems as bad as anti-Aleutian intolerance, the size, as much as the specificity, of the group despised seems irrelevant. All criminal acts, to the extent that they are founded on conscious, articulable views about the relative rights of others, may be said to be based on equally abhorrent views.¹⁵⁸

We are led to probe more deeply our intuitions concerning bias. One explanation of the strong sense of condemnation that might be felt toward bias criminals is based on epistemic considerations. Engaging in wrongdoing from racial animus (or analogous motivations) is virtually inconsistent with having an excuse for the wrongdoing.¹⁵⁹ Thus, upon learning that a crime was committed from racial animus, we may feel increased confidence that the actor's *prime facie* culpability will not have to be downwardly reassessed based on some as-yet-undisclosed exculpatory factor. An increase in confidence of this type, however, is not the same as an increase in the actor's objective culpability. A criminal who acts on racial animus would still be no more culpable than one who acted on personal animus.

Another explanation of our abhorrence of bias may be the natural tendency to conflate the view with its contingent consequences. In every instance of bias, we see partially reflected the slavery, genocide, and countless other wrongful acts that, as a matter of our contingent history, have been done in its name. Furthermore, there is little, if anything, good to associate with bias.¹⁶⁰ In contrast, other sources of crime, such as greed, when not taken to excess, may have socially useful aspects. Furthermore, many of the other diverse reasons for harming others—jealousy, short-temperedness, short-sightedness, rebelliousness, peer-pressure, self-destructiveness—blend into the

¹⁵⁸ See Murphy, *supra* note 118, at 23 (“[A]lmost all assaults, whether racial or not, involve motives of humiliation and are thus evil to the same degree.”).

¹⁵⁹ An excuse based on insanity might still be available.

¹⁶⁰ Perhaps some degree of increased cultural awareness and solidarity may be associated with small amounts of bias.

background environment of the human condition. Bias thus appears to unite a category of crimes into a particularly salient class, the paradigm members of which are among the greatest evils in human history. In punishing persons, we should ideally assess their punishment based on the harms they caused, intended or risked. We should not punish them based on the harms caused by other acts that may be similar, but not in a morally relevant way. For example, an assault should not be punished more harshly because it happened to be committed with a weapon used in a previous assault. Likewise, a German-American should not be punished more for a murder simply because Germans were responsible for the Holocaust. Based on similar reasoning, we should avoid the temptation to punish more harshly those who act based on anti-Semitism simply because anti-Semitism produced the Holocaust.

The conclusion that bias itself does not increase culpability does not leave us silent and still before it. Punishment is only one form of response to that which we view as morally repugnant. An assault based on race arguably reveals a particularly corrupt character. Yet it is generally conceded that bad character itself is not a ground for criminal liability.¹⁶¹ For example, we do not punish the mere disposition to dishonesty. Nevertheless, bad character is grounds for criticism, and so we may criticize bigots, where criticism does not rise to the level of intentionally inflicting suffering. Likewise, bigots may be shunned for the beliefs they hold, where shunning involves withholding the benefits of society over those minimum benefits that are deserved merely by virtue of being a person. Through these noncoercive modes, we may express the outrage we may feel in response to bias crimes. Unless bias can be tied to the degree of the wrongdoing or level of culpability, however, increased punishment is not warranted.

CONCLUSION: THE PLACE OF BIAS CRIME STATUTES

Bias crime statutes raise profound questions for moral and legal theory. The acts that bias crime statutes sanction are distinguished by the thoughts that underlie them. Having criminal sanctions triggered by thought is a disquieting notion for a society, such as ours, committed to freedom of thought. We are thus led to investigate the ways in which thought properly may be relevant to the criminal law. The concepts of wrongdoing and culpability inform our intuitions concerning desert and our understanding of much of the positive criminal law. These concepts provide a powerful analytical framework for investigating the place of bias crime statutes within a liberal political order.

¹⁶¹ See Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y 29 (1990); Murphy, *supra* note 118, at 297; Robinson, *supra* note 98, at 610 (arguing, however, that bias is relevant to punishment).

With respect to the wrongdoing branch of the investigation, we may ask whether bias crime statutes are justified on the ground that bias crimes are intrinsically or contingently more harmful than similar nonbias crimes. In order for bias crime to be intrinsically harmful, persons would have to have an interest in not being discriminatorily harmed. But such an interest implies an interest in the thoughts of another. To recognize such an interest would be incompatible with our respect for individual autonomy, and so improper. A theory of contingent harms is more morally palatable. Bias crimes are contingently harmful because of the secondary harms that may flow from them. Bias crime statutes thus may be conceived as employing bias as a proxy for the secondary harms that are their true concern. The use of proxies, however, is only justified if it results in less overinclusiveness and underinclusiveness than using statutes drafted in terms of the harms at issue. In the case of bias crime statutes, the uncertainties concerning relative fit are so great that presumptions against employing proxies may be decisive.

Increased culpability is a plausible hypothesis for justifying bias crime statutes. Mental states are traditionally considered relevant to culpability. The mental state triggering bias crime statutes may be construed as a type of intention, a motivation, or an intrinsic desire. Culpability, however, is a matter of an actor's attitude toward the morally relevant features of an act, its consequences, or its circumstances. Bias is an attitude toward a person's race, religion, or other specified characteristic. These characteristics, however, are generally morally irrelevant. One person has as much right to be free from assaults, harassment, and other crimes as another. Thus, acting based on bias will not be relevant for determining culpability. We may conclude that the place of bias crime statutes is limited, existing only where factors concerning relative fit make them the most appropriate means of addressing secondary harms.

The contingent justification of bias crime statutes mirrors the contingent harmfulness of bias. Although they are morally mistaken views of persons, bigotry, anti-Semitism, and other forms of bias do not necessarily violate the interests of others. Simply because the harmfulness of bias is contingent, however, is no reason not to condemn it, or more importantly, strive to purge our society of it. The contingent reality of bias is all the justification that is needed to combat it without restraint through noncoercive means such as education, protests, organizing, and personal acts against bias as it may be encountered in our daily lives. With respect to coercive means, however, the punishments we use to combat bias must not exceed the limited justifications that our world provides. But by whatever means we battle it, the most effective means require recognizing bias for what it is: a source of evil consequences, rather than an instance of evil itself.