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# THE IMPORTANCE OF BEING BIASED

Anthony M. Dillof\*

PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW. By Frederick M. Lawrence. Cambridge: Harvard University Press. 1999. Pp. xi, 269. \$39.95.

The war against bias crimes is far from finished. In contrast, the battle over bias-crime laws is largely over. Bias-crime laws, as commonly formulated, increase the penalties for crimes motivated by bias. The Supreme Court has held that such laws do not violate the First Amendment.<sup>1</sup> Virtually every state has enacted some sort of bias-crime law.<sup>2</sup> Even the federal government, which may consider itself without power to enact a general bias-crime law,<sup>3</sup> has made bias a

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1. See *Wisconsin v. Mitchell*, 508 U.S. 476, 476 (1993). Some bias-crime laws may be open to challenge on other constitutional grounds. In *State v. Apprendi*, 731 A.2d 485 (N.J.), cert. granted, 120 S. Ct. 525 (1999), the New Jersey Supreme Court reviewed a law that made bias a sentencing factor that would increase the maximum sentence to which a defendant is subject. According to the defendant, this law violated the Due Process Clause's guarantee that every sentence increasing fact be found by a jury under the reasonable doubt standard. The New Jersey Supreme Court rejected this contention based on its interpretation of Supreme Court precedent. See *id.* at 493-95. The United States Supreme Court will rule on the constitutionality of the New Jersey law this year. The constitutionality of the New Jersey law is far from certain. See *Jones v. United States*, 526 U.S. 227, 251-52 (1999) (finding it unsettled whether all sentence-range maximizing facts must be proven beyond a reasonable doubt). Even if the New Jersey law is struck down, however, states will be free to enforce bias-crime laws in which the existence of bias is not treated as a sentencing factor, but as an offense element to be proven at trial. *Apprendi* thus concerns the manner in which states will be required to establish the existence of bias, not the constitutionality of bias-based penalty enhancements generally.

2. See The Staff of the Syracuse Journal of Legislation & Policy, *Crimes Motivated by Hatred: the Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL'Y, 29, 37 (1995) (reporting that, as of 1995, bias-crime legislation of some sort had been enacted by 47 states) [hereinafter Staff].

3. Congress is undoubtedly aware of recent Supreme Court jurisprudence restricting its power to criminalize conduct, see *United States v. Lopez*, 514 U.S. 549 (1995) (striking down an act making carrying a gun in a school zone a federal offense), and has been informed that its power to enact general bias-crime legislation is doubtful. See *The Hate Crimes Prevention Act of 1998: Hearing on S.J. Res. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. 39-44 (1998) (testimony of Lawrence Alexander, Professor of Law, University of San Diego) (urging that Congress lacks authority under the Commerce Clause and the Thirteenth Amendment's Enforcement Clause to enact a general bias-crime law).

sentence-aggravating factor for the range of federal criminal offenses.<sup>4</sup> Bias-crime laws thus are an established feature of the legal landscape.

Against this background, Frederick Lawrence<sup>5</sup> has written *Punishing Hate: Bias Crimes Under American Law*. *Punishing Hate* is not a work of radical vision. It blazes no new trails in its method or its conclusions. Rather, it is a careful reconstruction of reasons and arguments underlying the current consensus approval of bias-crime laws. Accepting that bias should matter for the criminal law, it implies a better theory is needed of why bias should matter, and seeks to provide that theory.

To explain the importance of being biased, Lawrence analyzes bias-crime laws within the context of traditional moral theories and orthodox First Amendment concerns. He cogently explains the basic form and function of bias-crime laws, offers some useful refinements for their formulation, vigorously defends their moral soundness and constitutionality, and forcefully advocates their adoption by the federal government. Throughout, Lawrence displays an unwavering commitment to the ideal of equality, never leaving his readers in doubt as to where his sympathies lie. Occasionally voyaging into sophisticated areas of moral philosophy, criminal theory and federal jurisprudence, Lawrence presents his subjects with accessible, deliberate, and sometimes stirring prose. *Punishing Hate* also includes a number of extensive and well-researched appendices making the book a useful scholarly tool. Thus, Lawrence has written what may come to be regarded a classic liberal treatment of bias crimes and the laws governing them.

To say that Lawrence has presented a classic liberal treatment of his topic, however, is not to say that his valorizing of bias-crime laws will persuade the as-yet unconverted. Encompassing a variety of independent ideals, liberalism<sup>6</sup> occasionally yields merely plausible answers to difficult social issues. As will be discussed, Lawrence in *Punishing Hate* often seems to give unjustified priority to the ideal of equality. When the moral issues concerning desert become controversial, when the empirical evidence concerning social impact becomes thin, when the proper formulation of a law becomes debatable, when

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4. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a) (1998-99). Section 3A1.1(a) provides:

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

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6. By "liberalism," I refer to a range of positions distinguished by their commitment to the rule of law, political and intellectual freedom, toleration, opposition to racial and sexual discrimination, and respect for the rights of individuals. See Jeremy Waldron, *Liberalism*, in 5 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 598 (Edward Craig ed., 1998).

the commands of the Constitution become unclear, when the meaning expressed by an official act becomes ambiguous, Lawrence is willing to let the rhetorical appeal of equality carry the day. Thus, while Lawrence does not settle for simplistic answers to the questions he asks, he often does not ask the hardest questions.

Intellectually, bias crimes are located at the intersection of sociology, moral philosophy, criminal justice, American history, clinical psychology, and cultural studies. *Punishing Hate* thus attempts to cover an enormously complex topic in relatively few pages. Lawrence's strategy is to concentrate on the issues of greatest concern to his intended audience: the interested layperson, the lawyer, and the legislator. In this Review, I shall strategically limit myself to discussing the three major issues of concern to Lawrence: the justification of bias-crime laws, the constitutionality of bias-crime laws, and the role of the federal government in prosecuting bias-crimes.

## I. THE JUSTIFICATION OF BIAS-CRIME LAWS

In Chapter Three, Lawrence examines the central normative question: Are the increased penalties provided by bias-crime laws morally justified? Lawrence answers this question by applying both traditional consequentialist/utilitarian and deontological/retributive theories of punishment to bias-crime laws. Although such theories reflect deep philosophical differences, in practice they often converge. Both theories recognize that, generally speaking, the greater the harm associated with a criminal act, the greater the appropriate penalty. Likewise, both theories recognize that the mental state of the perpetrator is relevant in determining the magnitude of the penalty. There may, of course, be instances where consequentialist concerns for deterrence or incapacitation would authorize greater penalties than those recommended by desert-based forms of retributivism. Because such results are arguably unjust, Lawrence rejects a pure utilitarian theory of punishment in favor of a mixed theory, i.e., a utilitarian theory of punishment with desert-based side-constraints (p. 50). He then examines bias crimes in light of the mental states and harms associated with them. As discussed below, he concludes that both pure retributive and mixed theories of punishment support bias-crime laws.<sup>7</sup>

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7. Lawrence's conclusion in Chapter Three that bias-crime laws are warranted is ambiguous at best. Lawrence writes, "[Chapter 3] argues that bias crimes ought to receive punishment that is more severe than that imposed for parallel crimes." P. 45. To support this claim, Lawrence invokes both positive retributivist as well as mixed theories of punishment. Pp. 46, 50. These theories purport to recommend when a particular punishment ought to be imposed. Nevertheless, Lawrence later characterizes his discussion as merely establishing that enhanced penalties *may* be imposed, not that they ought to be imposed. P. 161.

Lawrence begins with a deontological justification based on the bias criminal's mental state.<sup>8</sup> According to Lawrence, this deontological justification is the one espoused by "most supporters" of bias-crime laws (p. 61). This justification asserts that bias criminals are more deserving of punishment than other criminals without appealing to the independent contingent premise that bias crimes cause greater harm than similar crimes not motivated by bias ("parallel crimes"). The justification begins with the unassailable premise that those who kill intentionally are more blameworthy, and hence more deserving of punishment, than those who kill negligently (p. 60). Likewise, so goes the argument, bias criminals are more blameworthy than other criminals. Why should bias criminals be especially blameworthy by virtue of their motivation? Lawrence explains that "[t]he motivation of the bias-crime offender violates the equality principle, one of the most deeply held tenets in our legal system and our culture" (p. 61).

It is unclear to what extent Lawrence endorses this most widely espoused justification of bias crimes. Lawrence states the justification with implicit approval. Elsewhere in the book, he expresses similar sentiments (pp. 38-39, 75). In explaining the grounds for bias-crime laws, however, Lawrence often refers to only justifications based on increased harms associated with bias crime (pp. 4, 5, 40, 45, 80, 95, 175).

Lawrence is sensible to de-emphasize this deontological justification of enhanced penalties. It is flawed. From a deontological perspective, mental states generally are considered relevant to blameworthiness because they speak to the *responsibility* of the offender for her wrongful act.<sup>9</sup> Purpose, knowledge, recklessness, and negligence are the four organizing mental states of the Model Penal Code.<sup>10</sup> They

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8. I pass over Lawrence's discussion of the consequentialist significance of the bias criminal's mental state. Rather than looking at traditional consequentialist issues such as the bias criminal's susceptibility to general deterrence or need for incapacitation, Lawrence argues that bias motivation is associated with more brutal crimes. P. 60. The argument, thus, relies on the harmfulness of bias crimes relative to other crimes, a topic Lawrence treats (and I discuss) in greater detail later.

Lawrence advances an additional consequentialist argument based on mental states. According to Lawrence, just as intentional vehicular homicide should be punished more than negligent vehicular homicide because negligent driving has some positive social value (where no accident occurs), so bias crimes should be punished more than other intentional crimes. P. 60. This is unconvincing. Unlike negligent conduct, the conduct involved in intentional crimes, whether motivated by bias or not, generally has no positive social value. Thus, no distinction should be made between bias and other intentional crimes. Lawrence's argument needs much greater elaboration.

9. See generally Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 319-25 (1996) (explicating relevance of mental states to culpability).

10. See MODEL PENAL CODE § 2.02(2) (1962). The Model Penal Code does not explicitly define "negligently" as a mental state. See MODEL PENAL CODE § 2.02(2)(d). Nevertheless, a mental state is supposed. In order to be negligent with respect to a material element, a person must be aware of facts that would lead a reasonable person to be aware of a substantial risk that a material element exists.

serve to establish the precise degree of responsibility the wrongdoer bears for the harm she has caused. An actor who rationally, intentionally, and deliberately commits an assault based on racial bias is no more responsible for the assault than one who similarly commits an assault based on greed. They both are, we might say, maximally responsible for the wrong of assault and so are equally blameworthy. Of course, the greed-driven offender merely knows the race of his victim and so is not as responsible for his victim's being of a particular race. A bias criminal is exactly a criminal who may be held fully accountable not only for causing harm, but also for the harm's being caused to a victim of a certain identifiable group. The group identity of the victim, however, is irrelevant to the wrongfulness of the assault. African Americans, for example, have no greater right not to be assaulted than whites and, as a general matter, deserve no greater protection.<sup>11</sup> A person who intentionally assaults an African American is not thereby responsible for a greater right violation than a person who commits an intentional assault indifferent to the race of his victim. Bias motivation does not increase the perpetrator's responsibility for any morally relevant aspect of the assault.<sup>12</sup>

On some accounts, however, mental states are relevant to blameworthiness not because they imply greater responsibility for a harm, but because they reflect the flawed character that is the underlying cause of the crime.<sup>13</sup> By rejecting the equality principle — “one of the most deeply held tenets in our legal system and our culture” (p. 61) — the bias criminal, it may be argued, reveals his character to be more deeply flawed than that of the ordinary criminal.<sup>14</sup>

Without taking a position on the general validity of character theories of punishment, I do not believe that such theories provide support for bias-crime laws. The equality principle does not appear to possess the privileged position that Lawrence ascribes to it. Although

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11. Bias-crime laws protect all groups equally. A law that provided enhanced penalties for crimes against only those of a particular racial or religious group likely would offend principles of substantive equality. I do not know any advocates of such group-specific laws, and I do not understand Lawrence as supporting bias-crime laws on the ground that they are covert minority-protection laws.

12. This point, like many others raised in this Review, is more fully developed in my article on bias-crime laws. See Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. L. REV. 1015 (1997).

13. See, e.g., R.A. Duff, *Choice, Character, and Criminal Liability*, 12 L. & PHIL. 345, 362 (1993) (“The proper focus of the criminal process is not, the ‘character’ theorist argues, on the particular actions for which a defendant is formally convicted and sentenced, but on some character-trait that his criminal act revealed.”); Michael S. Moore, *Choice, Character, and Excuse*, SOC. PHIL. & POL’Y, Spring 1990, at 29, 31-40.

14. See Jeffrie G. Murphy, *The State’s Interest in Retribution*, 283 J. CONTEMP. LEGAL ISSUES 283, 285 (1994) (characterizing bias-crime laws as punishing in response to a person’s particularly great inner wickedness); see also Paul H. Robinson, *Hate Crimes: Crimes of Motive, Character, or Group Terror?*, 1992/1993 ANN. SURV. AM. L. 605, 609 (considering, but rejecting, such a theory as inconsistent with traditional criminal law theory).

Lawrence does not explicitly define it, the equality principle roughly appears to be the principle that individuals should be treated without regard to race, color, religion, or other characteristics that historically have been the basis for widespread discrimination (pp. 11-20). So defined, this principle has ascended undoubtedly in importance in our culture and legal system in recent decades. Yet it is only one among many important ideals. Our culture and legal system equally cherish the principles of fairness, human dignity, autonomy, altruism, reciprocity, forgiveness, loyalty, and self-expression to name a few. Sadists, wife-beaters, loan sharks, child molesters, drug pushers, and their ilk generally act on motives as abhorrent as bias and generally have characters that are equally flawed. The standard penalty levels are believed sufficient to deliver the punishments they deserve. They should be sufficient for bias criminals as well.

Lawrence's harm-based analysis is more convincing. In arguing that bias crimes cause greater harms than parallel crimes, Lawrence takes both an *ex ante* and an *ex post* perspective on bias crimes.<sup>15</sup> *Ex ante*, Lawrence contends, a rational person would prefer to be the victim of a parallel crime because of the deep psychological harm that bias crimes may inflict (pp. 61-62). Is this correct? Deep psychological harm can be caused by perceived attacks on one's identity or sense of self. Some people's identities are based primarily on their race and religious affiliations. Other people's however are based on their family, hobbies, profession, ties to their community, commitments to sport teams, their college, state, and so on. Most people in our pluralistic and polymorphous culture define themselves by reference to many independent categories. I, for example, am a law professor, a Mets fan, a person of Ukrainian extraction, a cat owner, and an advocate of abortion rights. If, one day, I found the tires of my car slashed, I am not at all sure that, *ex ante*, I would prefer to learn that the perpetrator was a student appalled at my teaching ability, a law professor offended by my review of his book, a radical anti-abortion activist, or a crazed Yankees fan who wanted to strike out at *my* team. Each scenario carries its particular pain.

Indeed, it is deeply disconcerting to be the target of "random" violence. I remember being mugged as a teenager one night by a group of older teens who, in retrospect, probably had nothing better to do that night. As their blows rained down, I recall being overcome by the sheer senselessness of why I, a completely anonymous person to them, would be the target of their aggression. An explanation of any type, even one that included the despicable proposition "they think Jews deserve it" might have been more satisfying than contending with the unanswerable existential question "Why me?" As Lawrence

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15. Lawrence does not discuss the relation of these perspectives. It is not clear whether he believes they are equivalent or, if they diverge, which should control.

recognizes, bias crimes are crimes based neither on relatively unique attributes of the individual (such as past personal relations with the perpetrator) nor extremely common characteristics (such as carrying a wallet) (pp. 9, 62). The characteristics on which bias crimes are based, for example race and religion, fall somewhere in between. Lawrence, however, does not explain why crimes based on such middle-level characteristics result in “unique humiliation” (p. 62). Although in one passage, Lawrence theorizes that minority victims of bias crimes experience attacks as forms of racial stigmatization (p. 41), elsewhere he undercuts that theory by citing evidence that minority victims of bias crime do not experience greater psychological trauma than white bias-crime victims (p. 40).

More persuasive is Lawrence’s harm-analysis from an *ex post* perspective. Here, Lawrence relies on newspaper accounts and sociological studies documenting the feeling of depression and anxiety among bias-crime victims (pp. 63, 224 n.66). These works, however, suffer from baseline questions. Bias-crime victims may suffer greater psychological harms, but compared to whom? As offenses vary greatly in circumstance and participants, there are likely many categories of victims of a given offense who also suffer greater depression and anxiety than the average offense victim. Those assaulted on holidays, by alcoholics, by spouses, in prisons, in public, or the complementary sets of victims, may experience greater than average psychological harm. As Lawrence recognizes, the criminal law can operate only with a small number of levels of felonies and misdemeanors (p. 56). Thus, to justify an enhanced range of punishments, bias crimes must form a relatively tight class of crimes resulting in special psychological damage. None of the research cited by Lawrence compares bias crimes with other potentially psychologically harmful subclasses of parallel crimes — such as assaults based on sadism, gang-violence, random victim selection, political affiliation, or intense personal animosity — all of which can be accommodated, it is thought, under the standard set of penalty levels.<sup>16</sup>

There is a further, generally unnoticed, issue associated with Lawrence’s claim that the greater psychological harm suffered by bias-

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16. Studies cited by Lawrence, such as Joan C. Weiss, *Ethnoviolence: Impact upon and Response of Victims and the Community*, in *BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES* 174, 182 (1993), only compare bias crime to the general category of “personal” crimes.

There is a second baseline question. It is not clear that the degree of physical violence is held constant when the psychological impacts of bias and parallel crimes are compared. Bias crimes tend to be more violent than parallel crimes (p. 39). Their greater violence, rather than their victims’ perceptions of bias motivation, could explain their greater psychological impact. Moreover, the statistically greater physical violence involved in bias crimes does not justify treating these crimes separately as a uniquely penalized class of offenses; the standard set of criminal laws and penalty ranges is thought already sufficient to accommodate the subclass of particularly violent instances of crime.



crime victims justifies the harsher punishment of bias criminals. Harm, as used in either consequentialist or retributive theories, is a concept with a normative component. Not every unwanted occurrence constitutes a harm that justifies deterring the conduct that produced the unwanted occurrence. Likewise, not every setback of interests constitutes a harm that is relevant to determining the punishment an actor deserves.<sup>17</sup> For example, if a man is greatly disturbed by the knowledge that his neighbor reads heretical literature on Sunday, this disturbance should not be recognized as a harm for purposes of punishment. One way to reach this conclusion is to reason in a Rawlsian manner that self-interested individuals who value liberty would not agree in advance to restrictions on intellectual liberty based on the potentially unlimited sensitivity of second parties.<sup>18</sup> Another way to reach the conclusion is to rely on the basic moral premise that it is simply no business of one person what another reads — a person has a sphere of privacy and others have no claim to control what goes on within that sphere.<sup>19</sup> One's thoughts, to the extent they do not evidence future wrongdoing, are arguably within such a sphere.<sup>20</sup> Our thoughts are paradigmatically private matters. They help define who we are and reflect only our subjective beliefs and values. It would be generally conceded that adhering to racism as an abstract principle or even engaging in generally lawful and innocuous activities because of one's racism, such as closing one's store to honor Hitler's birthday, should not be grounds for punishment even if the fact of one's racism or the racist reason for one's action may greatly disturb another.<sup>21</sup> Indeed, the appreciation that such actions are another's, and hence not

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17. See JOEL FEINBERG, HARM TO OTHERS 31-36 (1984) (distinguishing setbacks from harms and noting that a sense of harm carries normative implications).

18. See JOHN RAWLS, A THEORY OF JUSTICE ch. III (1971).

19. See *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (invalidating a state statute prohibiting possession of obscene materials in the privacy of the home).

20. The claim to dominion over one's own thoughts has Lockean roots. See JOHN LOCKE, Second Treatise of Government § 27, in TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 2d ed. 1967); see also Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLIN L. REV. 65, 78 (1997) ("If we have the rights to control anything, it is the contents of our minds."); III Lysander Spooner, *The Law of Intellectual Property: or An Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas*, in THE COLLECTED WORKS OF LYSANDER SPOONER 58 (Charles Shively ed., 1971) ("Nothing is, by its own essence and nature, more perfectly susceptible of exclusive appropriation, than a thought.").

21. Concerning the feelings of outrage that one person's religious views might cause another, John Stuart Mill argued:

[T]here is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse, and the desire of the right owner to keep it. And a person's taste is as much his own peculiar concern as his opinion or his purse.

JOHN STUART MILL, ON LIBERTY WITH THE SUBJECTION OF WOMEN AND CHAPTERS ON SOCIALISM 84 (Stefan Collini ed., 1989) (1859).

part of our individual identity, enables us to live with another's objectionable attitudes. Admittedly more controversial are cases where the attitudes give rise to actions, such as bias crimes, that wrongfully impinge on others. Perhaps here, the victim has some claim to being psychologically harmed by thoughts that generally are not cognizable grounds for complaint. But there is a respectable normative argument that only the conduct, or, at most, the intent to engage in the conduct, is the legitimate concern of the victim.<sup>22</sup> This argument undoubtedly is bolstered by the proposition, advanced earlier,<sup>23</sup> that motives relating to race or other morally neutral characteristics do not increase the actor's responsibility for a given wrong or manifest a worse character. If a particular motive should not matter to a person determining the actor's punishment, why should it matter to the person harmed? Following this line of reasoning, the actor's motives, even if they generally are of concern to the victim, should not be. One's legitimate area of grievance ends where another's underlying thought processes begin. Any complete inquiry into the moral justification of bias-crime laws should address this issue.<sup>24</sup>

A further short-coming of Lawrence's attempt to justify bias-crime laws is his failure to apply his theoretical justifications to either existing bias-crime laws or his own model bias-crime law. It is fair to concede that bias crimes, generally speaking, create greater apprehension in the target community and produce greater trauma in society at large than crimes from other motivations. These effects, however, are diffuse. Compared to the other sorts of harms the criminal law seeks to prevent, these effects are difficult to identify and quantify. In contrast, the enhanced penalties authorized by bias-crime laws are concrete and specific. Such laws cannot be considered justified unless the amount of the additional penalty is justified. If the devil is in the details, Lawrence's failure to deal with these details bedevils his argument. A hypothetical bias-crime law that imposed a \$20 fine in addition to the penalty for the underlying crime likely would meet little objection from those who believe that desert should place a ceiling on unjustified punishment. A bias-crime law that imposed a mandatory additional twenty-year penalty likely would be considered objectionable

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22. It may be that "even a dog distinguishes between being stumbled over and being kicked." OLIVER WENDELL HOLMES, *THE COMMON LAW* 7 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881). It is another question whether the dog cares what inadequate reason motivated the kick.

23. See *supra* text accompanying notes 9-15.

24. In a later part of the book, Lawrence in fact distinguishes between an offense caused by racial motivation and apprehension of future physical harm that may be caused by a bias crime. He argues that, for the purpose of justifying bias-crime laws under the First Amendment, only the apprehension of future physical harm is relevant. P. 102. He does not, however, elaborate on the grounds of the distinction, and it is not clear whether he thinks it reflects a general moral principle as suggested above.

by even hard-core supporters of bias-crime laws. In fact, the penalty enhancements established by most bias-crime laws fall somewhere in between.<sup>25</sup>

Lawrence concludes his book by offering a model bias-crime law that is supposed to embody his considered opinions concerning the nature, scope, and necessity of bias-crime laws (pp. 170-71). Lawrence's model law takes the not uncommon approach of providing for a penalty enhancement of one or two sentencing levels. Assuming a background penal code like the Model Penal Code, Lawrence's model law would authorize the punishment of a bias-motivated act of criminal trespass resulting in a loss of under \$25 at the level of an assault with a deadly weapon; a simple assault based on bias at the level of an aggravated assault manifesting extreme indifference to human life; and a bias assault with a deadly weapon as a murder.<sup>26</sup> Even in qualitative terms, these are significant penalty enhancements. To my mind, the equivalences in desert they suggest are problematic.<sup>27</sup> Lawrence admits that his purpose is not to determine the precise amount of penalty enhancement appropriate for every possible bias offense (pp. 222-30). But unless he demonstrates that the appropriate penalty enhancement is great enough to, at least, move a bias crime into the next highest penalty level, he cannot claim to have presented a full defense of bias-crime laws.

## II. THE CONSTITUTIONALITY OF BIAS-CRIME LAWS

In Chapter Five, Lawrence asks “[a]re bias-crime laws constitutional” (p. 80)? The quick and easy answer, based on *Wisconsin v. Mitchell*,<sup>28</sup> is “yes.” In *Mitchell*, the Supreme Court squarely held that a Wisconsin statute establishing increased sentences for bias crimes did not violate the First Amendment.<sup>29</sup> Lawrence, however, does not rest with the positive law orthodoxy of the current Court. Nor does he attempt to work through the thicket of First Amendment cases and

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25. See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 480 (1993) (upholding a state bias-crime law that permitted a five-year sentencing enhancement).

26. See MODEL PENAL CODE §§ 210.2, 211.1, 220.3 (1962).

27. Cf. Lawrence Crocker, *Hate Crime Statutes: Just? Constitutional? Wise?*, 1992/1993 ANN. SURV. AM. L. 485, 495 (“[M]y own intuition . . . [is] that it is excessive for an assault that would otherwise receive a two-year sentence to receive instead a seven-year sentence . . .”).

28. 508 U.S. 476 (1993).

29. Bias-crime laws are open to challenge on grounds other than the First Amendment. Such challenges, however, are directed at only the procedures that implement bias-triggered penalty enhancements, and so only contingently involve bias-crime laws. See *supra* note 1. Lawrence reasonably limits his discussion of the constitutionality of bias-crime laws to their consistency with the First Amendment and their arguably novel focus on motive.

doctrine that the extensive literature on the topic engages.<sup>30</sup> Rather, Lawrence seeks to explore whether bias-crime laws are consistent with the deep and well-established values and principles lying at the heart of the First Amendment.<sup>31</sup> Lawrence does not give these values and principles short shrift. He portrays himself as a First Amendment stalwart in his view that racist speech should be protected (p. 82). Nevertheless, Lawrence ultimately concludes that bias-crime laws and the First Amendment are consistent and that it is possible “both to punish the bias criminal [pursuant to bias-crime laws] and to protect the right of the bigot to express his beliefs” (p. 80). Lawrence thus sets himself the project of distinguishing between bias crimes, which may be subject to enhanced penalties, and bias speech, which may not. This is a challenging project given that some speech may be criminal, some criminal conduct may be expressive, and both may be motivated by bias.

### A. *Bias-Crime Laws and Free Speech*

Where does bias speech end and bias crime begin? To answer this question, Lawrence proposes a “reformation” (p. 99) of the “fighting words” doctrine. The fighting words doctrine, as it now exists, permits the banning of words that tend to incite an immediate breach of the peace.<sup>32</sup> Lawrence points out, however, that the doctrine, as it was originally formulated in *Chaplinsky v. New Hampshire*,<sup>33</sup> permitted the banning of, not only words that tended to incite an immediate breach of the peace, but also those that by their very utterance inflicted injury. According to Lawrence, the Supreme Court, in choosing to em-

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30. See, e.g., *Madsen v. Women's Heath Ctr.*, 512 U.S. 753, 762-64 (1994) (holding that an injunction against anti-abortion protests was not improperly content based); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (stating that listeners' reaction to a speech is not a content-neutral basis for regulation); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (considering the First Amendment protections of nude dancing); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105-23 (1991) (invalidating content-based regulation on speech intended to benefit crime victims); *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating a state restriction on burning the American flag); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-48 (1986) (discussing the significance of a legislative motive to suppress speech); *California v. Cohen*, 403 U.S. 15 (1971) (recognizing the constitutional right to wear a jacket bearing an offensive slogan about the draft).

31. Lawrence identifies “the right to free expression” as lying at the heart of our legal culture. P. 80.

32. See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 522 (1972) (defining fighting words as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))). The scope of the fighting words doctrine as it currently exists, is discussed in Melody L. Hurdle, *Recent Development*, R.A.V. v. City of St. Paul: *The Continuing Confusion of the Fighting Words Doctrine*, 47 VAND. L. REV. 1143, 1174 (1994) (suggesting that fighting words should be defined in terms of their minimal contribution to the marketplace of ideas).

33. 315 U.S. 568, 572 (1942).

phasize the first type of fighting words and ignore the second, took the wrong path. Lawrence writes, “If *Chaplinsky* is to have any contemporary vitality, it must be understood to place outside the First Amendment’s reach those words that are intended to and have the likely effect of creating fear of injury in the addressee” (p. 102). Lawrence, however, is careful to distinguish the fear of injury and the mere wounding of feelings. “Words that have the intent to hurt the addressee’s feelings, even those that also have that effect, however unfortunate, do not come under this understanding of fighting words” (p. 102). This distinction between words that portend harm and words that merely wound feelings, not that between “conduct” and “speech,” is the key to drawing the line between constitutionally proscribable bias crimes and constitutionally protected hate speech. Thus, Lawrence concludes, “Racially targeted actions that are intended to create fear in the addressee and that are likely to do so may be treated as bias crimes . . . . [R]acially targeted behavior that vents the actor’s racism is racial speech that is protected, even if it disturbs the observer greatly” (p. 102).

It is not clear that Lawrence needs to reformulate the Supreme Court’s fighting words jurisprudence to get where he wants to go. Words used to communicate realistic threats of violence — “Your money or your life” — are uncontroversially subject to state control. There are no serious First Amendment challenges to the tort of assault or the crime of menacing even though words often are used in conjunction with other factors to perpetrate these unlawful acts. There are, however, three difficulties with drawing the distinction between proscribable conduct and protected speech along the lines Lawrence suggests.

First, the distinction between racially targeted action that creates fear of injury and racially targeted conduct that vents the actor’s racism is unsound. Racially motivated conduct may simultaneously create fear and vent racism. The distinction thus is as problematic as the distinction between verbal acts (“speech”) and nonverbal acts (“conduct”) that Lawrence rejects as inadequate to demarcate the protected/proscribable boundary (pp. 89-92). Furthermore, racially based conduct that may be proscribed (bias crimes) should not be identified with acts that create fear of injury in the addressee. Under most bias-crime laws,<sup>34</sup> a white teenager who anonymously slashes the tires of an African-American person’s car because of bias commits a bias crime even if he reasonably believes his act will be perceived as one of random vandalism, not bias. If the enhanced punishment of this act as a bias crime is constitutional, it cannot be because it involves the intent or effect of creating fear of injury in the addressee.

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34. See Apps. B-E (presenting representative bias-crime laws).

Second, Lawrence's identification of bias crimes with acts that are intended to and will have the likely effect of creating fear of injury does not extend sufficient protection to racially motivated expressive conduct. The march of Nazi sympathizers in Skokie, Illinois might be described as a "[r]acially targeted action[] that [is] intended to create fear in the addressee and [is] likely to do so" (p. 102). Likewise, in the 1950s, the public advocacy of communism may have created in some the fear of being injured in the course of a violent uprising. Such acts, however, clearly are protected under the First Amendment.<sup>35</sup> They critically differ from assault and menacing because these latter acts, by definition, require the creation of at least the fear of immediate injury.<sup>36</sup> The First Amendment traditionally has required courts to consider the concreteness and temporal proximity of the threatened harms.<sup>37</sup> Are the fears of future injury caused by bias crimes closer to the fears of immediate injury associated with assault and menacing or the speculative fears associated with neo-Nazism or a possible communist-inspired uprising? In the latter cases, the time frame, perpetrator, circumstances, and type of violence feared are indefinite and unspecified. Likewise, the fear of injury, or "heightened sense of vulnerability" (p. 40), that bias crimes create are indeterminate in these respects. Just as the general apprehension generated by racist demagoguery and demonstration should not support a prison term under free speech principles, so the general apprehension produced by bias crimes should not support an additional prison term.<sup>38</sup>

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35. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (striking down a law that criminalized advocating violence to effect political reform); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978) (invalidating an ordinance that would have denied a parade permit to a neo-Nazi group).

36. See, e.g., MODEL PENAL CODE § 211.1(1)(c) (1962); ALA. CODE § 13A-6-23 (1994); KY. REV. STAT. § 508.050 (1999); N.D. CENT. CODE § 12.1-17-05 (1999); OR. REV. STAT. § 163.190 (1997).

37. The "clear and present danger" test can be seen in a chronology of Supreme Court cases forming and incorporating the test. See *Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam) (reversing a conviction for a statement generally advocating lawlessness at an indefinite future time); *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (per curiam) (stating that advocacy, to be criminalized, must be "directed to inciting or producing imminent lawless action. . ."); *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (requiring "clear and imminent danger of some substantive evil" for criminalization); *Schenck v. United States*, 249 U.S. 47 (1919) (introducing the "clear and present danger" test). While the clear and present danger test has not always been applied vigorously by the Supreme Court, see *Schenck*, 249 U.S. at 52, strong arguments can be made for the test's theoretical soundness. See Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159 (1982).

38. Lawrence's fear-based criterion for bias crimes is also too narrow. Lawrence writes, "racially targeted behavior that vents the actor's racism is racial speech that is protected by the First Amendment, even if it disturbs the observer greatly." P. 102. A racially targeted assault may be behavior that vents the actor's racism, but it is not protected speech even in the absence of the intent or effect to create fear in the addressee. The First Amendment protects neither conduct nor speech, e.g., a bomb threat, that causes substantial direct harm.

Finally, Lawrence's theory leaves bias-crime laws open to the criticism of being improperly content based. Even if bias crimes could be subjected to significant penalties based on the fact that they, in causing fear of injury, are analogous to fighting words, the question remains whether bias crimes can be so singled out for enhanced penalization. In *R.A.V. v. City of St. Paul*, the Supreme Court struck down a local ordinance that prohibited cross burning and like acts that were likely to cause alarm in others "on the basis of race, color creed, religion or gender."<sup>39</sup> The Court reasoned that although the ordinance banned only fighting words, it violated the First Amendment because the ban was limited to an improper content-defined subcategory of fighting words (essentially bias-motivated fighting words).<sup>40</sup> As Lawrence recognizes, bias-crime laws might be open to similar challenges that they are not appropriately content neutral (p. 105). In *Mitchell*, the Court rejected such a challenge, in part, on the ground that bias-crime laws regulated conduct and not speech and so were not content based.<sup>41</sup>

Lawrence, however, rejects as superficial the speech/conduct distinction. He believes that bias crimes have an expressive aspect and, as such, should be afforded the protection available to speech (pp. 89-92). Lawrence thus accepts that the First Amendment's presumption against content-based restrictions applies to bias-crime laws. According to Lawrence, the proper inquiry is whether the state can "advance a nonpretextual justification for the distinction drawn in its criminal law, a justification that stands independent of any effort to suppress the expression of ideas" (p. 104). Similarly, Lawrence writes, "[w]e must ask whether bias crime statutes further an important interest unrelated to the suppression of racist speech" (p. 106). Lawrence identifies three such interests: the need to deter a rapidly increasing form of crime, the need to specifically deter a perpetrator with a high degree of potential dangerousness, and the desire to address a crime that has a particularly injurious effect on the victim, the targeted group, and society at large (p. 106). Thus, based on considerations not very different from those identified in *Mitchell*,<sup>42</sup> Lawrence concludes that bias-crime laws do not employ a constitutionally defective content-based distinction.

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39. 505 U.S. 377, 380 (1992).

40. *R.A.V.*, 505 U.S. at 391-94.

41. See *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993).

42. 508 U.S. at 487-88. The Court stated that:

[T]he Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.

*Id.*

Lawrence's defense of bias-crime laws is not satisfactory. As a general matter, in order to defend bias-crime laws against the claim that they are improperly content based, it is insufficient to show they further an important state interest unrelated to the suppression of speech. Such a showing entirely misses the point of the requirement of content neutrality. Preserving the peace and tranquility of a residential neighborhood is an important state interest unrelated to the suppression of speech.<sup>43</sup> An ordinance banning sound trucks that announce the communist manifesto from residential neighborhoods advances that interest. Nevertheless, the ordinance clearly would be an unconstitutional content-based restriction. Because the interest advanced does not explain why the ordinance is limited to a certain class of peace-disrupting conduct, the interest appears pretextual.

More specifically, the three harm-based justifications advanced by Lawrence have a disturbing air of pretext about them. Consider the alleged need to deter a rapidly increasing form of crime. As Lawrence recognizes, there is little solid evidence that the rate of bias crimes is increasing rapidly. Lawrence writes, "it remains difficult . . . to gauge whether the bias crime problem has actually worsened or merely appears to have done so [due to heightened awareness of the problem]" (p. 20). The issue is fogged by "incomplete data" (p. 24). The best argument for an increase in bias crimes, Lawrence believes, is the historical parallel between bias-crime rates and conditions of economic unrest (pp. 25-26). Characterizing the state of the current economy as "adverse" (p. 26), Lawrence infers a relatively high rate of bias crimes today. The general fall of the crime rate over the last few years,<sup>44</sup> however, belies the supposition that current economic conditions are fertile ground for antisocial sentiment and behavior. Furthermore, even assuming that the rising rate of bias crimes could be satisfactorily established, there remains a serious problem with relying on this fact as a nonpretextual justification. According to the Federal Bureau of Investigation's data for the period of 1985 to 1994, the rates of murder, rape, robbery, aggravated assault, larceny, and car theft increased.<sup>45</sup> Nevertheless, during that period, there was no across-the-board in-

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43. See *Carey v. Brown*, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."); *Saia v. New York*, 334 U.S. 558, 562 (1948) (implying that reasonable time, manner, and place restrictions are permissible to regulate loudspeakers).

44. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1998*, at 173 tbl.3.2 (1999) (describing the approximately 22% and 25% drop in rates of personal and property crimes (respectively) from 1995 to 1998).

45. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1997*, at 201 tbl.313 (117th ed. 1997).



crease in penalties. To single out bias crimes as being particularly in need of increased penalties based on rising rates seems pretextual.<sup>46</sup>

Equally questionable is Lawrence's reliance on the need to specifically deter perpetrators with a high degree of potential dangerousness. Lawrence cites a study that found that assaults based on bias are more than twice as likely to result in physical injury as other assaults (p. 39). To the extent that bias crimes are, on average, more dangerous than their counterpart crimes without bias, it would seem that specific deterrence could be achieved more directly through increased punishment of crimes actually involving physical injuries. Furthermore, an individual's potential dangerousness is a function of both the dangerousness of the crime and of the likelihood of an individual's committing a crime. Lawrence presents neither direct nor circumstantial evidence that bias criminals have an especially high rate of recidivism. While a term in prison is unlikely to negate the many factors that lead a person to commit a bias crime, the rehabilitative effects of prison are undoubtedly weak for many classes of offenders. Those who commit crimes motivated by the need to support a drug habit, the dislike of authority, religious conviction, uncontrollable anger, or deep-seated alienation are likely in need of specific deterrence.

There remains the claim that "the desire to address a crime that has a particularly injurious effect on the victim, the targeted group, and the society at large" (p. 106) constitutes a nonpretextual reason for bias-crime laws. These particularly injurious effects are undoubtedly central to the case for bias-crime laws. Let me, however, suggest three reasons to doubt that their invocation is anything more than a convenient pretext.

First, racism and other varieties of bigotry are disfavored ideologies in our society. In some individuals, these forms of bias exist as no more than unarticulated or barely conscious prompting. A man who chooses his seat on the bus to avoid sitting next to a person of a different color need not subscribe to a racist "ideology." Those who are subject to prosecution under bias-crime laws, however, are often extremists who ascribe to coherent, if baseless, theories of racism, intolerance, and bigotry. Lawrence himself characterizes these forms of bias as an ideology, and indeed, makes their status as an ideology an essential element in the justification of their prohibition (pp. 11-12). Bias-crime laws today are thus analogous to a hypothetical Cold War

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46. Furthermore, while the end of stemming the rising rate of bias crimes may be a constitutionally legitimate one, it cannot justify, from a deontological perspective, more severe punishment. From a deontological perspective, the perpetrator's personal desert, not her membership in a contingently expanding class of like perpetrators, must dictate the punishment. Lawrence does not set for himself the goal of developing a unified justification of bias-crime laws consistent with both deontological constraints and the Constitution. Such a justification, however, would be more intellectually satisfying than the diverse moral and constitutional justifications Lawrence presents.

era law providing enhanced penalties for crimes “motivated by Marxism.” Such a hypothetical law might be defended based on the particularly great injuries that Marxist-motivated crimes arguably tend to produce (economic instability, pervasive suspicion and fear, reactionary responses, etc.). In light of its facial targeting of an unpopular ideology, any such defense should be greeted with some degree of skepticism, if not heightened scrutiny. The same skepticism is appropriate for the rationales Lawrence advances in support of bias crimes.

Second, these harm-based rationales are not the ones that actually explain the enactment of bias-crime laws. The “desire to address a crime that has a particularly injurious effect” (p. 106) suggests a consequential desire to do something about a particularly virulent social problem. According to Lawrence, however, “[t]he rhetoric surrounding the enactment of bias-crime laws suggests that most supporters of such legislation espouse a thoroughly deontological justification” based on the bias criminal’s greater culpability for violating “the equality principle” (p. 61). This deontological justification undercuts the harm-based justifications Lawrence advances.

Finally, Lawrence himself seems to be motivated by concerns other than the harms to the victim, her group, and society that bias crimes allegedly cause. The most telling evidence that these concerns are pretextual is perhaps the very language of Lawrence’s model bias-crime law. Lawrence’s model statute establishes three means of committing a bias crime. Under the model statute, a person is guilty of a first-degree bias crime if he commits any crime “with the *knowledge* that . . . his conduct will be perceived . . . [as] motivated . . . by ill will . . . due to the . . . race, color [or] religion . . . of the victim” (p. 170; emphasis added). A person is guilty of a second-degree bias crime if he commits any crime “with *conscious disregard for the substantial and unjustifiable risk* that his conduct will be perceived . . . [as] motivated . . . by ill will . . . due to the . . . race, color [or] religion . . . of the victim” (p. 171; emphasis added). Given the Model Penal Code’s well-known purpose-knowledge-recklessness-negligence culpability scheme, one naturally would expect that the third way of committing a bias crime would be acting with the *purpose* that such action would be perceived as based on bias.<sup>47</sup> Such a provision would be consistent with the harm-based justification of bias-crime laws, which looks to the impact of the perception of bias. In fact, the third way to commit a bias crime under Lawrence’s statute is to commit any crime “motivated . . . by ill will . . . due to the . . . race, color, [or] religion . . . of the victim” (p. 170).

By including a provision that focuses on the motivation itself, as opposed to consistently addressing the perception of the actor’s con-

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47. Lawrence believes that permitting liability based on mere negligence improperly would minimize the gravity of bias crimes. P. 73.

duct, Lawrence's model law is underinclusive with respect to the harms that allegedly ground it. Lawrence's model law fails to cover those who act with the purpose of causing the mistaken perception of a biased crime. For example, outside the scope of Lawrence's model statute would be the Protective Property Owner and the Misleading Arsonist. The Protective Property Owner is a racially tolerant person who is afraid that if minorities come to live in his neighborhood, the property value of his house will diminish significantly, and thus, for purely economic reasons, he, out of desperation, dents the fender of his minority neighbor's car hoping that his neighbor will interpret this as racially biased and leave the neighborhood, but lacking the belief that there is a substantial likelihood that his act will be so interpreted. The Misleading Arsonist is an arsonist who, before destroying a competitor's store, paints a swastika on the property on the off-chance the arson will be attributed to a hate group and the ensuing investigation will be directed away from him. Though the Protective Property Owner and the Misleading Arsonist intend to cause the relevant harms, they slip through the model statute.

Likewise, by shifting from a focus on perception to motivation, Lawrence's model law is overinclusive with respect to the harms that allegedly ground it. Lawrence specifically considers the case of a person who conceals his bias motivation from the victim and her community so that "no one might even suspect that it was a bias crime" (p. 67). Thus, he assumes that "the actor . . . has not caused the objective harms associated with bias crimes" (p. 67). Lawrence labels such a person "The Clever Bias Criminal" (p. 65). If the harm-based justifications advanced by Lawrence were actually at work, one would expect the Clever Bias Criminal not to be subject to any additional punishment based on his underlying motives. Not only has he caused no additional harm, but because he has no reason to believe that his secretly bias-motivated crime will result in additional harm, the Clever Bias Criminal is no more blameworthy than a person who merely commits a parallel crime. Yet Lawrence's model bias-crime law, by permitting liability to be triggered by bias motivation alone, explicitly is formulated to reach the Clever Bias Criminal.<sup>48</sup>

In general, Lawrence displays admirable sensitivity to the subtleties and reach of the language of bias-crime laws. Lawrence clearly recognizes that there is a logical gap between his harm-based justifications of bias-crime laws and his motivation-based formulations of bias-crime laws (p. 64). Lawrence, however, does not even consider trying to minimize that gap through statutes that directly address the harms

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48. P. 170. Inexplicably, Lawrence states that the Clever Bias Criminal is guilty of an attempted bias crime. P. 67. Under all actual bias-crime laws, as well as Lawrence's model law, he would be liable for committing a bias crime, assuming that he completed an underlying crime.

associated with bias crimes. For example, statutes might create enhanced penalties where:

1. The offender acted with the specific intent to create (or with knowledge that he was likely to create) terror within a definable community.
2. The offender acted with specific intent to create (or with knowledge that he was likely to create) a threat of further crime.
3. The offender knew or should have known that a victim was particularly susceptible to the criminal conduct.
4. The offender, in the commission of the offense, intended to inflict serious emotional distress.
5. The commission of the offense created serious psychological harm (comparable to 'serious physical harm' specifications that enhance penalties).
6. The offender acted with specific intent to interfere with another's exercise of constitutional or statutory rights, or another's enjoyment of or access to public facilities, or another's enjoyment of equal opportunity.<sup>49</sup>

Nor does Lawrence even consider a statute that consistently focuses on only conduct creating the perception of bias motivation. Such a statute would seem to be more consistent with the harm-based justifications Lawrence advances. These facts appear to undercut the sincerity of Lawrence's proffered rationales.

What does Lawrence really have in mind when he speaks of "the desire to address a crime that has a particularly injurious effect" (p. 106)? Surprisingly nowhere in his book does he directly advance the claim that bias-crime laws will reduce the number of bias crimes or the harms associated with them. Such a claim would require complicated empirical argument concerning the causes and effects of bias crime that outstrips the current data.<sup>50</sup> By "address" Lawrence means something other than "prevent." Only in the final chapter of the book, entitled "Why Punish Hate," far away from his First Amendment discussion, does Lawrence reveal his true grounds for believing bias-crime laws are desirable (as opposed to merely permissible (p. 161)). Invoking an expressive theory of punishment, Lawrence writes that "[t]he punishment of bias crimes is necessary for the full expression of commitment to the American values of equality of treatment and opportunity" (p. 169). Lawrence appears to believe that such expression has both a noninstrumental symbolic value and also some consequentialist aspect for law-abiding citizens (pp. 166-67), but his discussion in this regard is lofty and abstract. Unfortunately, Lawrence does not

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49. Susan Gellman, *Hate Crime Laws Are Thought Crime Laws*, 1992/1993 ANN. SURV. AM. L. 509, 511 (proposing penalty enhancement for those situations) (footnotes omitted).

50. The success of bias-crime laws in deterring bias crimes is unknown. See Staff, *supra* note 2, at 64 (finding that the impact of bias-crime laws on bias crime is "relatively inconclusive" and conclusions are "difficult to draw").

address whether expressing opposition to an ideology is a legitimate motive for enhancing criminal sanctions for conduct based on the ideology. Could Marxist-motivated crime (or speech) be punished more severely simply because our society wants to express its objection to Marxism? Surely not. Relying on an expressive theory of punishment to justify content-based punishment seems far too easy a path to content-based criminal laws. Lawrence writes that “[e]xpressive theory may be concerned less with providing a full justification of punishment than with understanding the full impact of the punishment” (p. 167). But if the expressive theory is the key to understanding why a state “should” (p. 161) have bias-crime laws, and non-pretextual reasons determine constitutionality, its validity deserves closer scrutiny.

### B. *Bias-Crime Laws and Motives*

At the end of Chapter Five, Lawrence considers an additional First Amendment argument raised against bias-crime statutes: the argument that bias-crime laws violate the First Amendment because they criminalize motives (pp. 106-09). Lawrence rejects the argument in part because he considers the distinction between motives (which allegedly should not bear on liability) and intent (which obviously may) to be only a “formal” distinction bearing no substantive weight. Specifically, Lawrence believes that motives are definitionally just intentions that have not been established by the positive law as bearing on liability. Insofar as bias-crime laws establish that bias is relevant to liability, bias *becomes* an intention and is indistinguishable from other intentions the law may properly criminalize. Lawrence writes, “[w]hether bias-crime laws punish motivation or intent is not inherent in those prohibitions. Rather, the distinction simply mirrors the way in which we choose to describe them” (p. 109). Thus, Lawrence concludes, the motive-based argument against bias crimes cannot get off the ground.

While I do not subscribe to the proposition that the First Amendment contains an absolute prohibition against the criminalization of motives, I believe there is more to the intent/motive distinction than Lawrence recognizes. Lawrence is correct that many uncontroversial criminal law doctrines could be characterized as criminalizing motives. Burglary could be reformulated as trespassing with the motive to commit a felony on the unlawfully entered premises; the defense of necessity (or putative necessity) could be reformulated as committing a crime with the motive to avoid a greater evil; attempted homicide could be reformulated as acting with the motive of causing death. The much-repeated maxim against punishing motives, how-

ever, is not dismissed so easily. There is a core of truth to it.<sup>51</sup> As illustrated above, the motivations relevant to criminal law share a common quality: they directly reflect the perpetrator's intent to achieve a significant social harm or good beyond that associated with the prohibited conduct. In H.L.A. Hart's terminology, they are "further intention[s]."<sup>52</sup> In contrast, the criminal law has virtually never found relevant to liability motives that directly reflect only a further intent to achieve a socially insignificant end, such as the demonstration of manhood, the satisfaction of a material desire, the elimination of a romantic rival, the obtaining of funds to pay a personal debt, and so on.<sup>53</sup> The irrelevance of such intentions to liability is the maxim's core of truth. Thus, contra Lawrence, the maxim embodies more than a "formal" requirement — it reflects a substantive distinction between mental states that would make the actor accountable for significant social harms or benefits and those that would not.<sup>54</sup> Bias falls in the latter category. To act from bias is not logically equivalent to acting with the further intent to humiliate the victim, to spread fear through the victim's community, to provoke a race war,<sup>55</sup> or to achieve any other result, much less achieve a significant further social harm. Because bias-crime laws cannot be reformulated as prohibiting criminal conduct with the intent of achieving any further socially significant harm, they are contrary to the core truth of the general rule that criminal law does not punish motives.<sup>56</sup> Thus, even if the criminalization of motive is not per se offensive to the First Amendment, the argument may not be dismissed as easily as Lawrence suggests.<sup>57</sup>

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51. As George Fletcher has written:

At one level, the claim that motives do not typically bear on criminal liability is a technical point about the way offenses are usually defined. But there is also a deeper point suggested by the claim that the actor's ultimate purposes do not bear on his or her culpability for criminal conduct.

GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 452 (1979).

52. H.L.A. Hart, *Intention and Punishment*, 4 OXFORD REV. (1967), reprinted in H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW*, 117-18 (1968).

53. A narrow exception is MODEL PENAL CODE § 213.5 (1962), which provides that "[a] person commits a misdemeanor if, *for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse*, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm." (emphasis added). The provision would seem more just and effective if the italicized language concerning motivation were removed.

54. See *supra* text accompanying notes 9-15.

55. Cf. *Barclay v. Florida*, 463 U.S. 939, 949-51 (1983) (holding that a desire to start a race war may be relevant to several statutory aggravating factors).

56. Cf. Douglas N. Husak, *Motive and Criminal Liability*, CRIM. JUST. ETHICS, WINTER/SPRING 1989, at 3; Paul H. Robins, *Hate Crimes: Crimes of Motive, Character, or Group Terror?* 1992/1993 ANN. SURV. AM. L. 605, 606-09.

57. In a recent article, Carol S. Steiker argues that criminalizing bias is consistent with the criminal law's general treatment of motive. See Carol S. Steiker, *Punishing Hateful Mo-*

In sum, Lawrence's First Amendment defense succeeds in going a long way on very little. Abjuring the problematic distinctions between conduct and speech and between motive and ideology, Lawrence rests his case on a variety of relatively value-neutral, harm-based policy ends, such as protecting victims, their community, and society at large from injuries analogous to those caused by verbal assaults and menacing. Such an approach, if legally sound, still invites suspicion. Its empirical foundation in rising bias-crime rates, future dangerousness of bias criminals, and deterability of bias crimes is weak; its air of being motivated by hostility to a disfavored ideology is strong. Nevertheless, to anyone dissatisfied with the Supreme Court's treatment of the issue in *Mitchell*, Lawrence's account offers an alternative approach with appeal and potential.

### III. THE FEDERAL GOVERNMENT'S ROLE IN PROSECUTING BIAS CRIMES

The final major topic that Lawrence considers is the federal government's role in prosecuting bias crimes. Because there are currently no federal laws prohibiting bias crimes per se, a compelling argument for the expansion of the federal government into this area would be a significant contribution to an open policy issue. In this regard, *Punishing Hate* presents a generally persuasive, if not fully developed, case that the federal government should enact bias-crime laws and play some role in their enforcement.<sup>58</sup>

Lawrence organizes his discussion of the federal prosecution of bias crimes around three questions: the constitutional, the prudential

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*tives: Old Wine in a New Bottle Revives Calls for Prohibition*, 97 MICH. L. REV. 1857 (1999) (book review). She argues that all or many determinations of the criminal law to make motive relevant are "political to the core" in just the way the bias-crime laws allegedly are. *Id.* at 1866 (citations omitted). She offers the example of the manslaughter provocation doctrine according to which consuming passion caused by the discovery of infidelity is partially exculpatory. *See id.* at 1863. In contrast, Streiker notes, consuming passion caused by the discovery of one's daughter in bed with a man of another race will not be exculpatory. *See id.* at 1865. If this distinction between motives is not thought objectionable, why should the enhancement of a penalty due to bias be objectionable? The answer is that the manslaughter example involves the intention to kill and the further intention to revenge an act of adultery. This further intention is one that is considered socially valid, or at least "understandable." This assessment of the further intention undeniably involves a value judgment: the judgment that one's status as an adulterer is, at least arguably, morally relevant. In contrast, the status of being Asian-American, for example, is not morally relevant. Thus, to act based on bias is worse than to act based on the discovery of infidelity, which may mitigate culpability. But it is not worse than other "generic" motivations, like envy, which involve no socially acceptable further intentions.

58. The issue of whether the federal government should enact and enforce bias-crime laws is, of course, logically independent from the question, addressed in Part I, whether such laws are justified. The latter question concerned the appropriate penalty level for bias crimes. Assuming it were appropriate for the federal government to enact bias-crime laws, those laws could impose penalties that were either equal to or greater than the penalties for parallel crimes in the same jurisdiction.

and the pragmatic. With respect to the first question — Congress’s constitutional authority to enact bias-crime laws — Lawrence’s discussion would benefit from greater depth. Lawrence concedes that the Commerce Clause is “a poor[] fit” (p. 152) and the Fourteenth and Fifteenth Amendments are inadequate bases for a federal bias-crime law because of the state-action requirement (p. 153). This leaves the Thirteenth Amendment as the remaining potential source for the authority to regulate bias crimes. The Thirteenth Amendment, by its terms, expressly prohibits only slavery and involuntary servitude; bias crimes are neither. The Amendment’s Enabling Clause, however, has been interpreted broadly to permit legislation to eradicate so-called “badges and incidents” of slavery.<sup>59</sup> Following such broad interpretation, racially motivated violence against African Americans could be deemed a badge or incidence of slavery because the hostility producing such violence can be traced to the fact that African Americans were once the subjects of slavery in this country. Bias crimes against African Americans, however, have composed only about forty percent of reported bias crimes.<sup>60</sup>

Lawrence’s Thirteenth Amendment arguments for the constitutionality of bias-crime laws that reach beyond the protection of African Americans are comparatively weak. Lawrence notes that in the *Slaughter-House Cases*, the Supreme Court suggested that the Thirteenth Amendment would prohibit “Mexican peonage” and “Chinese coolie labor systems.”<sup>61</sup> The Thirteenth Amendment undoubtedly covers the actual slavery of all people both de jure and de facto, and, perhaps, analogous institutions such as the forced prostitution of illegal immigrants, as well as the badges and incidents thereof. It seems a stretch, however, to claim it covers discrete bias-motivated acts of violence against groups that have no history of subjugation in the United States. Lawrence asserts that modern cases have extended the Thirteenth Amendment’s protections to religious groups (p. 154). The cases he cites in support of this proposition,<sup>62</sup> however, only addressed the scope of 42 U.S.C. §§ 1981 and 1982. The Court made no reference to their roots in the Thirteenth Amendment. Furthermore, in those cases, the Court stated that discrimination based solely on re-

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59. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968); *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

60. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1998, at 215 tbl.344 (118th ed. 1998).

61. *Slaughter-House Cases*, 83 U.S. 36, 72 (1873) (noting that such systems would have to develop into slavery of those races).

62. See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (holding that a person of Arabian ancestry may be protected from racial discrimination under § 1981); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (holding that because Jews were considered a distinct race they may assert claims under § 1982).



ligion or place of origin was not within the scope of section 1981.<sup>63</sup> These cases are slender reeds to support his position.

In the end, Lawrence's call for this expansion of the Thirteenth Amendment seems to rest on the following passage:

The broad reach of the Thirteenth Amendment as understood today goes beyond a prohibition of re-enslavement of those who have previously been enslaved. By protecting ethnic, religious, and national-origin minority groups, the Thirteenth Amendment is now more consonant with a positive guarantee of freedom and equal participation in civil society. Violence, directed against an individual out of motive of group bias, violates this concept . . . ." [p. 154; footnote omitted]

This argument, in my view, is too facile and abstract, resting more on wishful thinking and an assumed shared understanding of "a positive guarantee of freedom and equal participation," than on solid legal authority and analysis. Lawrence devotes thirty-six pages to reviewing this country's convoluted history of federal civil rights enforcement (pp. 113-49). Given this introduction, one would expect greater attention to the substantive constitutional question at issue. While there is room to argue that the Thirteenth Amendment might support broad bias-crime legislation,<sup>64</sup> Lawrence does not make that argument convincingly.

Lawrence's discussion of the prudential and pragmatic questions relating to the federal bias crime prosecution is more persuasive, even if its practical significance is less than clear. Lawrence argues that there is a strong federal interest in supplementing states' historically lax prosecution of bias crimes, because racial equality is an important component of the "national social contract" (pp. 155-57). Lawrence advocates neither a massive federal "war" against bias crimes nor a barrage of dual state-federal prosecutions. Rather, he envisions a process in which "federal and state law enforcement work together, particularly at the investigatory stage, and then, when it comes time to determine which criminal charges are to be brought, the merits of each are weighed" (p. 160). Such a relationship, Lawrence believes, might resemble that between federal and state authorities in the area of police brutality prosecutions (p. 158). Would such a relationship work in practice? Lawrence thinks that local-federal turf battles are avoidable (p. 160). He, however, does not address the issues of whether dual jurisdiction over bias crimes might result in buck passing between local

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63. See, e.g., *Saint Francis College*, 481 U.S. at 613 ("If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.").

64. See, e.g., Peter Brandon Bayer, *Rationality — and The Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1, 67 n.214 (1988); G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1, 7-15 (1974).

and federal authorities or unduly complicate investigations. Nor does he consider whether it is a sound expenditure of limited federal resources to prosecute the typical bias crime involving minor property damage or personal injury. Likely, Lawrence would rely on the Justice Department to intelligently assess these matters before involving itself. It is difficult to object to the grant of power where the use of that power will be guided by intelligent discretion. Still, one wonders whether Lawrence's call for the federal prosecution of bias crimes is a proposal for a significant policy change with large-scale repercussions or merely for a symbolic expansion of federal authority with a negligible impact. Just as it is difficult to assess the validity of bias-crime laws without knowing the amount of the proposed penalty enhancements, it is difficult to assess the practicality of federal bias-crime enforcement without knowing the amount of the proposed activity.

#### CONCLUSION

*Punishing Hate* presents a well-organized and coherent defense of bias-crime laws. Nevertheless, it at points appears to reflect an unresolved tension in the thinking of the defenders of bias-crime laws. This tension is best exemplified by Lawrence's model bias-crime law. This law authorizes additional punishment based on the existence of bias, as well as the appearance, or perception, thereof. The latter condition ties into the harm-based rationales for bias-crime laws that inform most of Lawrence's defense of bias-crime laws. The appearance of bias is the more proximate cause of the harms associated with bias crimes since these harms follow from actual bias only insofar as the bias is perceived. It is, however, the former condition — the triggering of punishment by bias itself — that most raises the hackles of those who oppose bias-crime laws. The most likely explanation for going further and criminalizing motive is that only such a provision would make a statement directly against bias. It is doubtful that a hypothetical bill targeting "the appearance of a bias-motivated crime" would garner significant legislative support. Rather, one suspects, only insofar as bias-crime bills can be understood as striking at racism, intolerance, and bigotry, will they be elevated to law. Indeed, Lawrence's desire to be seen as striking at racism, intolerance, and bigotry itself may explain Lawrence's repeated statements that bias crimes are necessarily matters of motive<sup>65</sup> — a claim plainly inconsistent with Lawrence's model statute, which permits liability based on merely the perception of motive irrespective of actual motive.

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65. Lawrence begins his book by defining a bias crime as "a crime committed as an act of prejudice," p. 9, and later reasserts, after lengthy analysis, that "precisely what we are punishing" with bias-crime laws is "conduct grounded in racial animus." P. 79.

One senses in *Punishing Hate* a mild form of schizophrenia. On the one hand, Lawrence frequently adheres to a safe liberal/libertarian defense of bias-crime laws that turns on the harms that are produced contingently when bias-motivated acts are perceived as such. In this light, bias-crime laws are little more controversial than laws prohibiting menacing, verbal assault, or other plainly unprotected expression. On the other hand, Lawrence sometimes presents a more politically correct, but philosophically problematic position that bias motivation, and the objectionable values that inform it, are the evils that must be driven from our society. This sentiment arises both in the context of Lawrence's deontological justification of bias-crime laws as well as in the final chapter of *Punishing Hate* where Lawrence advances his expressive account of bias-crime laws untethered to the claim that they will reduce the number of bias crimes.

Perhaps my diagnosis is too strong. Perhaps it is legitimate to point to the harms contingently associated with bias crimes when responding to fastidious punishment theorists or zealous First Amendment advocates and to point to symbolic importance of equality when addressing an audience prone to reading appealing values into bias-crime laws. But an expressive account of bias-crime laws adds little to the debate. If bias-crime laws are not supported adequately by harm-based arguments, but trammel on First Amendment values, enacting them expresses a lack of respect for those First Amendment values. Conversely, if bias-crime laws are justified on harm-based grounds, then enacting them in an open society expresses the exact values underlying those grounds, such as the evil of humiliating another, not the ideal of equality. Ultimately, the place of bias-crime laws in our society must turn on the validity of those harm-based defenses that Lawrence so well identifies, not the importance of equality as an abstract ideal that Lawrence so elegantly articulates.