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THE PUNISHMENT OF HATE: TOWARD A NORMATIVE THEORY OF BIAS- MOTIVATED CRIMES

*Frederick M. Lawrence**

Implicit within every penal relation and every exercise of penal power there is a conception of social authority, of the (criminal) person, and of the nature of the community or social order that punishment protects and tries to re-create.¹

America, on the whole, has been a staunch defender of the right to be the same or different, although it has fallen short in many of its practices. The question before us is whether progress toward tolerance will continue, or whether, as in many regions of the world, a fatal retrogression will set in.²

Most everyone agrees that bias crimes are a scourge on our society and that the problem is getting worse.³ What is surprising in the face of this apparent consensus is the relative lack of focus on three critical underlying questions. First, what precisely distinguishes a

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1. DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* 265 (1990).

2. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 518 (1954).

3. See, e.g., *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2198 n.4 (1993) ("According to *amici*, bias-motivated violence is on the rise throughout the United States."); Robert J. Kelly et al., *Hate Crimes: Victimized the Stigmatized*, in *BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES* 23, 23-27 (Robert J. Kelly ed., 1993) (noting that the number of bias crimes is increasing); JACK LEVIN & JACK McDEVITT, *HATE CRIMES* 232 (1993) (stating that hate crimes occur frequently in every region of the United States); ANTI-DEFAMATION LEAGUE, 1993 AUDIT OF ANTI-SEMITIC INCIDENTS 1(1994) (finding that the total number of reported anti-Semitic incidents in 1993 represented an eight-percent increase from 1992 and was the second highest in the last 15 years); *Klanwatch Reports Hate Violence At Record Levels Last Year*, SPLC REP. (S. Poverty L. Ctr., Montgomery, Ala.), Apr. 1993, at 1 (reporting that 1992 was the "deadliest and most violent year since Klanwatch began tracking hate crimes in 1979"). But see GOVERNOR'S TASK FORCE ON HATE CRIMES, *HATE CRIMES/HATE INCIDENTS IN MASSACHUSETTS: ANNUAL REPORT*, 1992, at 8 (1993) (arguing that the increased incidents of bias crimes may reflect improved reporting and heightened awareness of bias crimes rather than an actual rise in the number of bias crime occurrences).

bias crime⁴ from a similar crime committed without bias motivation — that is, a “parallel” crime?⁵ Second, why should a bias crime be punished more severely than a parallel crime? Third, under what circumstances is an individual guilty of a bias crime, as opposed to a parallel crime? This article addresses these questions, each of which has gone largely unexplored in the growing literature on bias crimes.

Legal bias crime scholarship has focused on issues of hate speech,⁶ particularly in the university context,⁷ and on the tension

4. Bias crimes are often referred to, particularly in the popular press, as “hate crimes.” Although *hate crimes* is a powerfully evocative term, I reject it in favor of *bias crimes*, which captures more precisely what is at stake when we analyze bias-motivated violence.

What is essential about bias-motivated violence is that the perpetrator is drawn to commit the offense by the victim’s race, ethnicity, religion, or national origin. Many instances of personal, violent crimes may be motivated all or in part by hatred for the victim. If, however, there were no bias motivation, this conduct would not be considered a civil rights crime. See Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2117 n.5 (1993) [hereinafter Lawrence, *Civil Rights and Criminal Wrongs*] (discussing in part the over- and under-inclusiveness of the term *hate crimes* as applied to bias crimes); Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673, 673-74 n.3 (1993) [hereinafter Lawrence, *Hate Crimes/Hate Speech Paradox*] (same).

This observation about the critical role of “bias” and the subsidiary role of “hate” in understanding bias crimes is true under either the discriminatory selection model or the racial animus model. Both models are discussed *infra* at section I.A.

5. A “parallel” crime involves the identical underlying criminal conduct as the civil rights crime without the bias motive. For example, a simple assault without the bias motivation is the parallel crime to a bias-motivated assault. See Lawrence, *Civil Rights and Criminal Wrongs*, *supra* note 4, at 2200-02.

6. See, e.g., Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 151-60 (1992); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211 (1991); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990); Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1 (1991); R. George Wright, *Racist Speech and the First Amendment*, 9 MISS. C. L. REV. 1 (1988); Symposium, *Free Speech & Religious, Racial & Sexual Harassment*, 32 WM. & MARY L. REV. 207 (1991); Symposium, *Frontiers of Legal Thought: The New First Amendment*, 1990 DUKE L.J. 375; Symposium, *Hate Speech and the First Amendment: On A Collision Course?*, 37 VILL. L. REV. 723 (1992); Symposium, *The State of Civil Liberties: Where Do We Go From Here?*, 27 HARV. C.R.-C.L. L. REV. 309 (1992).

7. See, e.g., Charles R. Calleros, *Reconciliation of Civil Rights and Civil Liberties After R.A.V. v. City of St. Paul: Free Speech, Multicultural Education, and Political Correctness at Arizona State University*, 1992 UTAH L. REV. 1205; Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371 (1992); Ronald J. Rychlak, *Civil Rights, Confederate Flags, and Political Correctness: Free Speech and Race Relations on Campus*, 66 TUL. L. REV. 1411 (1992); Robert A. Sedler, *The Unconstitutionality of Campus Bans on “Racist Speech.” The*

between bias crimes and freedom of expression.⁸ Some scholars have explored the constitutionality of proposed federal bias crime legislation.⁹ Legal scholars have not, however, rigorously addressed the definition of *bias crime*, nor have they constructed a normative argument for enhanced punishment. At most, these authors have attempted to fine tune state or federal criminal statutes in order to make them more effective vehicles for punishing bias crimes.¹⁰

Bias crime scholarship in such allied social sciences as sociology and criminal justice has primarily tended to describe either the legal responses to incidents of bias-motivated violence¹¹ or the identifying characteristics of the perpetrators of bias crimes and their vic-

View From Without and Within, 53 U. PITT. L. REV. 631 (1992); Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933 (1991); Thomas W. Simon, *Fighting Racism: Hate Speech Detours*, 26 IND. L. REV. 411 (1993); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484; Symposium, *Campus Hate Speech and the Constitution in the Aftermath of Doe v. University of Michigan*, 37 WAYNE L. REV. 1309 (1991).

8. See, e.g., G. Sidney Buchanan, *The Hate Speech Case: A Pyrrhic Victory for Freedom of Speech?*, 21 HOFSTRA L. REV. 285 (1992); 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); David Goldberger, *Hate Crime Laws and Their Impact on the First Amendment*, 1992-1993 ANN. SURV. AM. L. 569; John A. Powell, *Rights Talk/Free Speech and Equality*, 1992-1993 ANN. SURV. AM. L. 587; Jonathan David Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crimes Statutes After R.A.V.*, 72 OR. L. REV. 157 (1993); Philip Weinberg, R.A.V. and Mitchell: *Making Hate Crime a Trivial Pursuit*, 25 CONN. L. REV. 299 (1993); Wayne R. Allen, Note, *Klan, Cloth and Constitution: Anti-Mask Laws and the First Amendment*, 25 GA. L. REV. 819 (1991); Eric J. Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 COLUM. L. REV. 179 (1993); Symposium, *Hate Crimes: Propriety, Practicality and Constitutionality*, 1992-1993 ANN. SURV. AM. L. 483. I have expressed my own proposal for addressing and resolving the conflict between freedom of expression and bias crimes in Lawrence, *Hate Crimes/Hate Speech Paradox*, *supra* note 4.

9. See, e.g., Lawrence Crocker, *Hate Crime Statutes: Just? Constitutional? Wise?*, 1992-1993 ANN. SURV. AM. L. 485, 495-500; Charles H. Jones, Jr., *An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, 21 HARV. C.R.-C.L. L. REV. 689 (1986); Gregory L. Padgett, Comment, *Racially Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies*, 75 J. CRIM. L. & CRIMINOLOGY 103 (1984).

10. See, e.g., Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L.J. 875 (1992); Charles J. Hynes, *Remarks Concerning Prosecution of Bias-Related Crimes*, 17 NOVA L. REV. 1213 (1993); Virginia Nia Lee, *Legislative Responses to Hate-Motivated Violence: The Massachusetts Experiences and Beyond*, 25 HARV. C.R.-C.L. L. REV. 287 (1990); Paul H. Robinson, *Hate Crimes: Crimes of Motive, Character, or Group Terror?*, 1992-1993 ANN. SURV. AM. L. 605; Michael A. Sandberg, *Bias Crime: The Problems and the Remedies*, in BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES, *supra* note 3, at 193; Tanya Kateri Hernandez, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 YALE L.J. 845 (1990); James Morsch, Comment, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659 (1991); Padgett, *supra* note 9, at 103; Note, *Combating Racial Violence: A Legislative Proposal*, 101 HARV. L. REV. 1270 (1988).

11. See, e.g., BIAS CRIME: THE LAW ENFORCEMENT RESPONSE (Nancy Taylor ed., 1991) (collecting essays by advocates, public officials, and criminologists discussing various aspects of the response by law enforcement to bias crimes); BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES, *supra* note 3, at 21-189 (same).

times.¹² This body of work is of great value to the present project, which brings the studies of sociologists and criminologists to bear on the fundamental legal issues raised by bias crimes.

This article explores how bias crimes differ from parallel crimes and why this distinction makes a crucial difference in our criminal law. Bias crimes differ from parallel crimes as a matter of both the resulting harm and the mental state of the offender. The nature of the injury sustained by the immediate victim of a bias crime exceeds the harm caused by a parallel crime. Moreover, bias crimes inflict a palpable harm on the broader target community of the crime as well as on society at large, while parallel crimes do not generally cause such widespread injury.

The distinction between bias crimes and parallel crimes also concerns the perpetrator's state of mind and, specifically, his bias motivation toward his victim. The punishment of an individual offender for the commission of a bias crime is warranted by the state of mind with which he acts.

Part I of this article discusses the differences between bias crimes and parallel crimes. This Part explores the distinctiveness of perpetrators and victims of bias crimes along with the impact of bias crimes on the victim, the target community, and society as a whole. Section I.A begins with an analysis of the requisite mental state of the bias crime offender under current bias crime statutes. This analysis demonstrates that there are two somewhat overlapping yet analytically distinct models of bias crimes. I refer to these models as the "discriminatory selection model" and the "racial animus model."¹³

12. See, e.g., LEVIN & McDEVITT, *supra* note 3, at 161. In their recent book, Professors Levin and McDevitt also address the response of law enforcement to the increased incidence of bias crimes. *Id.* at 159-205; see also Kelly et al., *supra* note 3, at 23-27.

13. I use *race* in *racial animus*, or in such terms as *racially motivated violence* or *racial intolerance*, as a shorthand term for the classifications enumerated in a bias crime statute as the basis for either a bias crime or an enhanced sentence. Under virtually every bias crime law, this encompasses motivation based not only on the victim's race but also on the victim's color, ethnicity, religion, or national origin. In many states, the groups covered by bias crime laws include those distinguished by gender or sexual orientation as well. See, e.g., CAL. PENAL CODE §§ 422.6, 422.7, 1170.75 (West Supp. 1994) (prohibiting bias crimes committed because of the victim's gender or sexual orientation); D.C. CODE ANN. § 22-4001 (Supp. 1994) (same); ILL. ANN. STAT. ch. 38, para. 12-7.1(a) (Smith-Hurd Supp. 1992) (same); IOWA CODE ANN. § 729A.1 (West 1993) (same); N.H. REV. STAT. ANN. § 651:6.I(g) (Supp. 1993) (same); MICH. COMP. LAWS ANN. § 750.147b (West 1991) (prohibiting bias crimes committed because of the victim's gender); N.D. CENT. CODE § 12.1-14-04 (1985) (same); VT. STAT. ANN. tit. 13, § 1455 (Supp. 1993) (same); WASH. REV. CODE ANN. § 9A.36.080(1) (West Supp. 1994) (same); W. VA. CODE § 61-6-21 (1992) (same).

This article takes no position on the question of how broadly bias crime statutes should be drawn. For examples of scholarly work taking such positions, see Eric Rothschild, *Recognizing Another Face of Hate Crimes: Rape As a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL

The discriminatory selection model of bias crimes defines these crimes in terms of the perpetrator's discriminatory selection of his victim. Under this model, it is irrelevant *why* an offender selected his victim on the basis on race. It is sufficient that the offender did so. The discriminatory selection model of bias crimes has received particular attention recently because the Supreme Court upheld a statute based on this model last year in *Wisconsin v. Mitchell*.¹⁴ Because *Mitchell* represents the constitutional authority for the enactment of bias crime laws, the Wisconsin statute at issue in that case warrants close examination.¹⁵ The racial animus model of bias crimes defines these crimes on the basis of the perpetrator's animus toward the racial group of the victim and the centrality of this animus in the perpetrator's motivation for committing the crime. A number of states have employed this model in their bias crime statutes.¹⁶ Many but not all cases of discriminatory victim selection are in fact also cases of racial animus.¹⁷ Given the differences that exist between these two models, any analysis of the punishment of bias

ISSUES 231, 262-85 (1993) (arguing that all rapes, with the possible exception of "acquaintance rape," are motivated by bias against women and should be treated as bias crimes); Wendy Rae Willis, *The Gun Is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197, 2204-25 (1992) (arguing that all rapes should be treated as bias crimes); Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 428-38 (1994) (arguing that once a state adopts a bias crime statute, it is constitutionally obligated to include homosexuals as a protected group under that statute). I note, however, that the framework developed in this article would apply equally to gender and sexual orientation in those states that have enacted such provisions in their bias crime laws.

14. 113 S. Ct. 2194, 2194-95 (1993).

15. See *infra* text accompanying notes 19-60.

16. See *infra* text accompanying notes 61-72. Most state bias crime statutes are ambiguous as to the required mental state of the perpetrator; that is, these statutes are susceptible of being construed as either racial animus model statutes or discriminatory selection statutes. See *infra* text accompanying notes 73-82. This article argues that if such ambiguity exists, courts should resolve it in favor of a racial-animus-model interpretation. See *infra* Part III.

17. The distinction between the racial animus model and the discriminatory selection model of bias crimes will be discussed in depth *infra* in section I.A. It may prove helpful even at this introductory stage to provide several hypotheticals to help clarify the nature of this distinction.

Consider a purse snatcher who preys exclusively upon women because he believes that he will better achieve his criminal goals grabbing purses from women than trying to pick wallets out of the pockets of men. The purse snatcher has discriminatorily selected his victims on the basis of gender, but he has not acted with animus toward women as a group. Similarly, consider the mugger who preys solely upon white victims because he believes that white people on balance carry more money than nonwhites. He too has selected his victim on the basis of race, but he has done so without bias motivation. These two hypotheticals provide examples of crimes fitting the discriminatory selection model but not the racial animus model.

The hypothetical case of the purse snatcher will be addressed again in greater depth. See *infra* text accompanying notes 215, 217-18.

crimes must provide a clear understanding of what distinguishes bias crimes from other criminal behavior.

Having established a typology of positive bias crime law in section I.A, I discuss in section I.B the outward manifestations of these crimes. This discussion first addresses the nature of the conduct of the bias crime perpetrator. I then turn to the impact of bias crimes on three different levels: (i) the impact of bias crimes on the specific victim of the crime; (ii) the broader impact of bias crimes on the "target" group, that is, the racial group of which the victim is a member; and (iii) the impact of bias crimes on the general community.

Part II demonstrates that bias crimes ought to be punished more severely than parallel crimes. I begin with an examination of the role of proportionality in criminal punishment. The proportionality of punishment to the seriousness of the crime is a critical aspect of the punishment theories of both retributivists and consequentialists. In order to determine the relative punishments for various crimes, there must be a means by which to measure the relative seriousness of those crimes. If the level of intentionality for two crimes is roughly the same — as is the case with an intentional assault and an intentional bias-motivated assault — the relative seriousness of the crimes is best measured by the harm caused. Although we cannot measure harm with arithmetic precision, much can be said to guide our understanding of harm. Finally, Part II applies the analysis of relative harms to the context of bias crimes, concluding that bias crimes warrant harsher punishment than parallel crimes.

Part III considers the aspects of bias crimes that are relevant in the punishment of an individual offender. Whereas the harm caused by bias crimes generally justifies the enhanced punishment of these crimes, the resulting harm to a particular victim does not, in and of itself, warrant the enhanced punishment of the perpetrator. Bias motivation of the perpetrator, and not necessarily the resulting harm to the victim, is the critical factor in determining an individual's guilt for a bias crime. Part III concludes that the discriminatory selection model of bias crimes, adopted by many states and upheld in *Mitchell*, fails to capture the essence of what constitutes a bias crime.¹⁸ The racial animus model of bias crimes, on the other hand, offers a far richer theory and ought to be the focus of

18. The approach that this article advocates would thus reopen the debate over the impact of bias crime laws on freedom of expression. Opponents of bias crime laws have argued that it is unconstitutional to punish motivation in general and bias motivation in particular. See, e.g., Gellman, *supra* note 8, at 362-79. For reasons that I have discussed at length elsewhere, see Lawrence, *Hate Crimes/Hate Speech Paradox*, *supra* note 4, I believe that this

the study of bias crimes. Discriminatory selection of a victim may often provide important evidence of racial animus, and in some instances even fully persuasive evidence. But selection of victims ought to play the role of proof for animus and not the greater role of an element of the crime.

I. HOW BIAS CRIMES ARE DISTINCT FROM PARALLEL CRIMES

A. *The Mental State of the Bias Crime Offender: The Discriminatory Selection Model and the Racial Animus Model of Bias Crimes*

A typology of bias crime laws¹⁹ properly begins with the Wisconsin penalty enhancement law²⁰ upheld by the Supreme Court in *Wisconsin v. Mitchell*.²¹ *Mitchell* was the first case in which the Supreme Court expressly sustained a modern bias crime law.²² In a

debate may properly be resolved in favor of the constitutionality of laws specifically punishing bias-motivated crimes.

19. The number of states that are reported to have some form of bias crime statute varies. By some definitions of *bias crime law*, virtually every state has such a statute. See, e.g., LEVIN & McDEVITT, *supra* note 3, at 186 ("Forty-seven states currently have some sort of hate crime legislation."); Joseph F. Sullivan, *Judges Hear 2 Bias Laws Assailed in Trenton*, N.Y. TIMES, Oct. 13, 1993, at B4 ("[Forty-six] states and the District of Columbia have enacted hate-crime statutes."). These include general intimidation, harassment, terrorism, and vandalism statutes under which a bias crime could be presented. In this article, statutes designated as "bias crime statutes" include only those laws that make some explicit reference to race, either as to racial animus motivating the perpetrator or as to discriminatory selection of the victim based on race.

20. Bias crime laws may be divided into "pure bias crime" and "penalty enhancement" laws. I have argued elsewhere that this distinction is strictly descriptive and that these two forms of bias crime laws are identical for all analytic purposes. See Lawrence, *Hate Crimes/Hate Speech Paradox*, *supra* note 4, at 695-98. Pure bias crimes include specified racially motivated behavior directed at a person or property. An example of a pure bias crime statute is the St. Paul, Minnesota ordinance that the Supreme Court struck down in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992); the ordinance prohibited conduct " 'which one knows or has reasonable grounds to know' " will cause " 'anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.' " 112 S. Ct. at 2541 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)). Penalty enhancement laws increase the criminal sanction — whether fines, terms of incarceration, or both — for certain crimes when those crimes are committed with racial motivation.

21. 113 S. Ct. 2194 (1993).

22. In *Beauharnais v. Illinois*, 343 U.S. 250 (1952), the Supreme Court upheld a group libel law punishing the dissemination of racially slanderous or inflammatory statements. *Beauharnais* was premised on the idea that just as libel of an individual falls outside the protection of the First Amendment, group libel is similarly unprotected. 343 U.S. at 254-58, 262-63. *Beauharnais*, however, was significantly undercut by *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that defamatory statements made against public officials will receive First Amendment protection unless such statements were made with knowledge of their falsity or a reckless disregard for the truth), and *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (requiring the state to prove that speech constitutes incitement to "imminent lawless action" before the state may apply the criminal law to suppress it). *Mitchell* is the first time that the modern Court, after *Sullivan* and *Brandenburg*, explicitly upheld a bias crime statute.

sense, the *Mitchell* case removed the constitutional shadow cast over bias crime statutes by *R.A.V. v. City of St. Paul*.²³ The penalty enhancement statute upheld in *Mitchell* was based on the discriminatory selection model. The nature of this model was crucial to the manner in which the State of Wisconsin sought to distinguish its statute from the ordinance struck down in *R.A.V.*²⁴ As discussed below, the distinction between the discriminatory selection model and the racial animus model, so significant in the argument advanced by the State of Wisconsin, was largely lost in the Court's decision in *Mitchell*. Nonetheless, *Mitchell* must be seen both as a challenge to the Wisconsin statute itself and as a part of an ongoing judicial consideration of the constitutionality of bias crime laws.

The events that gave rise to *Mitchell* took place on October 7, 1989, in Kenosha, Wisconsin, when Todd Mitchell, a nineteen-year-old black man, directed and encouraged a number of young black men and boys to attack a fourteen-year-old white boy, Gregory Riddick.²⁵ Mitchell selected Riddick solely on the basis of his race.²⁶ Mitchell was convicted of aggravated battery for his role in the severe beating — a crime that carries a maximum sentence of two years under Wisconsin law.²⁷ Mitchell's crime also implicated the Wisconsin bias crime statute, which provides for the enhanced penalty of racially motivated crimes.²⁸ Under this statute, the po-

23. The decision in *R.A.V.* raised serious doubts as to the constitutionality of bias crime legislation generally. In response to anticipated future questions, for example, the Federal Bureau of Investigation sent out a letter to over 16,000 local law enforcement agencies to inform them that the decision in *R.A.V.* did not affect their obligations to collect data under the Federal Hate Crimes Statistics Act of 1990. See Katia Hetter, *Enforcers of Hate-Crime Laws Wary After High Court Ruling*, WALL ST. J., Aug. 13, 1992, at B1. *Mitchell* was seen as resolving those doubts. See, e.g., Brian Levin, *U.S. Supreme Court Upholds Stiffer Sentences for Hate Crimes*, INTELLIGENCE REP. (S. Poverty L. Ctr., Montgomery, Ala.), Sept. 1993, at 4, 4-5 (quoting law enforcement officials' approval of the decision in *Mitchell*); see also *infra* text accompanying notes 50-57.

24. See Petitioner's Brief at 30-38, *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (No. 92-515).

25. 113 S. Ct. at 2196-97.

26. The primary evidence that Mitchell selected Riddick because of Riddick's race was Mitchell's exhortation to the group directly before the attack. Mitchell asked, "Do you all feel hyped up to move on some white people?" He then said, "There goes a white boy; go get him." 113 S. Ct. at 2196-97.

27. 113 S. Ct. at 2197; see WIS. STAT. §§ 939.05, 939.50(3)(e), 940.19(1m) (1991-92) (providing a two-year sentence for complicity in aggravated battery).

28. The bias crime statute provides:

(1) If a person does all of the following, the penalties for the underlying crimes are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or

tential penalty for an aggravated battery is increased by five years if the perpetrator of the assault selected his victim on the basis of the victim's race.²⁹ In addition to Mitchell's conviction for battery, he was also found to have acted out of racial bias in the selection of the victim.³⁰ Mitchell, whose maximum possible sentence for this offense was seven years, received a prison sentence of four years.³¹ He challenged his conviction, claiming that the enhancement of his prison term was a violation of his right to freedom of expression under the First Amendment. The Wisconsin appellate court upheld the conviction, but that state's supreme court reversed.³² Ultimately, the U.S. Supreme Court upheld Mitchell's sentence, including the enhanced portion.³³

When the *Mitchell* appeals were before the Wisconsin court, the conflict between bias crimes and freedom of expression was the central legal issue of concern for those who study and enforce bias crime laws.³⁴ The legal debate was dominated by the Supreme Court's decision in *R.A.V. v. City of St. Paul*.³⁵ In *R.A.V.*, the Supreme Court unanimously struck down a municipal ordinance prohibiting cross burning and other actions "which one knows or has reasonable grounds to know" will cause "anger, alarm or resentment in others on the basis of race, color, creed, religion or

the owner or occupant of that property, whether or not the actor's belief or perception was correct.

(2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is \$10,000 and the revised maximum period of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is \$10,000 and the revised maximum period of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is ordinarily a felony, the maximum fine prescribed by law may be increased by not more than \$5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

Wis. STAT. § 939.645 (1991-92).

29. Wis. STAT. § 939.645(2)(c) (1991-92); Wis. STAT. §§ 939.05, 939.50(3)(c), 940.19(1m) (1991-92).

30. 113 S. Ct. at 2197.

31. 113 S. Ct. at 2197.

32. *State v. Mitchell*, 473 N.W.2d 1 (Wis. Ct. App. 1991), *revd.*, 485 N.W.2d 807 (Wis. 1992), *revd.*, 113 S. Ct. 2194 (1993).

33. 113 S. Ct. at 2196.

34. See *supra* notes 6-8 (citing literature on the conflict between the regulation of racist speech or bias crimes and the protection of freedom of expression).

35. 112 S. Ct. 2538 (1992).

gender.”³⁶ Four Justices concurred in the judgment solely on the grounds of overbreadth.³⁷ The majority of the Court reached further and found that the St. Paul ordinance was an unconstitutional content-based regulation of speech.³⁸

The Court utilized a limited categorical approach to the First Amendment,³⁹ accepting the argument that “fighting words,” along with other categories of expression such as obscenity and defamation, are not entitled to full First Amendment protection.⁴⁰ These forms of expression nevertheless enjoy some limited protection and are not “entirely invisible to the Constitution.”⁴¹ Within any of these categories, expression may be proscribed only on the basis of its categorical nature and not on the basis of its content.⁴² Expression either operates in the full light of the First Amendment or in the shadow of that amendment but never wholly outside its protection.⁴³ Regardless of the First Amendment status of a category of expression, content-based regulations are the greatest evil and are

36. The St. Paul Bias-Motivated Crime Ordinance provided:

“Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”

112 S. Ct. at 2541 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)). The defendant in *R.A.V.* had been charged under the ordinance for burning a cross on the lawn of an African-American family who had recently moved into his neighborhood. 112 S. Ct. at 2541.

37. Justice White wrote the main concurring opinion in which Justices Blackmun and O'Connor joined and Justice Stevens joined in relevant part. 112 S. Ct. at 2558-60 (White, J., concurring); see also 112 S. Ct. at 2561 (Blackmun, J., concurring); 112 S. Ct. at 2571 (Stevens, J., concurring). It is safe to assume that these Justices would have upheld a narrowly drawn bias crime statute.

38. 112 S. Ct. at 2541-50.

39. The categorical approach to First Amendment jurisprudence assigns certain forms and types of expression to categories that receive less protection than does general expression. See, e.g., Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 307 (1981); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 601-08; see also Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (arguing that the categorical approach denies equal respect for all expression); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594-95 (1982) (stating that the general categorical methodology violates personal autonomy that is critical to the First Amendment); Pierre J. Schlag, *An Attack On Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983) (arguing that the categorical approach is inherently flawed as a First Amendment methodology); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restriction*, 46 U. CHI. L. REV. 81 (1978) (attacking categories themselves as nonneutral and therefore inappropriate as a basis for determining First Amendment protection).

40. 112 S. Ct. at 2543.

41. 112 S. Ct. at 2543.

42. 112 S. Ct. at 2543.

43. 112 S. Ct. at 2543.

"presumptively invalid."⁴⁴ The Court concluded that St. Paul had established a regulation aimed directly at racist speech and biased beliefs, rather than at "fighting words" generally or at a subgroup of fighting words selected for reasons other than the content of those words.⁴⁵ In so doing, the ordinance impermissibly chose sides in the debate over racial or religious prejudice.⁴⁶

The reasoning in *R.A.V.* became the paradigm for courts reviewing bias crime statutes. This view was adopted, with some modification, by the Ohio Supreme Court⁴⁷ and by the Wisconsin Supreme Court, the latter in its decision reversing the enhancement of Todd Mitchell's sentence for aggravated battery.⁴⁸ Following the decision in *R.A.V.*, the focus of attention among those who sought to enforce bias crime laws turned to limiting the reach of that case or distinguishing its holding from a particular statute.⁴⁹ When the Supreme Court decided to hear *Mitchell*,⁵⁰ the critical issue to the

44. 112 S. Ct. at 2542.

45. 112 S. Ct. at 2547-48.

46. 112 S. Ct. at 2549.

47. See *Ohio v. Wyant*, 597 N.E.2d 450 (Ohio 1992), *vacated and remanded*, 113 S. Ct. 2954 (1993), *affd. and reinstated in part, revd. and remanded in part*, 624 N.E.2d 722 (Ohio 1994).

48. *State v. Mitchell*, 485 N.W.2d 807, 807-10 (Wis. 1992). The reasoning of the Court in *R.A.V.* formed the basis of two other state court decisions striking down state bias crime statutes. See *State v. Sheldon*, 629 A.2d 753 (Md. 1993); *State v. Talley*, 858 P.2d 192 (Wash. 1993). In addition, *R.A.V.* was central to the New Jersey Supreme Court oral argument in *State v. Vawter*, 627 A.2d 1123 (N.J. 1993), and *State v. Mortimer*, 627 A.2d 1124 (N.J. 1993) (challenging the constitutionality of the New Jersey bias crime laws). See Tony Hagen, *Bias Laws Face Constitutional Probe at Court*, N.J. LAW., Oct. 18, 1993, available in LEXIS, News Library, Njlawr file; Sullivan, *supra* note 19, at B4.

Not every state court, however, has read *R.A.V.* as requiring the invalidation of its bias crime law. In *State v. Plowman*, 838 P.2d 558 (Or. 1992), the Supreme Court of Oregon upheld the Oregon racial intimidation law. This law makes it a crime for two or more persons to intentionally, knowingly, or recklessly cause physical injury to another because of their perception of that person's race, color, religion, national origin, or sexual orientation. See OR. REV. STAT. § 166.165(1)(a)(A) (1993). The court concluded that the Oregon statute could be distinguished from the St. Paul ordinance struck down in *R.A.V.* because the St. Paul ordinance "was directed against the substance of speech," whereas the Oregon statute "was directed at conduct." 838 P.2d at 565; see also *Dobbins v. Florida*, 605 So. 2d 922 (Fla. Dist. Ct. App. 1992) (upholding a sentence imposed under the Florida bias crimes statute).

49. See, e.g., Steven M. Freeman, *Hate Crimes: They're Still Against the Law*, ADL ON FRONTLINE (Anti-Defamation League, New York, N.Y.), Sept. 1992, at 1, 4 (distinguishing the ordinance struck down in *R.A.V.* from the model statute endorsed by the Anti-Defamation League). In Massachusetts, the State Attorney General convened a task force to reexamine the constitutionality of the Massachusetts civil rights crimes statutes in light of *R.A.V.* 1993 MASS. ATTY. GEN., A SPECIAL REPORT REGARDING THE CONSTITUTIONALITY OF MASSACHUSETTS CIVIL AND CRIMINAL CIVIL RIGHTS LAWS (1993).

50. *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992), *cert. granted*, 113 S. Ct. 810 (1992). The Court granted certiorari because of the conflict between the Wisconsin and Ohio courts in *Mitchell* and *Wyant*, respectively, and the need to resolve the constitutionality of bias crime laws. *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2198 & n.4 (1993).

parties was the applicability of *R.A.V.* to the Wisconsin penalty enhancement statute.

In defending its bias crime statute against constitutional attack, the State of Wisconsin seized upon the precise form and content of that statute and the fact that it was a statute based on the discriminatory selection model of bias crimes.⁵¹ The Wisconsin penalty enhancement law is the only explicit discriminatory selection model statute in the country. It expressly states that penalty enhancement is applicable if the offender "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of . . . the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."⁵² The first clause of the relevant section of the provision, unique among American bias crime laws, requires "intentional selection" of the victim on the basis of race. This provided a key element in the State's argument that its statute withstood the holding in *R.A.V.* The State contended that *R.A.V.* was concerned with the regulation of expression;⁵³ the Wisconsin bias crime statute proscribed not expression but conduct — the conduct of intentional discriminatory selection of a victim.⁵⁴

The focus on the discriminatory selection aspect of the Wisconsin statute was not just an attempt to frame the statute on the permissible side of the line between the regulation of speech and that of conduct; it was also designed to defend the bias crime statute from the claim that it punished "motivation." The Wisconsin Supreme Court in *Mitchell* had held that the Wisconsin bias crime law impermissibly strayed beyond the punishment of act and pur-

51. Petitioner's Brief at 29-31, *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (No. 92-515).

52. WIS. STAT. § 939.645(1)(b) (1991). The full text of the Wisconsin penalty enhancement statute is reprinted *supra* in note 28.

53. Petitioner's Brief at 36-38, *Mitchell* (No. 92-515).

54. The purported dichotomy between speech and conduct has been soundly criticized as a distinction that is inherently flawed and thus without analytic value as a tool in constitutional analysis. See, e.g., John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1494-96 (1975); Lawrence, *Hate Crimes/Hate Speech Paradox*, *supra* note 4, at 691-94; Melville B. Nimmer, *The Meaning of Symbolic Speech under the First Amendment*, 21 UCLA L. REV. 29 (1973). Nevertheless, the distinction continues to play a substantial role in First Amendment jurisprudence. This is particularly true in the debate over the constitutionality of bias crime laws. See, e.g., *R.A.V.*, 112 S. Ct. at 2546 ("[A] particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech."); *State v. Plowman*, 838 P.2d 558, 565 (Or. 1992) (distinguishing the Oregon statute from the St. Paul ordinance struck down in *R.A.V.* on grounds that the St. Paul ordinance "was directed against the substance of speech," whereas the Oregon statute "was directed at conduct"). The Supreme Court in *Mitchell* distinguished *R.A.V.* by pointing to the difference between speech and conduct. See 113 S. Ct. at 2201 ("[W]hereas the ordinance struck down in *R.A.V.* was explicitly directed at expression . . . the statute in this case is aimed at conduct unprotected by the First Amendment.").

poseful intent and went on to punish motivation.⁵⁵ In order to portray the statute as punishing something other than motivation, the State argued that Mitchell's discriminatory selection of Riddick because of Riddick's race was wholly distinct from whatever Mitchell's actual motivation for doing so may have been.⁵⁶ According to the State, Mitchell may have been motivated by Riddick's race or merely by the desire to show off in front of his friends, but so long as Mitchell chose Riddick on the basis of his race, his conduct triggered the Wisconsin penalty enhancement statute.⁵⁷

Ironically, although the State of Wisconsin was successful in defending the constitutionality of its bias crime statute, it was unsuccessful in explaining the nature of the discriminatory selection model to the Court. For that matter, the State failed to persuade the Court that the distinction between discriminatory selection and other models of bias crimes was relevant to the Court's consideration of the issue. On the one hand, the Court understood Mitchell's sentence to have been enhanced because he "intentionally selected his victim on account of the victim's race."⁵⁸ This appears to be consistent with the State's construction of its statute. But elsewhere the Court described the Wisconsin bias crime penalty enhancement law as one that "punishes criminal conduct [but also] enhances the maximum penalty for conduct *motivated by a discriminatory point of view* more severely than the same conduct engaged in for some other reason or for no reason at all."⁵⁹ Here, the understanding of the elements of the bias crime seems to turn less on the strict discriminatory selection of a victim than on the point of view that underpins that selection.

The Court's lack of focus on the specific nature of the bias crime statute under review in *Mitchell* perhaps stemmed from the fact that it was not persuaded by the argument that the statute impermissibly

55. "Because all of the [parallel] crimes are already punishable, all that remains is an additional punishment for the defendant's motive in selecting the victim. The punishment of the defendant's bigoted motive by the hate crimes statute directly implicates and encroaches upon First Amendment rights." 485 N.W.2d at 812. The Ohio Supreme Court reached essentially the same conclusion in *Ohio v. Wyant*, 597 N.E.2d 450, 457-59 (Ohio 1992).

56. Petitioner's Brief at 36-37, *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (No. 92-515).

57. *Id.* at 37. During his argument to the Supreme Court in support of the Wisconsin statute, State Attorney General James Doyle stated that the statute would have applied to Todd Mitchell if his sole motivation in selecting a white victim had been to impress his friends and if Mitchell himself had been otherwise indifferent as to the choice of his victim. Transcript of Oral Argument at 9-10, *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (No. 92-515).

58. 113 S. Ct. at 2196.

59. 113 S. Ct. at 2199 (emphasis added).

punished motive rather than conduct or intent.⁶⁰ The exact nature of the motivation being punished was therefore not deemed to be of great relevance. Had the Court focused on the statute itself, it would have seen that the bias crime law it was upholding was directed solely at the discriminatory selection of the victim.

The Wisconsin statute may be contrasted with state statutes that target the racist motivation of the bias crime offender. These are statutes of the racial animus model. New Jersey, for example, enhances the criminal penalty for a crime that is motivated, at least in part, by "ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity."⁶¹ The elements of a bias crime in Connecticut, Maryland, Pennsylvania, Florida, and New Hampshire also include hatred toward the victim's race and not mere discriminatory selection of that victim.⁶² Other states have statutes that, although less explicit as to the role of animus in a bias crime, implicitly require the existence of racial animus for criminal

60. 113 S. Ct. at 2199-200 (rejecting the argument that the statute impermissibly punishes motive because the "defendant's motive for committing the offense is one important factor" in the sentencing and because "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge").

61. N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1994).

62. Connecticut law provides that a person is "guilty of intimidation based on *bigotry or bias* if such person maliciously, and with specific intent to intimidate or harass another person because of such other person's race, religion, ethnicity or sexual orientation," causes or threatens injury or damage to property. CONN. GEN. STAT. ANN. § 53a-181b (West Supp. 1994) (emphasis added). Maryland law provides for both an animus standard and a discriminatory selection standard. Under the animus standard, "a person may not . . . [h]arass or commit a crime upon a person or damage the . . . property of a person . . . [w]here there is evidence that exhibits *animosity* on the part of the person committing the act against a person or group because of that person's or group's race, color, religious beliefs, or national origin." MD. CODE ANN., CRIM. LAW § 470A (Supp. 1993) (emphasis added). Under the discriminatory selection model, 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." MD. CODE ANN., CRIM. LAW § 470A (Supp. 1993). Under Pennsylvania law, an offender commits "ethnic intimidation if, with *malicious intention* toward the race, color, religion or national origin of another individual," he causes injury or damage to that individual's property. 18 PA. CONS. STAT. § 2710(a) (1983) (emphasis added). "Malicious intention" is defined as "the intention to commit [an] act motivated by hatred toward the race, color, religion, or national origin of another individual." 18 PA. CONS. STAT. § 2710(c) (1983). Under Florida law, the "penalty for any felony or misdemeanor shall be [enhanced] if the commission of such felony or misdemeanor evidences *prejudice* based on the race, color, ancestry, ethnicity, religion, sexual orientation, or national origin of the victim." FLA. STAT. ch. 775.085(1) (1993) (emphasis added). New Hampshire's bias crime statute provides for an extended term of imprisonment when the offender was "substantially motivated to commit the crime because of *hostility* towards the victim's religion, race, creed, sexual orientation, national origin, or sex." N.H. REV. STAT. ANN. § 651:6(I)(g) (Supp. 1993) (emphasis added).

conduct to be a bias crime.⁶³ The racial animus model of bias crimes is the one that bias crime scholars⁶⁴ and law enforcement agencies⁶⁵ most typically adopt. This model is consonant with the classical understanding of prejudice as involving more than differential treatment on the basis of the victim's race. This understanding of prejudice, as reflected in the racial animus model of bias crimes, requires that the offender have committed the crime with some measure of hostility toward the victim's racial group or toward the victim because he is part of that group.⁶⁶

The racial animus model of bias crimes is well illustrated by the regulations promulgated by the Federal Bureau of Investigation (FBI) to implement the Hate Crime Statistics Act of 1990.⁶⁷ These

63. Massachusetts law criminalizes assault or battery that is committed upon a person for "the purpose of intimidation because of said person's race, color, religion, or national origin." MASS. GEN. L. ch. 265, § 39 (1992). Massachusetts law defines *hate crime* as "any criminal act coupled with overt actions motivated by *bigotry and bias*." MASS. GEN. L. ch. 22C, § 32 (1992) (emphasis added). Vermont law provides for increased criminal penalties for any person who commits a crime "and whose conduct is *maliciously motivated* by the victim's actual or perceived race, color, religion, national origin, sex, ancestry, age, service in the armed forces of the United States, handicap . . . or sexual orientation." VT. STAT. ANN. tit. 13, § 1455 (Supp. 1994) (emphasis added).

64. See, e.g., LEVIN & McDEVITT, *supra* note 3, at 33-44 (analyzing the rise in bigotry as the root cause for the rise in bias crimes); Abramovsky, *supra* note 10, at 878 (stating that "[b]ias crimes are also microcosmic expressions of deeply rooted schisms and social intolerance"); Brian Levin, *Bias Crimes: A Theoretical and Practical Overview*, STAN. L. & POLY. REV., Winter 1992-93, at 165, 166 (arguing that bias crimes are motivated by prejudice and bigotry); Jeffrie G. Murphy, *Bias Crimes: What Do Haters Deserve?*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 20, 22 (defining *hate criminals* as "those who assault or harass from motives of racial hatred").

65. See, e.g., FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT. OF JUSTICE, HATE CRIME DATA COLLECTION GUIDELINES 4 (1990) [hereinafter FBI, HATE CRIME DATA] (defining a bias crime as a "criminal offense against a person or property which is motivated, in whole or in part, by the offender's bias against a race, religion, ethnic/national origin group, or sexual orientation group"); Boston Police Department Community Disorders Unit Manual (defining a bias crime as a crime "motivated by 'hatred against a victim based on his or her race, religion, sexual orientation, ethnicity, or national origin.'") (Although the Boston Police Department Manual attributes its definition of *bias crime* to the Federal Hate Crime Statistics Act, the Manual's language does not conform with that of the Act.)).

66. The classic definition of *prejudice* remains that proposed forty years ago by Gordon Allport. He argued that "[e]thnic prejudice is an antipathy based upon a faulty and inflexible generalization. It may be felt or expressed. It may be directed toward a group as a whole, or toward an individual because he is a member of that group." ALLPORT, *supra* note 2, at 9.

67. FBI, HATE CRIME DATA, *supra* note 65, at 4; see also Hate Crime Statistics Act, 28 U.S.C. § 534 (Supp. V 1993) (directing the Attorney General to acquire data and create guidelines with respect to bias crimes). States have implemented the mandate of the Hate Crime Statistics Act through legislation and regulations. See, e.g., MASS. GEN. L. ch. 22C §§ 32-35 (1992) (Massachusetts state "Hate Crimes Reporting Act" passed in compliance with the federal directive); MASS. REGS. CODE tit. 520, §§ 13.00-.08 (1992) (implementing regulations based upon those promulgated by the FBI); Telephone Interview with Richard W. Cole, Attorney General, Chief of Civil Rights Division, Attorney General's Office of Massachusetts (Jan. 3, 1995).

The FBI implementing regulations refer to bias crimes as "hate crimes." For the reasons discussed *supra* in note 4, the term *bias crimes* is used here. The terminology used in this

regulations define a bias crime as criminal conduct motivated in whole or in part by "bias" — that is, "[a] preformed negative opinion or attitude toward a group of persons based on their race, religion, ethnicity/national origin, or sexual orientation."⁶⁸ The regulations provide for a set of "bias indicators" to guide the classification of a particular crime as a bias crime. These bias indicators primarily involve direct evidence of racial animus on the part of the offender.⁶⁹ Some of the indicators are consistent with a discriminatory selection model of bias crimes,⁷⁰ and others are equally consis-

article is hardly dissonant with the thrust of the FBI regulations. Indeed, the FBI defines *hate crime* as "[s]ame as 'bias crime.'" FBI, HATE CRIME DATA, *supra* note 65, at 2; *see also* MASS. REGS. CODE tit. 520, § 13.02 (1992).

68. FBI, HATE CRIME DATA, *supra* note 65, at 4. The essential role of animosity in the racial animus model appears even more clearly in the Massachusetts regulations promulgated under the state "Hate Crimes Reporting Act." The Massachusetts regulations define a bias crime as conduct in which "[h]atred, hostility, or negative attitudes towards or prejudice against, any group or individual on account of race, religion, ethnicity, handicap, or sexual orientation . . . is a contributing factor, in whole or in part, in the commission of a criminal act." MASS. REGS. CODE tit. 520, § 13.02 (1992).

69. The list of bias indicators in the FBI regulations provides, in part, as follows:

(b) Bias-related oral comments, written statements, or gestures were made by the offender which indicate his/her bias. For example, the offender shouted a racial epithet at the victim.

(c) Bias-related drawings, markings, symbols, or graffiti were left at the crime scene. For example, a swastika was painted on the door of a synagogue.

(d) Certain objects, items, or things which indicate bias were used (e.g., the offenders wore white sheets with hoods covering their faces) or left behind by the offender(s) (e.g., a burning cross was left in front of the victim's residence).

(h) A substantial portion of the community where the crime occurred perceives that the incident was motivated by bias.

(i) The victim was engaged in activities promoting his/her racial, religious, ethnic/national origin, or sexual orientation group. For example, the victim is a member of the NAACP, participated in gay rights demonstrations, etc.

(l) There were indications that a hate group [defined in animus-based terms as a group which promotes "animosity, hostility, and malice" against a target group] was involved. For example, a hate group claimed responsibility for the crime or was active in the neighborhood.

(m) A historically established animosity exists between the victim's group and the offender's group.

(n) The victim, although not a member of the targeted racial, religious, ethnic/national origin, or sexual orientation group, is a member of an advocacy group supporting the precepts of the victim group.

FBI, HATE CRIME DATA, *supra* note 65, at 2-3, 5.

70.

(a) The offender and the victim were of different racial, religious, ethnic/national origin, or sexual orientation groups. For example, the victim was black and the offenders were white.

(e) The victim is a member of a racial, religious, ethnic/national origin, or sexual orientation group which is overwhelmingly outnumbered by members of another group in the neighborhood where the victim lives and the incident took place.

(g) Several incidents have occurred in the same locality, at or about the same time, and the victims are all of the same racial, religious, ethnic/national origin, or sexual orientation group.

tent with either model.⁷¹ What distinguishes the FBI definition from a discriminatory selection model such as that utilized in Wisconsin, however, is the manner in which the FBI regulations use indicators of discriminatory selection. The only relevance of a discriminatory selection criterion to the FBI is to allow for the inference of animus.⁷² In this manner, the FBI regulations are distinct from the Wisconsin model. For purposes of the FBI regulations, discriminatory selection of a victim, in and of itself, is irrelevant to the identification of conduct as a bias crime. Discriminatory selection of a victim becomes relevant only if that selection is probative of an underlying racial animus.

The discriminatory selection model represented by the Wisconsin penalty enhancement statute and the racial animus model adopted by the FBI — and enacted by such states as Florida, New Hampshire, Pennsylvania, New Jersey, Connecticut, and Maryland — are two distinct models of bias crime laws. The majority of bias crime statutes, however, cannot be unambiguously placed in one category or the other. Of those states that punish bias crimes in a manner distinct from the general punishment of the relevant parallel crime, the majority have employed neither the “intentionally selects” language of Wisconsin nor the “ill will, hatred, or bias due to race” language of New Jersey. California, for example, provides for the enhancement of criminal penalties for certain crimes if the defendant commits the crime “*because of* the [victim’s] race, color, religion, ancestry, national origin, or sexual orientation.”⁷³

Id. at 2-3.

71.

(f) The victim was visiting a neighborhood where previous hate crimes had been committed against other members of his/her racial, religious, ethnic/national origin, or sexual orientation group and where tensions remain high against his/her group.

....

(j) The incident coincided with a holiday relating to, or a date of particular significance to, a racial, religious, ethnic/national origin, handicap, or sexual orientation group (e.g., Martin Luther King Day, Rosh Hashanah, etc.).

(k) The offender was previously involved in a similar hate crime or is a member of a hate group.

Id. at 3.

72. The purpose of the FBI bias crimes reporting regulations is to aid in the identification of criminal acts in which “a bias motive” was a “contributing factor.” The FBI defines *bias* solely in racial animus model terms, as a “preformed negative opinion or attitude toward” the target group. *Id.* at 4. The FBI provides a list of examples to aid in the process of determining whether a bias motive exists — that is, facts that are “supportive of a finding of bias.” *Id.* at 2-3. Thus, even those indicators that are consistent with a discriminatory selection model of bias crimes are relevant under the FBI regulations only for the purpose of recognizing racial animus in the offender.

73. CAL. PENAL CODE § 422.6 (West Supp. 1994) (“[No person may] willfully injure, intimidate, or interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right . . . *because of* the other person’s race, color, religion, ancestry, national

The *because of* or *by reason of* formulation has been adopted in some form by most states with bias crime laws. Many of these states have enacted simple *because of* bias crime statutes. Such statutes require only that the defendant act with the mens rea for the parallel crime and that the crime be committed "because of" the victim's race.⁷⁴ This is also the formulation utilized in federal civil

origin, disability, gender, or sexual orientation." (emphasis added)); CAL. PENAL CODE § 422.7 (West 1991) (providing that punishment for certain racially motivated crimes not otherwise covered by § 422.6 be enhanced over the punishment ordinarily provided for those crimes).

74. See COLO. REV. STAT. § 18-9-121(2) (1993) (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 (emphasis added)); ILL. REV. STAT. ch. 38, para. 12-7.1 (1991) (providing that a person commits a hate crime when, "*by reason of* the race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual," that person commits certain specified crimes) (emphasis added)); IOWA CODE ANN. § 729A.2 (West 1992) (defining a hate 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"); IOWA CODE ANN. § 712.9 (West 1993) (enhancing penalties for hate crimes committed in Iowa); KY. REV. STAT. ANN. § 17.1523 (Michie 1992) (providing for the reporting of bias crimes that appear to be "caused as a result of or reasonably related to race, color, religion, sex, or national origin"); 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"); 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"); MINN. STAT. ANN. § 609.2231(4) (West Supp. 1993) (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"); MONT. CODE ANN. § 45-5-222 (1993) (enhancing sentences for person committing malicious intimidation or harassment); NEV. REV. STAT. § 207.185 (1991) (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"); 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 threatens 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"); OHIO REV. CODE ANN. § 2927.12 (Baldwin 1992) (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"); OR. REV. STAT. § 166.155 (1993) (providing that a person commits "the crime of intimidation

rights crimes statutes.⁷⁵ Other states augment this *because of* element of the bias crime with the additional element of "maliciousness."⁷⁶

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"); 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, or ethnic, animosity"); 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").

75. The recently enacted crime bill directs the U.S. Sentencing Commission to promulgate guidelines enhancing the penalties for federal crimes in which the "defendant intentionally selects a victim . . . because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096.

In addition, there are federal proscriptions against racially motivated criminal interference with certain protected rights and certain racially motivated crimes that are committed under color of law. See Lawrence, *Civil Rights and Criminal Wrongs*, *supra* note 4, at 2116-18 (classifying bias crimes as one of three categories of civil rights crimes, the others being criminal interference with certain protected rights — "rights interference crimes" — and crimes committed under color of law — "official crimes"). Thus, federal law prohibits the use of force or intimidation against a victim because of the victim's race and because the victim is engaged in one of certain enumerated activities, 18 U.S.C. § 245(b)(2) (1988), and also proscribes disparate punishment of persons based on race or national origin, 18 U.S.C. § 242 (1988).

These two federal criminal statutes each use the *because of* formulation in defining the bias element of their respective crimes. See 18 U.S.C. § 242 (1988) (punishing "[w]hoever, under color of any law . . . subjects any inhabitant of any State, Territory, or District . . . to different punishments, pains, or penalties on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens" (emphasis added)); 18 U.S.C. § 245(b) (punishing "[w]hoever . . . willfully injures, intimidates, or interferes with . . . any person *because of* his race, color, religion or national origin and because he is or has been" engaging in one of a number of protected activities, including serving on a state jury, attending public school, or using a public accommodation (emphasis added)).

76. 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 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"); R.I. GEN. LAWS § 11-42-3 (Supp. 1993) (providing that a person commits "[e]thnic or religious intimidation" if that person "threatens any injury to the person, reputation or property of another with the intent to terrorize that person by reason of their race, religion or national origin"); R.I. GEN. LAWS § 11-5-13 (Supp. 1993) (defining a "[f]elony bias-motivated assault" as an "assault or battery . . . committed for the purpose of intimidation because of the victim's gender, race, color, religion, national origin, handicap, or sexual orientation"); S.D. CODIFIED LAWS ANN. § 22-19B-1 (Supp. 1994) (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

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. These statutes make no explicit reference to either animus or discriminatory selection. Yet several observations are possible. The simple *because of* model is most consistent with a discriminatory selection model.⁷⁷ *Because of* language is more typically found in civil statutes than criminal proscriptions and, in the civil rights context, is concerned with an actor's discriminatory choice rather than his reasons for making this choice.⁷⁸ The *because of* formulation that requires maliciousness does suggest a greater concern with the motivation of the offender. Even this formulation, however, is consistent with the discriminatory selection model and has been interpreted in this manner.⁷⁹ But *because of* statutes are also not inconsistent with the racial animus model. These laws do not explicitly refer to the discriminatory selection of a victim and thus permit a court to interpret a mental state requirement that an of-

the acts prohibited"); WASH. REV. CODE § 9A.36.080 (1992) (providing that "[a] person is guilty of malicious harassment if he maliciously and with intent to intimidate or harass another person because of . . . that person's race, color, religion, ancestry, national origin, or . . . handicap . . . [c]auses physical injury to another person . . . [or] places another person in reasonable fear of harm to his person or property . . . [or] [c]auses physical damage to . . . the property of another person").

77. See, e.g., *State v. Plowman*, 838 P.2d 558, 560, 563 (Or. 1992) (construing the phrase "intentionally causes physical injury [to a victim] . . . because of" the victim's race in OR. REV. STAT. § 166.165(1)(a)(A) (1993) as a proscription against targeting a victim on the basis of the victim's race, and stating that "one need not hate at all to commit this crime").

78. In the employment discrimination context, Title VII utilizes a *because of* formulation that in no manner requires racial animus on the part of the employer. Title VII provides, "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual . . . because of such individual's race." 42 U.S.C. § 2000e-2 (1988) (emphasis added). In fact, *because of* under Title VII is sufficiently removed from animus to include acts solely because of their discriminatory impact on a protected class. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that an employer violates Title VII by implementing an employment practice perpetuating past patterns of purposeful discrimination, even if the employer has no present intent to discriminate). Similarly, discriminatory intent for purposes of the Equal Protection Clause should depend on neither animus nor conscious awareness of discrimination. See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 956-59 (1989).

79. The Washington Supreme Court recently construed a *because of* statute that required maliciousness as a discriminatory selection statute. See *State v. Talley*, 858 P.2d 217 (Wash. 1993). The Washington bias crime statute under review in *Talley* provided that a person was guilty of malicious harassment if he caused personal injury or damage to another's property "maliciously and with the intent to intimidate or harass another person because of that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap." WASH. REV. CODE ANN. § 9A.36.080 (West Supp. 1994). The Washington Supreme Court understood the statute to deal strictly with the discriminatory selection of a victim by the offender. It stated that "[t]he statute punishes the selection of the victim, not the reason for the selection. . . . The statute is triggered by victim selection regardless of the actor's motives or beliefs." 858 P.2d at 222.

fender have acted *because of* the race of the victim as a mens rea requirement of racial animus.⁸⁰

Classification of *because of* bias crime statutes is thus made difficult by the fact that these laws are consistent with either the discriminatory selection model or the racial animus model. Moreover, few of these laws have received definitive judicial construction.⁸¹ Thus, these statutes as yet may not be classified as examples of either the discriminatory selection model or the racial animus model.⁸²

There is one additional category of bias crime laws worthy of examination in this discussion of the mental state of the bias crime offender: statutes treating institutional vandalism. Many states have statutes that specifically punish disturbance of religious congregations or defacement and destruction of such institutions as houses of worship, cemeteries, or religious schools.⁸³ Institutional

80. See, e.g., *State v. Wyant*, 597 N.E.2d 450, 453 (Ohio 1992) (construing a penalty enhancement statute using the language "by reason of the race, color, religion, or national origin of another person" as requiring racial animus and stating that "the enhanced penalty results solely from the actor's reason for acting, or his motive" (quoting OHIO REV. CODE ANN. § 2927.12 (Baldwin 1992))).

81. The only state bias crime laws that utilize a *because of* formulation that have been definitively construed by the highest court of that state are those of Ohio, Oregon, and Washington. See *Wyant*, 597 N.E.2d at 453; *Plowman*, 838 P.2d at 563; *Talley*, 858 P.2d at 217.

82. Proponents of bias crime laws, apparently unaware of the potential ambiguity of the language used in bias crime statutes, have shown little interest in resolving the ambiguity. The recently enacted legislation that enhances criminal penalties for bias crimes provides a good example. The legislation, as eventually enacted, uses *because of* language and the discriminatory-selection-model formula. A *hate crime* is defined as "a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096.

By contrast, Senator Diane Feinstein, the chief sponsor of the bill, argued for its passage using language that clearly reflects the racial animus model. She said that "[s]omeone who selects a victim of a crime based on bigotry and hatred, should be subject to the stiffest penalties." 139 CONG. REC. S13176 (daily ed. Oct. 6, 1993) (statement of Sen. Feinstein).

The purpose of the argument in Part III of this article is thus twofold. First, newly enacted bias crime statutes ought to be based upon the racial animus model. Second, judges and prosecutors interpreting statutes that are susceptible of construction in terms of either the discriminatory selection model or the racial animus model ought to adopt the latter. See *infra* Part III.

83. See, e.g., ALA. CODE § 13A-11-12(a)(1) (1994) (providing that a person "commits the crime of desecration of venerated objects if he intentionally desecrates any public monument or structure or place of worship or burial"); ARIZ. REV. STAT. ANN. § 13-1604(A)(1) (1989) (providing that a person "commits aggravated criminal damage by intentionally or recklessly . . . defacing . . . place[s] used for worship or any religious purpose"); GA. CODE ANN. § 16-7-26 (1992) (criminalizing the malicious defacement of "a church, synagogue, or other place of public religious worship"); HAW. REV. STAT. § 711-1107(1)(b) (1994) (criminalizing the desecration of a "place of worship or burial"); LA. REV. STAT. ANN. § 14-225 (West 1986) (criminalizing the knowing defacement of "[a]ny church, synagogue, or other building, structure, or place used for religious worship or other religious purpose"); ME. REV. STAT. ANN. tit. 17-A, § 507 (West 1964) (criminalizing the desecration of "any place of worship or bur-

vandalism statutes do not require animus on the part of the offender, only knowledge that the institution attacked or defaced was in fact one protected by the law. With one exception, these statutes are discriminatory selection model statutes.⁸⁴

The landscape of state bias crime law thus consists of a few statutes falling clearly within the discriminatory selection model or the racial animus model and a substantial number of bias crime laws that are ambiguous as to what they punish. Only one state, Wisconsin, has adopted an explicit discriminatory selection statute governing bias crimes against the person, although virtually all state institutional vandalism laws are of this model. Only five states have explicitly adopted the racial animus model. The balance of states with bias crime laws are not clear as to what models they employ.

Part III of this article returns to the ambiguity created by the two models of bias crimes and the resulting lack of clarity in state bias crime statutes. I argue that the racial animus model is preferable and that states should either abandon discriminatory selection as a model for bias crimes or recognize that cases of discriminatory selection in the absence of racial animus present defendants who are less blameworthy than cases involving criminals who act out of racial animus.

ial"); Miss. CODE ANN. § 97-17-39 (Supp. 1993) (criminalizing the defacement of churches or cemeteries); Miss. CODE ANN. § 97-35-17 (1972) (criminalizing the disturbance of "any congregation of persons lawfully assembled for religious worship"); N.M. STAT. ANN. § 30-15-4 (Michie 1978) (criminalizing the desecration of any place of religious worship); S.C. CODE ANN. § 16-17-520 (Law. Co-op. 1976) (criminalizing the disturbance of "any meeting, society, assembly or congregation convened for the purpose of religious worship"); VA. CODE ANN. § 18.2-423.1 (Michie 1988) (making it "unlawful for any person . . . with the intent of intimidating another person or group of persons, to place or cause to be placed a swastika on any church, synagogue or other building or place used for religious worship"); VA. CODE ANN. § 18.2-423 (Michie 1988) (making it "unlawful for any person . . . with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another").

84. I classify institutional vandalism statutes as discriminatory selection laws because the cases brought under these statutes ordinarily involve an actor who selects his target because of the racial or religious nature of the institution. These laws, however, if strictly read, allow for a finding of guilt based on a much lower showing of culpability by the actor. So long as the actor *knows* that the institution he defaces is a church or synagogue, it matters neither whether he was motivated by religious animus nor whether he selected the institution for that reason. This standard goes beyond not only the racial animus model but the discriminatory selection model as well. As a practical matter, however, knowledge of the religious nature of the institution that is vandalized is deemed to be a surrogate for discriminatory selection of that institution because of its religious identification. So understood, these are discriminatory selection statutes.

There is only one exception to this general rule. The Virginia institutional vandalism statute requires not only that the offender know the nature of the institution that he attacks but also that he act with racial or religious animus. VA. CODE ANN. § 8.01-42.1 (Michie 1992) (providing for action for injunctive relief or civil damages against violence or vandalism "where such acts are motivated by racial, religious, or ethnic animosity").

Before reaching that part of the discussion, I turn to the impact and effect of bias crimes. Section I.B describes the uniqueness of bias crimes. Part II argues that the distinguishing characteristics of bias crimes justify the enhanced punishment of these crimes.

B. *The Outward Manifestations of Bias Crimes:
The Offender's Conduct and the Effect of Bias Crimes*

1. *The General Nature of the Bias Crime and Its
Impact on the Victim*

Recent sociological and criminological research allow us to begin to paint a picture of bias crimes collectively⁸⁵ and to distinguish these crimes from parallel crimes collectively. For the moment, it is helpful to understand these empirical findings, not in terms of any conclusions that might emerge, but in a purely descriptive sense. The normative implications of these descriptive findings will be addressed in Part II.

Bias crimes are far more likely to be violent than are other crimes. This is true on two levels. In the first place, a crime committed with bias motivation is dramatically more likely to be an assault than is a parallel crime.⁸⁶ Secondly, bias-motivated assaults are between two and three times more likely than other assaults to involve physical injury to the victim.⁸⁷ As opposed to the perpetrators of other crimes, perpetrators of bias crimes are more likely to be strangers to their victims, as they have focused *exclusively* on race in selecting the victim.⁸⁸ This fungibility of victims to the bias-

85. The data upon which much of the discussion in this section relies are somewhat limited. Nonetheless, the conclusions that sociologists and criminologists studying bias crimes have drawn to date are consistent and are a very helpful point of departure for present purposes. The mandate of the Hate Crime Statistics Act, 28 U.S.C. § 534 (Supp. V 1993), will hopefully lead to further empirical studies of bias crimes, enhancing the opportunity for meaningful legal analysis in this area. The 1993 bias crimes report by the Federal Bureau of Investigation was based on information submitted by 6850 of the nation's approximately 16,000 law enforcement agencies. Because compliance under the Act is voluntary, the Act's effectiveness as an information-gathering vehicle appears to be extremely limited. See Levin, *supra* note 64, at 171. Although the compliance figures for 1993 represent a dramatic improvement over the 3000 agencies reporting in 1992, they still demonstrate a compliance record of only 41%.

86. See LEVIN & McDEVITT, *supra* note 3, at 11 (noting that while only seven percent of all crimes reported to police involve assaults, approximately half of all bias crimes are assaults); see also Levin, *supra* note 64, at 166.

87. LEVIN & McDEVITT, *supra* note 3, at 11-12.

88. *Id.* at 13 (relying on certain studies to conclude that while approximately 60% of all crimes are committed upon strangers, approximately 85% of the incidents of bias crimes are committed against strangers); see, e.g., Laurie Goodstein, *Black Youth Acquitted in Hasidic Jew's Slaying in Crown Heights Riot*, WASH. POST, Oct. 30, 1992, at A3 (describing how the killing of Yankel Rosenbaum in Crown Heights was committed by a mob looking to exact vengeance against a "Jew" for the accidental vehicular killing of a black child by a Hasidic

motivated criminal is so integral to the bias crime that courts have looked to it as a critical element for identifying bias crimes.⁸⁹ Bias crimes are also distinguishable as a group from parallel crimes based on the number of perpetrators. Bias crimes are significantly more likely than other crimes to be committed by groups and not by individuals.⁹⁰

Bias crimes are also distinct from parallel crimes in terms of their particular emotional and psychological impact on the victim. The victim of a bias crime is not attacked for a random reason — as is the person injured during a shooting spree in a public place — nor is he attacked for an impersonal reason — as is the victim of a mugging for money. Moreover, the bias crime victim cannot reasonably minimize the risks of future attacks because he is unable to change the characteristic that made him a victim.

Bias crimes give rise to a heightened sense of vulnerability beyond that normally found in crime victims. Bias crime victims have been compared to rape victims, in that the physical harm associated with the crime, however great, is less significant than the powerful accompanying emotional sense of violation.⁹¹ The victims of bias crimes thus tend to experience psychological symptoms such as depression or withdrawal, as well as feelings of anxiety and helplessness and a profound sense of isolation.⁹² One study of violence in the workplace found that victims of bias-motivated violence re-

Jew); *The Effects of Hate: A Partial List of Hate Crimes Reported Across the Country in Recent Months*, DET. FREE PRESS, Jan. 18, 1993, at 8A (describing various recent incidents in which only the victim's race seemed important to the criminal, or in which the victim was chosen as a representative of a certain racial group, including the case of a Hispanic man who killed two black men because his ex-girlfriend had dated black men). Even the cross burning in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), was directed not at the victim family qua individuals but rather as an African-American family who had recently moved into the predominantly white neighborhood in St. Paul where the incident took place. See 112 S. Ct. at 2541; David G. Savage, *Hate Crime Law Is Struck Down*, L.A. TIMES, June 23, 1993, at A1.

89. See, e.g., *People v. Baker*, 5 Cal. Rptr. 2d 372, 378-79 (Ct. App. 1994) (relying on the defendant's indifference to the personal selection of the victim as persuasive evidence of bias motivation), *opinion superseded by* 28 Cal. Rptr. 2d 794 (1994).

90. See LEVIN & McDEVITT, *supra* note 3, at 16 (citing crime survey statistics illustrating that while approximately 25% of all crimes are committed by more than one perpetrator, over 60% of bias crimes are committed by more than one perpetrator).

91. See Joan C. Weiss, *Ethnoviolence: Impact Upon and Response of Victims and the Community*, in BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES, *supra* note 3, at 174, 182.

92. See, e.g., Levin, *supra* note 64, at 166; Weiss, *supra* note 91, at 182-83; Melinda Henneberger, *For Bias Crimes, a Double Trauma*, NEWSDAY, Jan. 9, 1992, at 113; N.R. Kleinfeld, *Bias Crimes Hold Steady, But Leave Many Scars*, N.Y. TIMES, Jan. 27, 1992, at A1, B2.

ported a significantly greater level of negative psycho-physiological symptoms than did victims of non-bias-motivated violence.⁹³

The markedly increased symptomatology among bias crime victims exists regardless of the race of the victim. The psychological trauma of being singled out because of one's race exists for white victims as well as for members of minority groups.⁹⁴ This is not to suggest, however, that there is no difference between bias crimes committed by white perpetrators against people of color and bias crimes in which the victim is white, as in *Wisconsin v. Mitchell*.⁹⁵ A difference exists between black and Hispanic victims and white victims concerning a second set of factors — that is, defensive behavioral changes. These data suggest that although bias crimes directed at minority victims do not produce a greater level of psychological damage than those aimed at white victims, they do cause minority bias crime victims to adopt a relatively more defensive behavioral posture than white victims of bias crimes typically adopt.⁹⁶

The additional impact of a bias-motivated attack on a minority victim is not solely due to the fact that the victim was selected because of an immutable characteristic. This much is true for all victims of bias crimes. Rather, the very nature of the bias motivation when directed against minority victims triggers the history and social context of prejudice and prejudicial violence against the victim and his group. The bias component of bias crimes committed against minority group members is not merely prejudice per se but prejudice against a member of a historically oppressed group. In a similar vein, Charles Lawrence, in distinguishing racist speech from otherwise offensive words, described racist speech as words that "evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see."⁹⁷ Minority victims of bias crimes therefore experience the at-

93. Joan C. Weiss et al., *Ethnoviolence at Work*, J. INTERGROUP REL., Winter 1991-92, at 28-29.

94. *Id.* at 29-30. The data collected for the study of bias-motivated violence at work were analyzed by ethnicity. There was no statistically significant difference among whites, blacks, and Hispanics in the average number of psychological symptoms experienced as a result of being the victim of bias-motivated violence. *Id.* at 29. Moreover, the rates of reported "ethnoviolent victimization" between whites and blacks in the study were approximately the same. *Id.* at 23.

95. 113 S. Ct. 2194 (1993).

96. Weiss et al., *supra* note 93, at 29. Included among the several factors used to measure defensive behavior were staying home at night more often, watching children more closely, trying to be "less visible," and moving to another neighborhood. *Id.* at 27-28.

97. Lawrence, *supra* note 7, at 461.

tack as a form of violence that manifests racial stigmatization and its resulting harms.

Stigmatization of this type has been shown to bring about humiliation, isolation, and self-hatred.⁹⁸ An individual who has been racially stigmatized will often be hypersensitive in anticipation of contact with other members of society whom he sees as "normal" and will even suffer a kind of self-doubt that negatively affects his relationships with members of his own group.⁹⁹ The stigmatized individual may experience clinical symptoms such as high blood pressure¹⁰⁰ or increased use of narcotics and alcohol.¹⁰¹ In addition, stigmatization may present itself in such social symptoms as an approach to parenting that undercuts the child's self-esteem and perpetuates an expectation of social failure.¹⁰² All these symptoms may result from the stigmatization that comes even from nonviolent prejudice. Nonviolent prejudice carries with it the clear message that the target and his group are of marginal value and could be subjected to even greater indignities, such as violence that is motivated by the prejudice.¹⁰³ An even more serious presentation of these harms results when the potential for physical harm is realized in the form of the violent prejudice represented by bias crimes.

2. *The Impact of Bias Crimes on the Target Community*

The impact of bias crimes reaches beyond the harm to the immediate victim or victims of the criminal behavior. There is a more widespread impact on the "target community" — that is, the community that shares the race, religion, or ethnicity of the victim — and an even broader-based harm to the general society.

Members of the target community of a bias crime experience that crime in a manner that has no equivalent in the public response to a parallel crime. Not only does the reaction of the target com-

98. Delgado, *supra* note 6, at 136-37.

99. See, e.g., ALLPORT, *supra* note 2, at 150-53; ERVING GOFFMAN, STIGMA 7-17, 130-35 (1963); ROBERT M. PAGE, STIGMA 1-24 (1984); Harold W. Stevenson & Edward C. Stewart, *A Developmental Study of Racial Awareness in Young Children*, 29 CHILD DEV. 399, 408 (1958).

100. See Ernest Harburg et al., *Socio-Ecological Stress, Suppressed Hostility, Skin Color, and Black-White Male Blood Pressure: Detroit*, 35 PSYCHOSOMATIC MED. 276, 277-78, 290-93 (1973).

101. See KENNETH CLARK, DARK GHETTO 90-97 (1965).

102. See IRWIN KATZ, STIGMA: A SOCIAL PSYCHOLOGICAL ANALYSIS 102-17 (1981); HARRY H.L. KITANO, RACE RELATIONS 125-26 (1974); Ari Kiev, *Psychiatric Disorders in Minority Groups*, in PSYCHOLOGY AND RACE 416, 420-22 (Peter Watson ed., 1973).

103. Cf. ALLPORT, *supra* note 2, at 57-59 (discussing the progression of prejudicial action from "antilocution" to discrimination to violence).

munity go beyond mere sympathy with the immediate bias crime victim, but it exceeds empathy as well.¹⁰⁴ Members of the target community of a bias crime perceive that crime as if it were an attack on themselves directly and individually. Consider the burning of a cross on the lawn of an African-American family or the spraypainting of swastikas and hateful graffiti on the home of a Jewish family. Others might associate themselves with the injuries to these families, experience feelings of anger or hurt, and thus sympathize with the victims. Still others might find that these crimes trigger feelings similar to the sense of victimization and attack felt by victims and thus empathize with the victims. The reactions of members of the target community, however, will transcend both empathy and sympathy. Members of the target community experience reactions of actual threat and attack from this very event. Bias crimes spread fear and intimidation beyond the immediate victims and their friends and families to those who share only racial characteristics with the victims.¹⁰⁵ This additional harm of a personalized threat felt by persons other than the immediate victims of the bias crime differentiates a bias crime from a parallel crime and makes the former more harmful to society.

This sense of victimization on the part of the target community leads to yet another social harm uniquely caused by bias crimes: the target community's response of fear, apprehension, and anger may be directed at the group with which the immediate offenders are, rightfully or wrongfully, identified.¹⁰⁶ In addition to generating the generalized concern and anger over lawlessness and the perceived ineffectuality of law enforcement that often follows a parallel crime, a single bias crime may ignite intercommunity tensions that may be of high intensity and of long-standing duration.¹⁰⁷

104. See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 221 (1990) (highlighting the importance of empathy in combating discrimination in the United States).

105. See, e.g., ANDREW KARMEN, *CRIME VICTIMS* 262-63 (2d ed. 1990); LEVIN & McDEVITT, *supra* note 3, at 234; Kelly et al., *supra* note 3, at 26; Matsuda, *supra* note 6, at 2330-31; cf. ROBERT ELIAS, *THE POLITICS OF VICTIMIZATION* 118 (1986) (discussing the feelings of fear that violent nonbias crimes cause nonvictims to experience).

106. Compare the situations in which groups are rightfully identified with the immediate offenders (for example, the association of a bias crime offender who is a member of a skin-head organization with other members of that organization) with situations in which the identification between group and offender is mistaken (for example, the association of the those who killed Yankel Rosenbaum with the Crown Heights black community or of those who killed Yusef Hawkins with the Bensonhurst white community).

107. Kelly et al., *supra* note 3, at 26. The Crown Heights riots exemplify how the mere perception of a bias crime can lead to violence between racial groups. See, e.g., Lynne Duke, *Racial Violence Flares for 3rd Day in Brooklyn*, WASH. POST, Aug. 22, 1991, at A4 (describing how racial tensions from the vehicular killing of a black child led to riots in Crown Heights).

3. *The Impact of Bias Crimes on Society as a Whole*

Finally, the impact of bias crimes may spread well beyond the immediate victims and the target community to the general society. This effect includes a large array of harms from the very concrete to the most abstract. On the most mundane — but by no means least damaging — level, the isolation effects discussed above¹⁰⁸ have a cumulative effect throughout a community. Consider a family, victimized by an act of bias-motivated vandalism, which then begins to withdraw from society generally; the family members seek safety from an unknown assailant who, having sought them out because of an immutable characteristic, might well do so again. Members of the community, even those who are sympathetic to the plight of the victim family and who have been supportive of them, may be reluctant to place themselves in harm's way and will shy away from socializing with these victims or having their children do so. The isolation of this family will not be solely due to their act of withdrawal; there is a societal act of isolation as well that injures both the family that is cut off and the community at large.¹⁰⁹

Bias crimes cause an even broader injury to the general community. Such crimes violate not only society's general concern for the security of its members and their property but also the shared values of equality among its citizens and racial and religious harmony in a heterogeneous society. A bias crime is therefore a profound violation of the egalitarian ideal and the antidiscrimination principle that have become fundamental not only to the American legal system but to American culture as well.¹¹⁰

This harm is, of course, highly contextual. We could imagine a society in which racial motivation for a crime would implicate no greater value than the motivation of dislike.¹¹¹ But that is not our society. Bias crimes implicate a social history of prejudice, discrimi-

between blacks and Jews); *Crown Heights: The voices of hate must not prevail*, DET. FREE PRESS, Aug. 25, 1991, at 2F (reporting that violence erupted between the black and Jewish communities after the accidental killing of a black child by a Hasidic Jew).

108. See *supra* text accompanying notes 98-99.

109. Weiss, *supra* note 91, at 183.

110. See, e.g., Delgado, *supra* note 6, at 140-41. See generally Paul Brest, *The Supreme Court, 1975 Term — Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

111. It is not easy to imagine such a society, but it is possible. In the 1930s anthropologist Ethel John Lindgren reported findings about the Tungus and the Cossacks who, although racially and culturally distinct, lived in close proximity without conflict. See KITANO, *supra* note 102, at 100-01. Although the Tungus were Mongolian nomads and the Cossacks were Caucasoid Christian village-dwellers, neither group believed itself to be racially superior. Although their cultural practices remained distinct, the two groups maintained supplementary and complementary relations. *Id.*

nation, and even oppression. As such, they cause a greater harm than parallel crimes to the immediate victim of the crime, the target community of the crime, and to the general society.

II. THE ENHANCED PUNISHMENT OF BIAS CRIMES

An analysis of any issue of criminal law, particularly of one that proposes the imposition of criminal punishment, must confront two critical requirements of just punishment: (i) only the guilty should be punished, and (ii) the punishment of the guilty should be proportional to the crime committed.¹¹² The balance of this article takes up these requirements for the punishment of bias crimes in reverse order.

This Part argues that bias crimes ought to receive punishment that is more severe than that imposed for parallel crimes. Section II.A explores the proportionality requirement in depth and demonstrates that some level of fit between the seriousness of a crime and the harshness of the criminal penalty is essential to modern theories of punishment. Section II.B turns to the means by which the harm and thus the seriousness of a crime may be measured. Finally, section II.C applies the theories of proportionality and harm that have been developed to the context of bias crimes. This Part concludes that the harmful consequences particular to bias crimes warrant their enhanced punishment.

A. *The Proportionality Between the Seriousness of the Crime and the Harshness of the Criminal Punishment*

The relevance of the resulting harms caused by bias crimes to the punishment of those crimes springs from the requirement of proportionality between crime and punishment. Most punishment theorists accept and indeed defend this doctrine. I begin this discussion with an analysis of the traditional defense of proportionality associated with retributivists and then proceed to show that utilitarians as well as modern eclectic punishment theories embrace the

We may hypothesize that an assault committed by a Cossack against a Tungus out of bias against the Tungus race would cause no greater injury to the victim, to the Tungus community generally, or to the entire society than a simple assault would cause. The animus against the Tungus held by this individual Cossack would represent only an individual, abnormal psychological profile. It would not implicate a broad and deep fabric of racial and ethnic prejudice that such acts implicate in our society.

112. See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 6.3.2, at 415-16 (1978) (criticizing social protection as a justification for punishment for its tendency to suppress these "two important principles of justice").

proportionality requirement. I then apply these views of proportionality to the context of bias crimes.

Retribution theory justifies proportionality as inherent in the very nature of punishment. For the retributivist, the offender deserves punishment because he has violated the norms of society imbedded in the criminal law. The sheer fact that the defendant deserves to be punished — not social utility — justifies the punishment.¹¹³ Retributivists do not agree on a single basis for this “desert,” and it is from the various answers to this inquiry that different strands of retributive thought emerge.

The simplest form of retribution theory is vengeance: the criminal has harmed society and therefore he deserves to be harmed by society.¹¹⁴ More sophisticated theories of retributive punishment look in two directions for a foundational concept of desert. One theory, following Hegel, grounds punishment in the offender's *right* to be punished. Through punishment of a crime, society demonstrates its respect for the criminal; a criminal's fundamental right to be treated as an autonomous human being requires punishment for his choice to violate the law.¹¹⁵ The other strand of retributive thought focuses on the offender's obligation to pay the proverbial “debt” he owes to society as a result of his criminal activity.¹¹⁶ A civilized society requires a legal system that confers substantial benefits on its citizens in return for their adherence to the rules of the

113. Jeffrie Murphy provides the following terse and insightful definition of the retributive theory of punishment: “[S]peaking very generally, [retribution] is a theory that seeks to justify punishment, not in terms of social utility, but in terms of *this* cluster of moral concepts: rights, desert, merit, moral responsibility, justice, and respect for moral autonomy.” JEFFRIE G. MURPHY, *Retribution, Moral Education, and the Liberal State*, in *RETRIBUTION RECONSIDERED* 15, 21 (1992).

114. See, e.g., JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 2.03, at 7 (1987) (stating that some retributivists argue that it is not only justified to punish the offender but “necessary to ‘hurt him back’” because he has harmed society). George Fletcher has criticized this view of retribution as overly simplistic in a striking phrase: “[Retribution] is obviously not to be identified with vengeance or revenge, any more than love is to be identified with lust.” FLETCHER, *supra* note 112, § 6.3.2, at 417.

115. For expositions of this theory, see G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 70-71 (T.M. Knox trans., Clarendon Press 1942) (1821); Joshua Dressler, *Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endangered Doctrines*, 34 Sw. L.J. 1063, 1073-81 (1981); Margaret Radin, *Cruel Punishment and Respect for Persons*, 53 S. CAL. L. REV. 1143, 1164-70 (1980).

116. The classic statement of the debt metaphor as a justification for punishment is that of Immanuel Kant. See IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 101-08 (John Ladd trans., 1965) (1797). For contemporary expositions of this strand of retributive punishment theory, see FLETCHER, *supra* note 112, § 6.3.2, at 417-18; Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475, 478-79 (1968), reprinted in HERBERT MORRIS, *ON GUILT AND INNOCENCE* 34-35 (1976); MURPHY, *supra* note 113, at 23-24; cf. John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW & PHILOSOPHY* 3, 3-18 (Sidney Hook ed., 1964).

system. When a member of that society breaks the law, he incurs a debt to society because, having enjoyed the benefits of the legal system, he has not accepted its burdens. The criminal's rejection of the burden of abiding by the law establishes a debt that he now owes. This debt is "paid" through punishment.

A common ground shared by all forms of retributive thought — simple vengeance, personhood-based,¹¹⁷ and debt-based retribution — concerns the level of appropriate punishment. Punishment, to be morally justifiable, must be proportional to the crime for which it is imposed.¹¹⁸ This conception of proportionality need not mean a mechanical application of *jus talionis* requiring that the punishment of the offender be identical to the crime he committed.¹¹⁹ The minimum requirement for proportionality of punishment under a retributive theory is that the punishment for a particular crime, when placed along the spectrum of all criminal punishments, stands at the same point as that occupied by the crime in the spectrum of all crimes.¹²⁰ This requirement is essential under both debt-based and personhood-based retribution. Proportional punishment satisfies the offender's debt under a debt-based notion of retribution because the offender has been required to "pay" the relative amount of punishment that corresponds to the relative amount of harm that he caused society. Under personhood-based retribution, proportional punishment recognizes the legitimate rights of both wrongdoer and offended party because it is geared to the relative harm done to the victim and caused by the offender.

Proportionality of crime and punishment is not the unique province of retributive punishment theorists. Most utilitarians also em-

117. See Radin, *supra* note 115, at 1164-69 (terming personhood-based retribution "protective retribution" for its foundation in protecting the integrity and autonomy of the individual).

118. FLETCHER, *supra* note 112, § 6.3.2, at 416-17; KANT, *supra* note 116, at 131-33; J.D. Mabbott, *Punishment*, in *THE PHILOSOPHY OF PUNISHMENT* 39 (H.B. Acton ed., 1969); George Schedler, *Retributive Punishment and the Fall of Satan*, 30 AM. J. JURIS. 137, 157-59 (1985).

119. See H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 161 (1968). *Jus talionis* will often lead to immoral results. Although reasonable people disagree as to the morality of executing the murderer, most if not all would regard the suggestion of raping the rapist to be immoral. In other instances, it is impossible to attain identity of crime and punishment. An adult, for example, cannot be subjected to identical punishment for child abuse. Finally, literal *jus talionis* will often be highly speculative at best. How do we know all of the damage suffered by a crime victim, physical and psychological, and how would we create an identical harm to the offender? See JEFFRIE G. MURPHY, *Does Kant Have a Theory of Punishment?*, in *RETRIBUTION RECONSIDERED*, *supra* note 113, at 31, 58-59.

120. See, e.g., MICHAEL DAVIS, *How to Make the Punishment Fit the Crime*, in *TO MAKE THE PUNISHMENT FIT THE CRIME* 69, 77-83 (1992); MURPHY, *supra* note 119, at 58-60; Mabbott, *supra* note 118, at 49-50.

brace some concept of proportionality in their justification for criminal punishment. In the simplest utilitarian model, punishment for a category of crimes must be set at a level sufficient to deter the commission of those crimes.¹²¹ This concept of proportionality, however, is wholly extrinsic to the nature of the crime committed. Utilitarian punishment turns on the temptation of future criminal activity. The problems that such a wooden utilitarian theory presents are apparent. Fixing punishment at the minimum level necessary to deter the offender from further criminal behavior could lead to shockingly disproportionate penalties. Herbert Packer warned of a theory of punishment under which "the violent psychopath and the incorrigible writer of bad checks might find themselves side by side in lifelong detention."¹²²

This concern that a simplistic formula would lead to results far removed from widely shared intuitions about appropriate levels of punishment or, at least, ranges of punishment, led to efforts among utilitarian punishment theorists to find a means of importing a concept of proportionality. Like retributivists, they sought to ground proportionality in the gravity of the crime, but they sought to do so without reliance upon retributive argument.

Alfred Ewing, for example, argued that ideas of "proportion between guilt and penalty[] are too deeply rooted in our ethical thought to be dismissed lightly, however hard they may be to rationali[z]e."¹²³ He located proportionality in the educative aspect of criminal punishment. This educative role of punishment was an extension of traditional deterrence theory. The total utilitarian benefit achieved through punishment was not restricted to the specific deterrence of the offender himself, or even to the general de-

121. See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 178-188 (Oxford, Clarendon Press 1879) (1823).

122. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 140 (1968). A framework for punishment concerned solely with the likelihood of the offender to commit future crimes would look only to the minimum amount of punishment necessary to attain rehabilitation or specific deterrence of the offender. In certain instances, this will yield highly problematic results that most theorists would be unwilling to embrace. Because the goal is solely the deterrence of future criminal behavior, the level of punishment will be keyed only to the strength of the offender's disposition to commit crimes and not to the nature of the crimes. See also IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 37-38 (1989).

123. A.C. EWING, THE MORALITY OF PUNISHMENT 45 (1929). Ewing sought to justify by utilitarian means those notions of desert and proportionality previously associated only with retribution. He sought to reach these results "without the *prima facie* irrationality" of retributive theory. *Id.* at 100. Unlike other utilitarian punishment theorists of the period, such as Hastings Rashdall, John McTaggart, T.H. Green, and Bernard Bosanquet, Ewing saw utilitarianism as requiring an account of the deeply held intuitive notion of desert and of "justice as a good-in-itself," *id.* at 45, and he expressly set out to provide such an account. See ALAN W. NORRIE, LAW, IDEOLOGY AND PUNISHMENT 121-25 (1991).

terrence of potential wrongdoers. Rather, the benefit included the general moral education of society.¹²⁴

In his explanation of the educative effect of punishment, Ewing sought to find a utilitarian grounding for the general concepts of desert and proportionality. As to desert, the moral education of society depends on the punishment of those who are guilty of wrongdoing:

The moral object of a punishment as such is to make people think of a certain kind of act as very bad, but, if it were inflicted otherwise than for a bad act, it would either produce no effect of this sort at all or cause people to think an act bad which was not really bad, and this is why we must first of all ask — is a punishment just?¹²⁵

Ewing's theory also grounds the requirement of proportionality between crime and punishment in the educative role of punishment. For Ewing, punishment must do more than provide a crude moral education that bifurcates all conduct into the good and the bad. Punishment must also teach the relative seriousness of various forms of impermissible conduct. The criminal law should "compare the degrees of badness presupposed on the average by different off[s]es, and, having done that, [] can lay down the principle that a lesser off[s]e should not be punished so severely as a greater one."¹²⁶

Ewing's goal — to establish both desert and proportionality without reference to retributive argument — was not fully achieved. His theory remained susceptible to critique from the standard, and most telling, argument against pure utilitarian theories of punishment. Theoretically, moral education could be achieved through the punishment of the wholly innocent. As long as the authorities concealed the fact of a defendant's innocence, the punishment of the innocent person might have a strong educative effect.¹²⁷ The utilitarian rejoinder to this critique is that the educative effect of punishment is, by definition, served only by the punishment of the guilty; punishment of the innocent fails to impart the proper moral education.¹²⁸ The flaw in this rejoinder is that it confuses punishment and publicity. Punishment itself neither deters nor educates beyond the defendant himself. As Mabbott wrote, "A

124. See PRIMORATZ, *supra* note 122, at 115-17.

125. EWING, *supra* note 123, at 104.

126. *Id.* at 106.

127. See NORRIE, *supra* note 123, at 123-25; Mabbott, *supra* note 118, at 152-54.

128. This is the response mounted by Ewing himself. See EWING, *supra* note 123, at 91. For a contemporary statement of this argument, see Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 228-29 (1984).

judge sentences a man to three years' imprisonment not to three years *plus* three columns in the press."¹²⁹ General moral education, like general deterrence, turns on publication of the punishment. So long as the publication excludes reference to the innocence of the defendant, it will achieve Ewing's educative purpose.

Ewing's theories, however, set the stage for much of the debate over the justification for punishment.¹³⁰ What Ewing sought to do solely within a utilitarian framework has been better accomplished by those developing "mixed theories" of punishment, drawing on aspects of both utilitarian and retributivist thought. These eclectic approaches embrace proportionality of punishment and guilt, not as a theory that serves to justify punishment in its own right, but rather as a limiting principle of a justification for the imposition of criminal punishment. Two prominent illustrative examples will suffice.

Hart's distinction between the "General Justifying Aim" for punishment and the limiting principles governing the "Distribution" of punishment allows a significant role for proportionality.¹³¹ Lengthy sentences for minor crimes might be effective to deter the commission of such crimes, but, for Hart, it is "wrong to employ them."¹³² Such sentences are wrong neither because of the retributive reason that there is a "penalty 'naturally' fitted to [the crime's] degree of iniquity"¹³³ nor because of the traditional utilitarian reason that the imposition of such a sentence would impose a greater cost on the offender than benefit to the society.¹³⁴ Rather, "[t]he guiding principle is that of a proportion within a system of penalties between those imposed for different offenses where these have a distinct place in a commonsense scale of gravity."¹³⁵ This "commonsense scale" is a central aspect of Hart's synthesis of utilitarian and retributive theories. Hart relies on "very broad judgments both of relative moral iniquity and harmfulness of different types of offense."¹³⁶ Without the conformity of punishment to such a scale, common morality may be confused or the law may be held in contempt.¹³⁷

129. Mabbott, *supra* note 118, at 40.

130. See, e.g., NORRIE, *supra* note 123, at 121-25.

131. See HART, *supra* note 119, at 8-24.

132. *Id.* at 24-25.

133. *Id.* at 25.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

Packer also embraces a critical role for proportionality between crime and punishment. Packer's "integrated theory of punishment" places proportionality as one of the issues of the minimal doctrinal content of criminal law.¹³⁸ Packer writes, "It is inescapable . . . that some offenses are to be taken more seriously than others and that the severity of the available punishment should be proportioned to the seriousness with which the offense is viewed."¹³⁹

Proportionality is a key element of the justifications for punishment. Whether through the retributive argument in its Kantian and Hegelian roots and modern interpretations, through the position advanced by such utilitarian theorists as Ewing, or through the contemporary eclectic theorists, it is, as Packer said, "inescapable" that some crimes are worse than others and must be punished more severely as a result. Before this understanding of proportionality may be brought to bear on the ultimate question of the present project — the punishment of bias crimes — the question of what it means for one crime to be "worse" than another deserves further attention.

B. *Evaluating the Seriousness of Crimes: Considering Culpability and Measuring Harms*

Two elements of a crime describe its seriousness: the culpability of the offender¹⁴⁰ and the harm caused to society.¹⁴¹ Murder, for example, is a more serious crime than intentional assault because of the harm caused. Although the offender acts willfully in both instances, the murder victim is dead, whereas the assault victim is only injured. Murder is also a more serious crime than an accidental killing because of the difference in the actors' culpability. Although a death results in each case, the murderer acts willfully, whereas the accidental killer acts without intent.

Much has been said about the role of culpability in the assessment of the seriousness of a crime. Most of the study and articula-

138. PACKER, *supra* note 122, at 62-70, 139-45.

139. *Id.* at 143. Why an offense might be taken more seriously can be a matter of a retributive assessment of wrongdoing or a utilitarian measure of potential social damage. For Packer, "[t]he point is that different offenses are perceived differentially regardless of *why* they are perceived differently." *Id.* at 144.

140. I follow the Model Penal Code in using *culpability* as a descriptive term meaning state of mind. See MODEL PENAL CODE § 2.02(2) (1962) (defining the culpability categories of "purposely," "knowingly," "recklessly," and "negligently"). I use the term *mens rea*, on the other hand, as a normative term, arising out of assessment of blame or wrongdoing. See FLETCHER, *supra* note 112, § 6.2.1, at 398-401 (discussing normative and descriptive usages of *mens rea*).

141. See, e.g., ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 64-67 (1985).

tion of modern criminal law has been toward a focus on the state of mind or culpability of the accused. This focus does not mean that the results of the conduct are unimportant. Rather, punishment under the criminal law, whether based on a retributive or consequentialist argument, is critically linked to the actor's mental state.¹⁴²

Culpability and its impact on the seriousness of a particular crime emerge directly from substantive criminal law.¹⁴³ In extreme terms, culpability is necessary at some level for guilt at all. The utter absence of culpability negates the possibility of guilt.¹⁴⁴ We can also draw much finer distinctions about culpability from existing criminal law doctrine. Culpability provides the general organizing mechanism within which the Model Penal Code assigns levels of punishment. For most crimes under the Code, purposeful

142. The focus on culpability is consistent with punishment that is grounded either in the retributive goal of meting out just deserts or in the utilitarian goal of reducing criminal conduct. See HART, *supra* note 119, at 26-27 (recognizing that specific and general deterrence, rehabilitation, and incapacitation all serve the goal of reducing criminal conduct).

Nowhere is the centrality of the accused's mental state to crime reduction theory more clearly visible than in the influential Model Penal Code. The Code's organizing principle is culpability, and the grading of offenses is based upon the defendant's culpability as to each element of the crime. See, e.g., MODEL PENAL CODE § 210 (1962) (prescribing that grades of criminal homicide are determined by the culpability of the accused). Moreover, except in the case of capital crimes or first-degree felonies, the Code prescribes the same punishment for the crimes of attempt, solicitation, and conspiracy as for the crime attempted or solicited or that is the object of the conspiracy. MODEL PENAL CODE § 5.05(1) (1962). Thus, the Code is a marked departure from the common law, under which inchoate crimes are punished less severely than the target offense. See DRESSLER, *supra* note 114, §§ 27.02, 27.09, at 331, 363; see also Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725 (1988). See generally HART, *supra* note 119, at 1-27; PACKER, *supra* note 122, at 100-02.

Retribution theory also centers on the culpability of the individual. This is most readily apparent in the form of retributive theory that justifies punishment based on the incorrect moral choice made by the individual to do wrong. See KANT, *supra* note 116, at 100. Culpability is of equal import to those retributivists who are primarily concerned with consequences. Herbert Morris, for example, has argued that the accused's duty to suffer punishment flows both from his moral choice and the consequences of his conduct. See MORRIS, *supra* note 116, at 34-36; see also FLETCHER, *supra* note 112, § 6.6.5, at 472-83 (discussing the relationship between wrongdoing and the consequent harm). That results are relevant to some retributivists does not negate the critical role of individual choice that underpins any deontological theory of punishment. Choice can be understood only in the context of culpability.

143. My colleague Ken Simons has provided a thorough restatement and critique of the treatment of culpability in the substantive criminal law and its role in establishing the seriousness of various crimes. See Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992).

144. This is to be distinguished from strict liability crimes, which do not require culpability. A defendant is not *guilty* of a strict liability crime. Rather, the defendant has violated the strictures of such a crime. Similarly, there is not "punishment" for strict liability crimes in the same sense that there is punishment for other crimes, and that is precisely because of the absence of criminal culpability. See, e.g., MODEL PENAL CODE §§ 1.04(5), 2.05 (1962) (providing that strict liability is sufficient for conviction of only "violations" that do not carry criminal punishment *per se*).

or knowing conduct warrants a more severe penalty than does reckless conduct; recklessness itself gives rise to harsher punishment than that corresponding to negligent criminal behavior.¹⁴⁵ Moreover, the doctrines relating to excuse generally, and to provocation or diminished capacity in particular, are premised upon the relationship between the offender's culpability and the seriousness of his crime.¹⁴⁶

In contrast to this doctrinally and theoretically well-developed understanding of the relationship between culpability and the level of punishment, the role of harm in assessing this relationship has been largely unexplored. This gap is surprising because the intuitive case for harm as a key component in assessing a crime's seriousness is at least as strong as it is for culpability.

The intuitive claim is most evident in the relative treatment of homicide and attempted homicide. Society punishes a successful murderer with greater severity than an unsuccessful, would-be murderer, even if the latter fails to kill his victim for reasons wholly extrinsic to his own efforts — for example, the unforeseeable weapon malfunction. From a culpability standpoint, the successful and would-be murderers are the same, yet their punishments differ.¹⁴⁷ The same point may be illustrated at the lower end of the homicide scale. Reckless conduct — that is, reckless risk creation — resulting in death constitutes the felony of manslaughter.¹⁴⁸ If the identical conduct with the identical culpability does not result in death, however, the actor is guilty of a far lesser crime, often only

145. See, e.g., MODEL PENAL CODE § 2.02(2) (1962) (defining the culpability categories of "purposely," "knowingly," "recklessly," and "negligently"); MODEL PENAL CODE § 210.1-4 (1962) (prescribing grades of criminal homicide determined by the culpability of the accused).

146. See FLETCHER, *supra* note 112, § 6.6.2, at 461-63 (noting that excuse doctrines are premised upon the understanding that "[l]esser culpability justifies a mitigated punishment"); Martin Wasik, *Excuses at the Sentencing Stage*, 1983 CRIM. L. REV. 450.

147. See generally FLETCHER, *supra* note 112, § 4.1, at 240-42 (noting that courts could theoretically refrain from using harm as a factor bearing on the gravity of the offense). As mentioned above, see *supra* note 142, the Model Penal Code ordinarily treats attempts the same as completed crimes for purposes of punishment. See MODEL PENAL CODE § 5.05(1) (1962) (prescribing the same punishment for the crimes of attempt, solicitation, and conspiracy as for the crime attempted or solicited or that is the object of the conspiracy); see also Ashworth, *supra* note 142, at 738 (discussing whether the Model Penal Code is correct in treating attempts as equivalent in grade to the offense attempted). The only exception to this general rule is for first-degree felonies: the attempt or solicitation or conspiracy to commit a first-degree felony is reduced to a second-degree felony. See MODEL PENAL CODE § 5.05(1) (1962).

148. The Model Penal Code defines criminal homicide as purposely, knowingly, recklessly or negligently causing the death of another. See MODEL PENAL CODE § 210.1(1) (1962). Criminal homicide that is committed recklessly constitutes manslaughter. MODEL PENAL CODE § 210.3(1)(a) (1962).

a misdemeanor such as the Model Penal Code's "reckless endangerment."¹⁴⁹

Homicide doctrine alone, however, is of limited value in illuminating the role of harm in punishment law. In many ways, homicide is a unique crime.¹⁵⁰ All that we can learn from homicide doctrine in this context is that at the extreme end of all crimes — the taking of a human life — it matters greatly whether or not someone actually dies. For a theory of harm useful across a broader range of crimes, one must reason from first principles.

Two initial propositions inform the evaluation of relative harms. First, the kind of harms that we wish to measure cannot be restricted to the individualized reactions of particular victims. Because the purpose of gauging harms here is to inform the criminal law, the weighing process must entail a large aspect of aggregation. Second, the relative harms caused by various crimes need not be universal and will often be contextual to a particular society. Although most societies will consider murder worse than assault, the relative harms caused by trespass, theft, and simple assault may vary with a culture's valuation of private property and physical integrity.

The calculus of harms may proceed from either an *ex ante* or *ex post* point of view. The *ex ante* analysis ranks the harms that result from various crimes in terms of the relative risk preferences of a rational person.¹⁵¹ The least harmful crime of all is the one that the rational person would risk, given a choice between risking this crime and any other crime. The same process of analysis may then

149. See MODEL PENAL CODE § 211.2 (1962) (providing that recklessly causing a risk of death to another is a misdemeanor). Several states have adopted this approach to the punishment of reckless endangerment. Compare, e.g., ALASKA STAT. § 11.41.250(b) (1989) (making reckless endangerment a class A misdemeanor) with ALASKA STAT. § 11.41.120 (1993) (making manslaughter a class A felony); ARIZONA REV. STAT. ANN. § 13-1201 (1989) (making reckless endangerment class 1 misdemeanor or, if there was a substantial risk of imminent death, a class 6 felony) with ARIZONA REV. STAT. ANN. § 13-1103 (West Supp. 1993) (making manslaughter a class 2 felony); CONN. GEN. STAT. ANN. § 53a-63 (West 1985) (making reckless endangerment class A misdemeanor) with CONN. GEN. STAT. § 53a-55 (1993) (making first-degree manslaughter a class B felony).

Some states grade reckless endangerment as a felony, but in no jurisdiction is it graded as seriously as manslaughter. Compare, e.g., N.Y. PENAL LAW § 120.25 (McKinney 1987) (making first-degree reckless endangerment a class D felony) with N.Y. PENAL LAW § 125.20 (McKinney 1994) (making first-degree manslaughter a class B felony); WIS. STAT. § 941.30 (1991-92) (making first-degree reckless endangerment a class D felony) with WIS. STAT. § 940.06 (1991-92) (making reckless homicide a class C felony).

150. For a full analysis of the innumerable unique issues in the criminal law raised by the crime of homicide, see FLETCHER, *supra* note 112, §§ 4.1-5.3, at 235-390.

151. Mabbott proposes an analogous approach to evaluating the relative harms caused by various crimes. See Mabbott, *supra* note 118, at 162. For a more recent exposition of the *ex ante* evaluation of relative harms, see DAVIS, *supra* note 120, at 80-81.

be brought to bear on all remaining crimes to produce the next-to-least harmful crime.¹⁵² Once every crime has been considered, a rough ranking will exist of crimes from the least to the most harmful.

This process produces only a rough ranking because there are several necessary qualifications. The first qualification stems from the first general proposition discussed above.¹⁵³ The aggregation of harm assessments of all rational actors in a society renders it impossible to create a strict ranking of all harms in a numerical order. The first qualification, therefore, is that the ranking of crimes by harm caused produces not a strict numerical ranking but a series of groupings of crimes, and these groupings may be small in number. This small number of groupings is not, however, problematic for our project. The purpose of assessing relative harms is to give content to the goal of assigning punishment based on the seriousness of the crime. A small number of "harm levels" correlates with the similarly small number of discrete crime levels that most jurisdictions maintain.¹⁵⁴

The second qualification to the *ex ante* ranking of crimes by harm stems from the difficulty in comparing unlike harms. It is one thing to say with some confidence that the rational person would risk suffering a petit larceny before risking grand larceny and therefore the harm of the former is less than the harm of the latter. It is quite another to ascertain the rational person's choice between the theft of a substantial sum of money and a fraud causing an approximately equivalent loss. This qualification also finds its solution in the small number of harm groupings. For example, in ranking fraud, theft, assault, and petty theft, a rational person would probably think the following:

- (i) The fraud and the theft represent roughly the same risk level and therefore ought to be grouped together for purposes of assessing the harm resulting from these crimes;

152. Professor Davis describes this analysis with the following formula:

The least crime is the one a rational person would prefer to risk (all else equal) given a choice between risking it and risking any other of that type; the next least is the one a rational person would prefer to risk given a choice between it and any other of that type except the least; and so on.

DAVIS, *supra* note 120, at 80.

153. Although each crime causes a unique harm to its victim, our purpose is not to measure these individual subjective assessments of harm but rather to probe for an aggregated, societal assessment of the harm associated with the commission of a crime. See text accompanying notes 150-51.

154. The Model Penal Code, for example, provides for only six levels of crimes: felonies of the first, second, and third degree, misdemeanors, petty misdemeanors, and violations. See MODEL PENAL CODE §§ 1.04, 6.01 (1962).

- (ii) I would risk either fraud or theft of a substantial sum of money before risking assault with a deadly weapon;
- (iii) I would risk neither fraud nor theft of a substantial sum of money before risking a petty theft.

Relative harms may also be assessed through an ex post analysis that focuses on the nature of the resulting harm. This analysis seeks to rank crimes according to what the victim has lost as a result of the crime. Professors von Hirsch and Jareborg have proposed measuring harm in this manner through reference to a "living standard analysis."¹⁵⁵

To understand the concept of living standard analysis, it is initially helpful to understand what the "living standard" is not. First, it is not limited to issues of relative economic affluence, as in the traditional meaning of *standard of living* in economic literature.¹⁵⁶ Von Hirsch and Jareborg adopt a broader meaning, developed by Amartya Sen, that encompasses not only economic abilities but economic and noneconomic factors, all of which bear on a total sense of a person's well-being.¹⁵⁷ Second, the living standard is not limited to those issues that affect an individual's ability to make choices about his life.¹⁵⁸ A broad conception of living standard captures the nature of certain harms — for example, serious bodily injury — through which the victim loses more than the ability to make life choices.

Harm, as measured by loss or negative impact upon living standard, becomes a far-reaching concept that draws upon our assessment of what it means to live a good life — a key question raised both in everyday life and complex social inquiry.¹⁵⁹ This measuring device allows for a meaningful comparison of harms based on the interests implicated by a particular crime. Reckless driving and aggravated assault might produce the same physical injury to a victim,

155. Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1 (1991).

156. See, e.g., WILLARD W. COCHRANE & CAROLYN SHAW BELL, *THE ECONOMICS OF CONSUMPTION* 17 (1956) (defining *standard of living* as the list of goods, services, and conditions the individual strives to attain); CARLE C. ZIMMERMAN, *CONSUMPTION AND STANDARDS OF LIVING* 3 (1936) (arguing that *standard of living* consists in part of the goods and services that society wants to consume and acquire).

157. Amartya Sen, *The Standard of Living: Lecture II, Lives and Capabilities*, in *THE STANDARD OF LIVING* 20 (Geoffrey Hawthorn ed., 1987).

158. Joel Feinberg has proposed measuring the resulting harm from a crime by the impact of the crime on the ability of the victim to make choices as to the manner by which he will conduct his life. See JOEL FEINBERG, *HARM TO OTHERS* 37-61, 188-217 (1984) (measuring harm by the impact of a crime on a victim's "welfare interests").

159. See Amartya Sen, *The Standard of Living: Lecture I, Concepts and Critiques*, in *THE STANDARD OF LIVING*, *supra* note 157, at 1; von Hirsch & Jareborg, *supra* note 155, at 13-14.

but the assault will likely offend the victim psychologically, whereas the car accident will not. The aggravated assault is thus the more serious crime of the two.¹⁶⁰ A satisfactory measurement of harms for the purpose of understanding the relative seriousness of crimes must have a means by which to capture the distinction between these two crimes.

The living standard measure of harm is necessarily contextual. Properly understood, this contextuality is a virtue and not a short-coming. Sensitivity to cultural variation is an essential element of any attempt to measure harm.¹⁶¹ Living standard analysis is contingent upon the values a society holds.¹⁶² Although intercultural comparisons of harm may therefore be difficult to achieve, relative judgments within a culture as to harm will be possible.

The living standard analysis admittedly is vague: What does it mean to compare various injuries that could be caused to the respective victims' sense of well-being? But although the analysis cannot produce a precise formula for measuring harm, neither is it a mere foil for unguided discretion and unprincipled intuition.¹⁶³ Living standard analysis provides both a consistent vocabulary for the discussion of harm and a set of principled limitations on that discussion. It thus enables discussion of questions essential to understanding whether the enhanced punishment of bias crimes may be justified.¹⁶⁴

160. See von Hirsch & Jareborg, *supra* note 155, at 14, 20.

161. See *supra* text accompanying notes 150-51.

162. Von Hirsch and Jareborg cite the "extreme example" of the harm caused by rape in Bangladesh as opposed to western countries. See von Hirsch & Jareborg, *supra* note 155, at 14. Surely rape causes an excruciating level of harm in our society. The harm that results from a rape in Bangladesh, however, transcends even this level, because in addition to the physical assault and personal trauma caused by rape, there is the additional harm to the rape victim of total social ostracism. *Id.*

163. I do not address the more far-reaching potential criticism of the living standard analysis — that it does not provide a precise formula for assessing harm and thus assigning levels of criminal punishment. This criticism misses the mark because it is based on a faulty premise. For several reasons, no such precise formula is possible. First, those who actually employ this analysis or any analysis in the creation of a listing of comparative harms will necessarily have to use their judgment in doing so. Second, no workable theory can produce more than a reasonably small number of discrete harm categories. Final assignment of crimes within these categories will also require judgment on the part both of criminal law drafters and sentencing judges. The purpose of the living standard analysis is not to determine harm levels perfectly and exactly but to provide a vocabulary and a theoretical framework in which the determination might take place.

164. Living standard analysis seeks to take account of those harms that are inherently difficult, if not impossible, to quantify. My contention is that with all the difficulties in describing such injuries as those to dignity and autonomy, no analysis of harms is complete or even minimally useful without factoring in these types of injury. As Geoffrey Hawthorn wrote about Sen's conception of the living standard, "we have to reject being precisely wrong

Measuring harms with the living standard analysis requires a focus on two key variables. The first variable is the severity of a particular crime's invasion upon a victim's "personal interest." Consider the personal interest represented by the traditional economic term *standard of living*. At one end of the spectrum are injuries to the most primal and basic issues of standard of living — survival with the barest of human functional capacity. Crimes that cause injury on this level are the most serious of all. At the other end of the spectrum is deprivation of a relatively high level of comfort; this injury, although real, is not great. Between these end points, there is a potentially infinite number of gradations of well-being. In order to provide a scale that will be consistent in application and suggest no greater accuracy than it may fairly claim, a relatively small number of interim points is appropriate.¹⁶⁵

The second variable for living standard analysis is the various kinds of interests that may be violated by a crime. These interests begin, but do not end, with physical safety and the protection of material possessions. At a minimum, a full understanding of living standard must also include a recognition of personal dignity interests and those of individual autonomy.¹⁶⁶

We may then discuss the harm caused by various crimes in terms of how deep an injury is sustained and to what kind of interests. Murder affects physical safety at the most profound level and is thus a crime of the gravest harm evaluation. Burglary may have a minimal effect on physical safety, particularly if it occurs at a time when the dwelling would likely be unoccupied. Burglary will, however, have some greater impact on living standard with respect to material possessions. This might interfere only with a level of relative comfort — the taking of a VCR — or with the level of primal basic needs — the taking of a car from a house in the desert with no other means of transportation and no means of communication. But neither of these interests captures the full harm caused by a burglary. The deepest harm caused by a burglary may well stem

in favor of being vaguely right." See Geoffrey Hawthorn, *Introduction to THE STANDARD OF LIVING*, *supra* note 157, at vii-viii.

165. Von Hirsch and Jareborg propose a living standard scale of four levels, including the end points of (i) subsistence, (ii) minimal well-being, (iii) adequate well-being, and (iv) enhanced well-being. See von Hirsch & Jareborg, *supra* note 155, at 17-19.

166. See Sen, *supra* note 157, at 26-29. In their discussion of living standard analysis, von Hirsch and Jareborg suggest four such interests, although they acknowledge that their compilation was less the result of supporting theory than "impressions" of the kinds of interests normally involved in crimes committed. They propose physical integrity, material support and amenity, freedom from humiliation, and privacy and autonomy. See von Hirsch & Jareborg, *supra* note 155, at 19-21.

from the violation of the victim's sense of autonomy. Victims of burglaries often describe the ongoing injury they feel as they continue to live in the house that the perpetrator unlawfully entered.¹⁶⁷

The final stage of living standard analysis calls for a combination of the injuries to various interests caused by a crime. The injuries to different interests caused by a single crime may vary in severity. In the case of burglary, for example, the injury to physical safety might be minimal, the injury to material possession variable, and the injury to autonomy significant. In order to determine the relative harm caused by the crime of burglary, we must aggregate these various injuries in some manner.

We might assess the relative harm caused by crimes by beginning with the deepest injury inflicted upon any interest by a crime and setting harm, at minimum, at this level. If we decide that burglary causes a very serious — but not the most profound — injury to autonomy interests, we would set its harm level at a similar “very serious” level. This level will be one of a small number of discrete levels of harm.¹⁶⁸ But what of the other interests affected by burglary? Depending upon the severity of the intrusion, these interests may be used to increase the measure of harm caused by burglary within the “very serious” harm level.¹⁶⁹ Living standard analysis permits not only an assignment of crimes to a small number of harm levels but also a rough set of rankings within these broad ranges.

Both the *ex ante* analysis of ranking harms in terms of the relative risk preferences of a rational person and the *ex post* ranking of harms through use of a living standard analysis help clarify the harms caused by crimes. Harm, along with culpability, lies at the heart of measuring the seriousness of a crime. Armed with the above discussion, I now return to the context of racially motivated violence and the question of the relative seriousness of bias crimes and parallel crimes.

C. *The Relative Seriousness of Bias Crimes*

The seriousness of a crime, as discussed above,¹⁷⁰ is a function of the offender's culpability and the harm caused. It follows, therefore, that the relative seriousness of bias crimes and parallel crimes will also turn on the culpability and harm associated with each.

167. ELIAS, *supra* note 105, at 116.

168. See, e.g., *supra* note 154 (describing the six levels of crimes under the Model Penal Code).

169. See von Hirsch & Jareborg, *supra* note 155, at 23-35.

170. See *supra* text accompanying notes 140-42.

In order to compare the culpability attached to parallel crimes and bias crimes, we must first return to the central relationship between the two. Every bias crime contains within it a "parallel" crime against person or property. In the case of a bias-motivated assault, for example, the parallel crime of assault exists alongside the bias crime. In a sense, the parallel crime exists "within" the civil rights crime. Thus, bias crimes are two-tiered crimes, comprised of a parallel crime with the addition of bias motivation.¹⁷¹ The comparison of culpability for parallel crimes and bias crimes will thus weigh the single-tier mens rea of the parallel crime with the two-tier mens rea of the bias crime. The requisite mens rea for the parallel crime will generally be recklessness, knowledge, or purpose.¹⁷² This mens rea represents the requisite culpability for both the parallel crime and the first tier of the bias crime. Whatever culpability distinction does exist between parallel crimes and bias crimes resides at the second-tier mens rea of the bias crime. To establish a bias crime, the prosecution must prove, along with the

171. I have argued at length elsewhere that the most compelling basis for the distinction between parallel crimes and civil rights crimes generally, including bias crimes, is the mental state of the actor. See Lawrence, *Civil Rights and Criminal Wrongs*, *supra* note 4, at 2200-07, 2209-10. This argument is further developed below in order to demonstrate that the guilt of the bias crime offender turns on his possessing a bias motivation. See *infra* Part III.

172. The parallel crimes of most bias crimes are crimes against the person or property, such as vandalism or assault. To be guilty of these parallel crimes, the accused must have possessed a specific intent with respect to the elements of the crime. The Model Penal Code has broadened the traditional concept of specific intent to include not only purposefulness but also knowledge. Under the Code:

A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such result.

MODEL PENAL CODE § 2.02(2)(b) (1962).

For some parallel crimes, however, the requisite culpability is less than specific intent, in which recklessness will suffice for criminal liability. The Model Penal Code defines recklessness as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(c) (1962).

Consider, for example, an offender who throws rocks at a place of worship. Although he may be specifically motivated by the religious affiliation of the institution, his purpose is not to cause any actual property damage. Thus, his culpability with respect to bias is certainly purposefulness, but his culpability with respect to the parallel crime of vandalism is only recklessness. In several states he would be guilty of the bias crime of religiously motivated vandalism. See, e.g., MD. CODE ANN., CRIM. LAW § 470A (Supp. 1993); MO. REV. STAT. § 574.085 (Supp. 1993); OHIO REV. CODE ANN. § 2909.11(4) (Baldwin 1988); see also Lawrence, *Civil Rights and Criminal Wrongs*, *supra* note 4, at 2205-06 (defending a two-tiered mens rea approach in defining bias crimes).

first-tier mens rea applicable to the parallel crime, that the accused was motivated by bias in the commission of the parallel crime.¹⁷³ This proof would be necessary under either the racial animus model or the discriminatory selection model of bias crimes. Under the racial animus model, the offender must have purposefully acted in furtherance of his hostility toward the target group. Under the discriminatory selection model, the offender must have purposefully selected the victim on the basis of his perceived membership in the target group. Under either model, nothing short of this mens rea of *purpose* will constitute the requisite culpability for the second tier of a bias crime. Unless the perpetrator was motivated to cause harm to another because of the victim's race, the crime is clearly not a bias crime.¹⁷⁴

The culpability associated with the commission of parallel crimes and bias crimes is thus identical as to *what* the offender did and differs only in respect to *why* the offender did so. The relevance of this difference in culpability to the calculation of crime seriousness depends upon the reasons that the culpability itself is relevant to crime seriousness.

Why is it that the intentional murderer ought to be punished more severely than the negligent killer? The result of the conduct of each is the death of the victim; they differ only as to their culpability.¹⁷⁵ To the consequentialist, the murderer is punished more because he was more likely to cause death than was the negligent killer.¹⁷⁶ If this is the role of culpability in the calculation of crime seriousness, then the culpability associated with bias crimes makes these crimes more severe than parallel crimes. Bias crime offenders

173. Under both federal and state law, the burden on the prosecution is to show motivation. See Lawrence, *Civil Rights and Criminal Wrongs*, *supra* note 4, at 2209; Hernandez, *supra* note 10, at 848-50; Morsch, *supra* note 10, at 664-67.

The second-tier mens rea for bias crimes of motivation is akin to the Model Penal Code culpability level of "purpose." See Lawrence, *Civil Rights and Criminal Wrongs*, *supra* note 4, at 2209-10. Motive can be distinguished from purpose. Purpose concerns a person's conscious object to engage in certain conduct or to cause a certain result. See, e.g., MODEL PENAL CODE § 2.02(2)(a)(i) (1962). Motive, on the other hand, concerns the cause that drives the action to further that purpose. See Morsch, *supra* note 10, at 666. Although purpose and motive are plainly not identical, the distinction is not critical in the framework of a two-tier analysis. Consider the bias crime of an assault with racial motivation. The perpetrator of this crime could either (i) possess a mens rea of purposefulness or knowledge or recklessness with respect to the assault along with a *motivation* of racial bias; or (ii) possess a first-tier mens rea of purposefulness (or knowledge or recklessness) with respect to the parallel crime of assault and a second-tier mens rea of purpose with respect to the object to assault the victim because of his race. See Lawrence, *Hate Crimes/Hate Speech Paradox*, *supra* note 4, at 719-20.

174. Lawrence, *Civil Rights and Criminal Wrongs*, *supra* note 4, at 2209-10.

175. See *supra* text accompanying notes 140-42.

176. For an exposition of this view, see Simons, *supra* note 143, at 503-08.

are more likely to cause harm than are those who commit the same crimes without bias motivation. Bias crimes generally are more likely to be assaults than are parallel crimes and bias-motivated assaults are far more likely to be brutal.¹⁷⁷

An alternative explanation for punishing the murderer more severely than the negligent killer is that his act of killing intentionally is more blameworthy than is the accidental, or even reckless, killing.¹⁷⁸ If culpability is relevant to crime seriousness because it bears on blameworthiness, then the argument that the culpability associated with bias crimes makes these crimes more serious than parallel crimes is as compelling as it was for the consequentialist. The motivation of the bias crime offender violates the equality principle, one of the most deeply held tenets in our legal system and our culture.¹⁷⁹ To the extent that crime seriousness is designed to capture a deontological concept of blameworthiness, bias crimes are more serious than other crimes. The rhetoric surrounding the enactment of bias crime laws suggests that most supporters of such legislation espouse a thoroughly deontological justification for the enhanced punishment of racially motivated violence.¹⁸⁰

This trend is well illustrated by an unusual punishment for bias crimes proposed in Marlborough, Massachusetts. The Marlborough city council unanimously approved an ordinance that would deny public services, such as local licenses, library cards, or even trash removal, to those convicted of bias crimes. Supporters of the ordinance drew upon the community's disdain for the racial prejudice demonstrated by the bias criminal rather than the harm caused by the criminal's conduct.¹⁸¹

Culpability analysis, therefore, advances the argument for the relatively greater seriousness of bias crimes. The argument is equally supported by culpability theory based upon consequentialist and nonconsequentialist justifications for punishment.

177. See *supra* text accompanying notes 86-87.

178. See Simons, *supra* note 143, at 495-96.

179. See *supra* text accompanying note 110.

180. See, e.g., 139 CONG. REC. S13176 (daily ed. Oct. 6, 1993) (statement of Sen. Feinstein, chief sponsor of the Hate Crimes Sentencing Enhancement Act of 1993) (arguing for the Act's passage because "[s]omeone who selects a victim of a crime based on bigotry and hatred, should be subject to the stiffest penalties").

181. See Doreen Iudica Vigue, *Marlborough Eyes Halt to Services as Hate Crime Penalty*, BOSTON GLOBE, Jan. 26, 1994, at 1. The proposed ordinance was later vetoed by the city's mayor who raised concerns both as to the ordinance's enforceability and its constitutionality. See Doreen Iudica Vigue, *Marlborough Mayor Vetoes Hate Crime Law*, BOSTON GLOBE, Feb. 3, 1994, at 22.

A harms-based analysis also demonstrates that bias crimes are more serious than parallel crimes, regardless of the theory of punishment we assume.¹⁸² Under an *ex ante* analysis, the question is whether the rational person would risk a parallel crime before he would risk a bias crime.¹⁸³ For several reasons, the answer is probably yes. Consider the example of vandalism. The parallel crime arising out of the defacement of a building or home is primarily a nuisance to the victim. The loss is insurable and, if not insured, is suffered in terms of time or money or both. If that vandalism is bias-motivated, the defacement might take the form of swastikas on a synagogue or racist graffiti on the home of an African-American family. This harm is not a mere nuisance. The potential for deep psychological harm, and the feelings of threat discussed earlier,¹⁸⁴ exceed the harm ordinarily experienced by vandalism victims. No one can buy insurance to cover these additional harms. Faced with the choice between these two types of vandalism, the rational person would risk the relatively insurable parallel crime before risking the more personally threatening bias crime with its longer-lasting effects.¹⁸⁵

A similar analysis applies to attacks against persons rather than property. In the parallel crime of assault, the perpetrator generally selects the victim (i) randomly or for no particular conscious reason, (ii) for a reason that has nothing to do with the victim's personal identity, such as when the victim is apparently carrying money, or (iii) for a reason relating to personal animosity between the perpetrator and the victim. A random assault or a mugging

182. The analysis of proportionality above, *see supra* text accompanying notes 113-39, drew upon retributive and utilitarian theories of punishment. Under each, the severity of punishment must correlate in some manner with the seriousness of the offense. The harms analysis that follows in the text draws on the proportionality argument developed in this article and therefore applies to both retributive and utilitarian justifications of punishment.

183. *See supra* text accompanying notes 151-54.

184. *See supra* text accompanying notes 91-107.

185. A recent case of an electrical fire that destroyed a Boston area synagogue provides the framework for a useful hypothetical example of a rational person's relative willingness to bear the risk of parallel vandalism versus bias-motivated vandalism. *See* Matthew Breilis, *Synagogue Fire is Traced to Faulty Circuit Breaker*, BOSTON GLOBE, Jan. 14, 1994, at 38. In the short period immediately after the fire, prior to the determination of the cause, there might well have been widespread concern that the fire was the result of bias-motivated arson. In this case, the news that it was not would be met with great relief. Part of this relief would be attributed to the fact that the fire had occurred accidentally and was not the result of arson, bias-motivated or otherwise. But this explanation would not capture the entire reaction, part of which would be attributable to the fact that anti-Semitism was ruled out as a cause. Had the fire been caused by foul play without bias motivation — for example, by pecuniarily motivated arson without any trace of anti-Semitism — surely the reaction of both victims and the general community would have exceeded the reaction that followed the accidental fire, but it would not have been as great as if the arson had been religiously motivated.

leaves a victim with at least a sense of being unfortunate and at most a sense of heightened vulnerability. An assault as a result of personal animosity causes at most a focused fear or anger directed at the perpetrator.¹⁸⁶ Unlike a parallel assault, a bias-motivated assault is neither random nor directed at the victim as an individual, and this selection and the message it carries cause all the harms discussed earlier.¹⁸⁷ The perpetrator selects the victim because of some immutable characteristic, actual or perceived. As unpleasant as a parallel assault is, the rational person would still risk being victimized in that manner before he would risk the unique humiliation of a bias-motivated assault.

An ex post analysis provides further clarity and support for this conclusion. A living standard analysis focuses on depth of injury caused by a crime to interests like physical safety, material possessions, personal dignity, and autonomy.¹⁸⁸ The parallel assault crime and the bias assault crime will cause roughly similar injuries to the physical safety and material possessions of the victim. But the injury to the bias crime victim's autonomy — in terms of his sense of control over his life — and to his personal dignity will exceed that inflicted upon the parallel assault victim. This is clear from the far greater occurrence of depression, withdrawal, anxiety, and feelings of helplessness and isolation among bias crime victims than is ordinarily experienced by assault victims.¹⁸⁹

Moreover, the target community and society suffer greater consequences from bias crimes than from parallel crimes. A parallel crime may cause concern or even sorrow among certain members of the victim's community, but it would be unusual for that impact to reach a level at which it would negatively affect their living standard. By contrast, bias crimes spread fear and intimidation beyond the immediate victims to those who share only racial characteristics with the victims. Members of the target group suffer injuries similar to those felt by the actual victim.¹⁹⁰ Unlike the sympathetic nonvictims of a parallel crime, members of the target community

186. Cf. *supra* note 97 and accompanying text. I omit domestic violence from this category of parallel assault. Domestic violence shares many characteristics with bias crimes, in terms of both the culpability of the perpetrator and the impact on the victim. A full exploration of the relationship between domestic violence and bias crimes is beyond the scope of this article, but it is certainly a question that deserves serious attention.

187. See *supra* section I.B.1.

188. See *supra* text accompanying notes 155-69.

189. See Levin, *supra* note 64, at 166; Weiss, *supra* note 91, at 182-83; Henneberger, *supra* note 92, at 113; Kleinfeld, *supra* note 92, at B2; see also Weiss et al., *supra* note 93, at 28-29.

190. See KARMEN, *supra* note 105, at 262-63; Kelly et al., *supra* note 3, at 26; Matsuda, *supra* note 6, at 2330-31; see also *supra* text accompanying note 105.

will suffer a living-standard loss in terms of a threat to dignity and autonomy and a perceived threat to physical safety. Bias crimes therefore cause a greater harm to a society's collective living standard than do parallel crimes.

According to Herbert Packer, "[I]t is inescapable that . . . some offenses are to be taken more seriously than others and that the severity of the available punishment should be proportioned to the seriousness with which the offense is viewed."¹⁹¹ Because bias crimes are more serious than most parallel crimes, it is equally inescapable that bias crimes warrant enhanced criminal punishment over those penalties that apply to parallel crimes.

III. ATTRIBUTION OF GUILT FOR BIAS CRIMES

Having argued above that bias crimes ought to receive more severe punishment than parallel crimes, I now turn to the definition and critical elements of a bias crime. Section III.A returns to the relationship between culpability and harm discussed in Part II but does so in the context of understanding individual guilt. Whereas the seriousness of bias crimes generally justifies the enhanced punishment of these crimes collectively, the harm to a particular victim does not, in and of itself, warrant the conclusion that a particular perpetrator is guilty of a bias crime. Bias motivation of the perpetrator, and not necessarily the resulting harm to the victim, is the critical factor in determining an individual's guilt for a bias crime. For the purposes of section III.A, *bias motivation* may entail either racial animus or discriminatory selection.

Section III.B applies the focus on bias motivation to the two models of bias crimes developed in Part I — the discriminatory selection model and the racial animus model. This section argues that the discriminatory selection model of bias crimes, upheld in *Wisconsin v. Mitchell*, is inferior to the racial animus model as a description of those offenses that warrant enhanced punishment. Discriminatory selection of a victim may often provide important evidence of racial animus, but selection alone is insufficient for bias crime guilt.

A. *The Crucial Role of the Offender's Mental State in Determining Guilt or Innocence*

The result of the criminal conduct alone does not ultimately tell us much concerning the guilt or innocence of an actor accused of a

191. PACKER, *supra* note 122, at 143.

bias crime. The most compelling basis for deciding whether an individual has committed a bias crime lies in the mental state of the actor. This section uses general criminal law principles to justify a focus on mental state and applies those conclusions to the particular context of bias crimes.

The modern trend in the study of criminal law, as noted above,¹⁹² has been toward a focus on the state of mind or culpability of the accused. Punishment theorists — retributivists and utilitarians alike — have generally considered guilt or innocence to be critically linked to the actor's mental state. If the focus concerning guilt is shifted from the accused's culpability to the results of his conduct, then guilt is triggered by events and circumstances that may be beyond his control. The occurrence of harmful results is often fortuitous and therefore outside the realm of that which provides a justifiable indication of the actor's blameworthiness.¹⁹³

A result-oriented focus is particularly inappropriate for determining guilt in the context of bias crimes. In many cases, the harms associated with a bias crime depend entirely on whether the victim, the target group, and the society perceive the perpetrator's bias motivation. But in most cases, a perpetrator will have little control over the perceptions of others; the victim, the target group, and the community may mistakenly perceive a bias motive when none is present, and they might fail to perceive a bias motive that is in fact really there.¹⁹⁴ Accordingly, the criminal law should not focus on the results of a perpetrator's actions when deciding whether he has committed a bias crime. Rather, the law should focus on the accused's mental state. Society refuses to punish a person who has caused a truly accidental death, but it does punish the murderer, even though both persons' actions have caused a loss of life. Nor

192. See *supra* text accompanying notes 140-146 (discussing the focus on the actor's culpability for punishment under both retributive theories of punishment and utilitarian theories).

193. See BERNARD WILLIAMS, *MORAL LUCK* 20-39 (1981) (analyzing the role of contingencies in making moral assessments); FLETCHER, *supra* note 112, § 6.6.5, at 479; Kenneth Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 504-06 (arguing that results occurring by accident negate intention); see also Lawrence, *Civil Rights and Criminal Wrongs*, *supra* note 4, at 2203-04.

194. Those who have argued for a harms-based guilt standard have dealt primarily if not exclusively with the civil context, which permits a focus on the harm caused and the need to compensate the victim. See, e.g., Delgado, *supra* note 6. If this view were applied to the criminal context, it would allow for the punishment of bias crimes solely for the harm caused unless the defendant could prove that the offending act was utterly devoid of racial motivation, so long as the target community perceived the act to be racially motivated. This is essentially the position advocated, for example, in Note, *Combating Racial Violence: A Legislative Proposal*, *supra* note 10. I reject this application of strict liability principles and radical burden shifting in the criminal context.

would this outcome change if the victim's family, firmly but incorrectly, believed that the accused acted intentionally. Similarly, the guilt or innocence of a person accused of a bias crime should turn on his mental state, not on the results of his actions.

Our focus on culpability — that is, the motivation of the bias criminal — presents us with three problem cases that warrant further analysis: the cases of the Clever Bias Criminal, the Unconscious Racist, and the Unknowingly Offensive Actor.

The Clever Bias Criminal is aware of the centrality of culpability in establishing guilt of a bias crime. He therefore articulates a pretextual, nonbias motivation for an assault that was in fact motivated by bias.

The Unconscious Racist commits an interracial assault that, although unconsciously motivated by bias, is without conscious racial motivation. He asserts, for example, that the victim improperly strayed into his neighborhood and that he would have attacked the victim regardless of ethnicity in order to defend his "turf." Unlike the Clever Bias Criminal, the Unconscious Racist consciously believes this assertion.

The Unknowingly Offensive Actor seeks to shock or offend the community generally but chooses to do so in a manner that is particularly threatening to a certain racial or ethnic group. He defaces public property with a swastika because he knows that this public use of a societal taboo will shock people in general. He neither intends to offend Jews in particular nor is he even aware of the fact that the swastika has this particularized effect on the Jewish community.

The least problematic of our three cases is that of the Clever Bias Criminal. This case presents strictly an evidentiary problem. The prosecution will have to demonstrate bias motivation beyond a reasonable doubt; this will often be difficult. The proof problems raised by bias motivation, however, are not inherently different from those raised by proof of any other motivation. Suppose that a state adopts murder for profit as one of the aggravating circumstances in its capital sentencing process.¹⁹⁵ Profit motivation will involve many of the same evidentiary problems as does proof of bias motivation. To some extent, the prosecution can prove each using circumstantial evidence. For example, evidence that the defendant was paid is certainly probative of profit motivation. But proof of murder for gain requires more. The prosecution must prove not only that the defendant was compensated for committing the murder but also that monetary gain provided the motivation for

195. See, e.g., MODEL PENAL CODE § 210.6(3)(g) (1962) (providing that the aggravating circumstances to be considered include whether the murder "was committed for pecuniary gain").

the act. A combination of such factors as the timing and nature of the payment along with the payment itself may prove profit motivation. Similarly, the circumstances of the Clever Bias Criminal's interracial assault may give rise to a strong inference of racial motivation. Those circumstances, combined with the nature of the assault and statements made by the accused during the assault,¹⁹⁶ may prove bias motivation. Although proof of the defendant's motivation will often present a serious challenge for the prosecution, this fact alone does not justify a result-oriented approach to bias crimes.

The case of the Clever Bias Criminal raises one additional problem that warrants brief examination. Suppose that the Clever Bias Criminal successfully articulates his pretextual nonracial motivation not to the jury but rather to the victim and the victim's community. Put differently, what should be the result when the victim and the target community of a racially motivated assault are unaware that the attacker was motivated by bias? One might argue that under these circumstances, the actor is not guilty of a bias crime because he has not caused the objective harms associated with bias crimes. This requirement of actual harm for guilt, however, is misconceived. As I discussed earlier,¹⁹⁷ actual harm has never been a *sine qua non* for guilt, and there is no reason for bias crimes to be an exception to this rule. Consider a would-be assassin who places what he believes to be a lethal quantity of poison in his victim's drink. Unbeknownst to the assassin, the dosage is quite harmless. The intended victim is left alive, unaware and completely unaffected by the events. The actor has thus caused no objective harm. He is guilty, however, of attempted murder.¹⁹⁸ His guilt is grounded either in his future dangerousness¹⁹⁹ or in his moral blameworthiness for this unsuccessful attempt.²⁰⁰ Under either understanding, it is irrelevant that the intended victim emerged unscathed. Similarly, it is irrelevant to the guilt of the Clever Bias

196. For an example of a case in which the defendant's statements were important evidence of his bias motivation, see *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).

197. See *supra* note 194 and accompanying text.

198. As a further example of this phenomenon, consider the crime of attempted false imprisonment. See, e.g., MODEL PENAL CODE § 212.3 (1962) (providing that a person commits a misdemeanor if he knowingly restrains another unlawfully so as to interfere substantially with his liberty). Attempted false imprisonment leaves the victim unaffected because the victim never felt falsely imprisoned.

199. See, e.g., EWING, *supra* note 123, at 45; PACKER, *supra* note 122, at 140; see *supra* notes 121-22.

200. See, e.g., MURPHY, *supra* note 113, at 21; Radin, *supra* note 115, at 1164-69; see *supra* notes 115-17.

Criminal that he did not cause the harms caused by completed bias crimes. He is guilty of an attempted bias crime.

The case of the Unconscious Racist raises a far more complex problem than that of the Clever Bias Criminal. Unlike the Clever Bias Criminal, the reasons proffered by the Unconscious Racist as motivation for his conduct are not consciously pretextual.²⁰¹ Consider the racially charged incident in Bensonhurst, New York, in which a group of white youths assaulted Yusef Hawkins, a black teenager.²⁰² Many residents of Bensonhurst insisted that the area had no racial problems, reasoning instead, "It's not your color. It's whether they know you or not."²⁰³ Suppose that a jury hearing evidence of this "turf motivation" is fully persuaded that (i) the defendants were consciously motivated by a desire to protect their neighborhood from outsiders; (ii) the defendants' unconscious motivation was to keep African Americans out of their neighborhood; and (iii) the defendants were honestly unaware of their unconscious motivation. These defendants, as described, are Unconscious Racists. Should the Unconscious Racist be found guilty of an "unconscious" bias crime? In other words, is guilt of a bias crime sufficiently established by a mens rea of unconscious bias motivation and an actus reus of conduct that in fact causes the resulting harm of a bias crime?

The answer must be "no." For several reasons, the Unconscious Racist is not guilty of a bias crime. First, in general, punishment based upon a person's unconscious motives runs afoul of the principle of voluntariness that underpins the criminal law: a person may only be punished for what he did of his own volition.²⁰⁴ Professor Moore has described this as the "principle of consciousness": "[I]n

201. There has been a growing recognition of the role of unconscious racism in our understanding of our society in general and of our legal system in particular. See, e.g., Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). One student author has identified unconscious racism as the cause of prosecutorial and investigatory biases against enforcement of bias crimes laws. See Hernandez, *supra* note 10, at 852-55. Unconscious racism has not been brought directly to bear on the mens rea of civil rights crimes. Moreover, no one has argued that crimes motivated by unconscious racism should be deemed bias crimes. Cf. Note, *Combating Racial Violence: A Legislative Proposal*, *supra* note 10, at 1272-75 (advocating shifting the burden of proving racial motivation to facilitate prosecution of bias crimes, but advancing no argument based upon unconscious racism).

202. See Andrew Sullivan, *The Two Faces of Bensonhurst*, NEW REPUBLIC, July 2, 1990, at 13-16.

203. *Id.*

204. See MODEL PENAL CODE § 2.01(1) (1962); DRESSLER, *supra* note 114, § 9.02, at 65; FLETCHER, *supra* note 112, § 10.3.2, at 802-07; HART, *supra* note 119, at 22-24, 140-45; PACKER, *supra* note 122, at 73-77.

order to ascribe fairly responsibility to a person for causing a harm, he must have *consciously* acted intentionally, and to ascribe fairly responsibility to a person for attempting to cause a harm, he must have acted with that harm as his *conscious* reason.”²⁰⁵ It is one thing to punish the Unconscious Racist for assault; he intentionally acts to attack his victim and his conscious reason for doing so is to hurt the victim. It is quite another thing to punish the Unconscious Racist for a bias crime; he did not consciously attack his victim *for racial reasons*, nor is his conscious reason for doing so to inflict the particular harms associated with a bias crime. With respect to the bias element of his crime, the Unconscious Racist is comparable to the paradigmatic case of a sleepwalker who commits a criminal act. The sleepwalker is guilty of no crime because his acts are not considered to be his own.²⁰⁶

The second reason that the Unconscious Racist should not be deemed guilty of a bias crime concerns the evidentiary problems that arise relative to the determination of the precise nature of a defendant's unconscious. These problems are extremely difficult and perhaps unsolvable. Earlier, I dismissed the evidentiary questions raised with respect to the Clever Bias Criminal because these questions are not different from similar proof problems that occur in various areas of criminal law.²⁰⁷ But criminal law includes no analogy to the proof required in the Unconscious Racist case. Nowhere in the criminal law is there an established need to determine the unconscious, either as an element of a crime or as an aspect of a defense.²⁰⁸

Finally, the need for reliance upon theories of unconscious racism in order to prosecute bias crimes effectively may not be as great as it may appear. Consider a hypothetical based on the Bensonhurst case. Suppose that, in addition to the proof outlined above, the prosecutor of Unconscious Racist II could show that (i) the assault was motivated by the victim's status as “outsider”; and (ii) to the defendants, the term *outsider* is a pretext for *black* —

205. Michael S. Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563, 1621-27 (1980).

206. See Norval Morris, *Somnambulistic Homicide: Ghosts, Spiders, and North Koreans*, 5 RES JUDICATAE 29-32 (1951) (discussing *The King v. Cogdon* (unreported), in which the defendant was acquitted of murder after she killed her daughter while sleepwalking); see also James William Cecil Turner, *The Mental Element in Crimes at Common Law*, in THE MODERN APPROACH TO CRIMINAL LAW 195, 204 (L. Radzinowicz & J.W.C. Turner eds., 1945) (collecting situations in which a person accused of a criminal act defended with the argument that the conduct was involuntary).

207. See *supra* text accompanying notes 195-98.

208. See GLANVILLE WILLIAMS, CRIMINAL LAW § 17 (2d ed. 1961).

that is, they regard all blacks as "outsiders." Under these circumstances, the prosecution has proven a bias crime. In fact, Unconscious Racist II is not really unconscious about his racist motives at all. He stands in virtually the same moral position as the Clever Bias Criminal. Although his use of a pretext for race is not necessarily driven by a desire to avoid prosecution, Unconscious Racist II articulates a pretext that masks what is in fact a conscious bias motivation.

Unconscious Racist II does not, however, comprise all cases of the Unconscious Racist. If it appears that "outsider" is not a pretext for race but in fact a more complex concept that correlates strongly but not perfectly with race, it would be too dangerous an invasion into the psyche to construct a case of bias motivation.

The last of the three special cases is that of the Unknowingly Offensive Actor. The Unknowingly Offensive Actor model is based upon a growing number of vandalism cases involving the use of swastikas that lack any bias motivation. Young offenders in particular commit these crimes for a "thrill" or in order to shock adults. Perpetrators of these crimes do not specifically seek to offend the local Jewish community and are unaware that their conduct has this effect.²⁰⁹ The Unknowingly Offensive Actor, therefore, consciously acts intentionally in a manner that (i) is intended to cause the harm associated with a parallel crime of vandalism, but (ii) in fact causes the harm associated with a bias crime.

The Unknowingly Offensive Actor is like the Clever Bias Criminal and the Unconscious Racist with respect to element (ii) but differs from the other two with respect to element (i). Unlike the Clever Bias Criminal, he truly does not intend to cause the harm of a bias crime. Unlike the Unconscious Racist, he does not even intend to do so unconsciously. Has the Unknowingly Offensive Actor committed a bias crime?

Although guilty of the parallel crime of vandalism, the Unknowingly Offensive Actor is not a bias criminal. Most Unknowingly Offensive Actors fall into either of two categories: the Unknowingly Offensive Actor (Unlucky) and the Unknowingly Offensive Actor

209. See Donald P. Green & Robert P. Abelson, *Understanding Hate Crime: A Case Study of North Carolina* (Apr. 20, 1993) (unpublished manuscript, part of a working paper series for the Institution for Social and Policy Studies at Yale University) (suggesting that some bias crimes are manifestations of generalized juvenile delinquency rather than directed expressions of animus or hostility toward the target group). The phenomenon of the Unknowingly Offensive Actor is captured by Jack Levin's apt and colorful phrase, "'Twenty years ago they might have stolen hubcaps. Today they spray-paint a swastika on a building.'" Anthony Flint, *Swastikas Often a Tool of Shock Not Hate*, BOSTON GLOBE, Jan. 31, 1994, at 13 (quoting Northeastern University Professor Jack Levin).

(Negligent). The Unknowingly Offensive Actor (Unlucky) is a vandal who, by fortuity, selects a means of vandalism that creates a harm normally associated with a bias crime. He cannot become a bias criminal merely by the accident of picking a swastika as the mark by which he will deface property if, as we hypothesize, he truly does not know the impact of this symbol.²¹⁰ Under this hypothesis, the Unknowingly Offensive Actor cannot be blamed for his crime beyond the blame that attaches to a case of simple vandalism.

The Unknowingly Offensive Actor (Negligent), by contrast, is not blameless. Even if he did not know the meaning and impact of the swastika, he *should* have known. The blame that attaches to the conduct of the Unknowingly Offensive Actor (Negligent), however, is on a different and lower level from that of the true bias criminal. He is not blameworthy for committing a racially motivated act of vandalism. At most, he has been negligent concerning his awareness of the symbols he uses.²¹¹ This negligence is insufficient culpability to support guilt for the commission of a bias crime.²¹²

Guilt of a bias crime turns on the culpability of the actor — that is, on his bias motivation — and not on the results of his conduct. The problems raised by the Clever Bias Criminal, the Unconscious Racist, and the Unknowingly Offensive Actor require no contrary result. But the question remains, what is the nature of bias motiva-

210. See *supra* text accompanying notes 182-95 (discussing limitations of result-oriented punishment generally and specifically with respect to the punishment of bias crimes); FLETCHER, *supra* note 112, §§ 3.1.1, 6.6.5, at 115-18, 472-83 (arguing that result-oriented punishment is inappropriate for certain crimes).

211. By definition, the behavior of the Unknowingly Offensive Actor (Negligent) does not reach the level of recklessness with respect to the elements of a bias crime. Reckless conduct, under the Model Penal Code, is action taken with a *conscious* disregard of the likelihood of the harm. MODEL PENAL CODE § 2.02(2)(c) (1962). By hypothesis, the Unknowingly Offensive Actor has not consciously disregarded the possibility that the swastika will have a particularized harm on Jews. At most, he has behaved negligently. Under the Model Penal Code, a person is criminally negligent with respect to an element of a crime when his failure to perceive a substantial and unjustifiable risk that the element exists "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." MODEL PENAL CODE § 2.02(2)(d) (1962).

Given the findings of Professors Green and Abelson's study, see Green & Abelson, *supra* note 209, the Unknowingly Offensive Actor's ignorance of the meaning of the swastika may constitute a gross deviation from what the reasonable person in his situation would know. In any event, the highest level of culpability that the Unknowingly Offensive Actor exhibits with respect to a bias crime is that of criminal negligence.

212. At most, the Unknowingly Offensive Actor (Negligent) could be charged with some low level of bias crime. There is no jurisdiction with a bias crime law that requires only negligence with respect to the element of racial motivation. I have argued elsewhere that the *mens rea* requirement for bias crimes ought to be the requisite *mens rea* for the parallel crime and the purpose to commit a bias crime — that is, conscious racial motivation. See Lawrence, *Civil Rights and Criminal Wrongs*, *supra* note 4, at 2209-10.

tion? Thus far in the discussion, I have not distinguished between bias motivation as animus toward the victim's racial group and bias motivation as discriminatory selection of the victim based on race. It is to this question — the relative merits of the racial animus and the discriminatory selection models of bias crimes — that I now turn.

B. *Analyzing the Discriminatory Selection Model and the Racial Animus Model of Bias Crimes*

The two models of bias crimes differ as to the role racial animus plays, if any, in defining the elements of the crime. The racial animus model defines these crimes on the basis of the perpetrator's animus toward the racial group of the victim and the centrality of this animus in the perpetrator's motivation for committing the crime.²¹³ The discriminatory selection model defines these crimes solely with reference to the perpetrator's choice of victim on the basis of the victim's race.²¹⁴

Any case that would meet the requirements of the racial animus model would necessarily also satisfy those of the discriminatory selection model because a crime motivated by animus toward the victim's racial group will necessarily be one in which the victim was discriminatorily selected on this basis. The reverse is not true. Cases of discriminatory selection need not be based upon racial animus. Two hypothetical cases will illustrate the point that some cases could fall within a discriminatory selection model statute but outside a statute of the racial animus model.

The Purse Snatcher is a thief who preys exclusively upon women because he believes that he will better achieve his criminal goals by grabbing purses from women than by trying to pick wallets out of the pockets of men. The Purse Snatcher discriminatorily selects his victims on the basis of gender. Nonetheless, he has no animus toward women as a group, and his thefts are not motivated by any attitudes about women other than the manner in which they carry their valuables.²¹⁵ The Violent Show-Off is based on the hypothetical proposed by the Attorney General of Wisconsin during the oral argument to the Supreme Court in *Wisconsin v. Mitchell*.²¹⁶ Sup-

213. See *supra* text accompanying notes 16-17, 61-72.

214. See *supra* text accompanying notes 14-15, 52-57.

215. The hypothetical of the Purse Snatcher assumes that we are in a jurisdiction that includes gender as one of the categories protected by its bias crime statute. See *supra* note 13.

216. See *supra* note 57.

pose that Todd Mitchell's sole motivation in selecting a white victim was to impress his friends, and that Mitchell himself was otherwise indifferent as to the choice of his victim. If this were the case, Mitchell's selection of Riddick would have been racially based, but the selection itself would not have been based on any animus toward white people. Has either the Purse Snatcher or the Violent Show-Off committed a bias crime?

As a matter of positive law, both the Purse Snatcher and the Violent Show-Off are guilty under the Wisconsin discriminatory selection model bias crime statute, and both are innocent under the New Jersey racial animus model bias crime statute.²¹⁷ As a normative issue, the Purse Snatcher should not be deemed a bias criminal and the Violent Show-Off, depending on the circumstances of his offense, may not be. The discriminatory selection model thus overreaches in instances such as the two cases under consideration.

The Purse Snatcher easily demonstrates the distinctions between the two models of bias crimes and the shortcomings of a discriminatory selection model. The Purse Snatcher acts with no animus toward his victim's group. From either a retributive or utilitarian perspective, the Purse Snatcher should not be punished for a bias crime.

Punishing the Purse Snatcher not only for the theft but also for a bias crime would place him on the same moral plane as someone who targets women out of a violent expression of misogyny. Even if the harms caused by the two criminals are similar, their culpability is distinct. For a retributivist, the difference in culpability between that of the Purse Snatcher and the violent misogynist translates into a similar difference in blame: the Purse Snatcher is less blameworthy than the violent misogynist and deserves a lesser punishment. Put differently, the Purse Snatcher deserves to be punished for the theft but not for a bias crime. The same claim may be maintained from a consequentialist point of view. The appropriate deterrence for the Purse Snatcher is neither more nor less than the deterrence appropriate for any other common thief. If the defendant were a bias criminal, his misogynistic drive to commit his crime would require greater deterrence and thus warrant greater punishment. Under either approach to punishment, therefore, the culpability of the violent misogynist is directly related to the factors

217. See *supra* text accompanying notes 52-57, 61-62. The "innocence" of the Purse Snatcher and the Violent Show-Off, of course, refers only to charges under a bias crime law. Each is guilty of a parallel crime — theft for the Purse Snatcher and assault for the Violent Show-Off.

that make bias crimes more serious than parallel crimes, whereas the culpability of the Purse Snatcher does not implicate those factors. Because a discriminatory selection model bias crime statute would punish the Purse Snatcher as a bias criminal, it must be flawed.

The Violent Show-Off raises a harder set of issues. He has much in common with the Unknowingly Offensive Actor, who should not be held criminally liable for the commission of a bias crime.²¹⁸ The Violent Show-Off's purpose is to assault a victim in a manner that will impress his friends. To him, it is of no importance that the manner itself calls for the discriminatory selection of a victim. The racially discriminatory dimension of the Violent Show-Off's act is unconnected to the purpose of his conduct.

There is a distinction between the Violent Show-Off and the Unknowingly Offensive Actor that appears on first examination to call for the former's bias crime liability. Whereas the Unknowingly Offensive Actor was unaware that his conduct would cause a focused harm on a particular racial group, the Violent Show-Off knows full well that he is seeking out a member of a particular racial group to do harm. Recall that the Unknowingly Offensive Actor sought to shock everyone; his means of doing so was to draw a swastika. Suppose that he sought not to shock the general community but to shock the Jewish community in particular and that his means of doing so was to deface a synagogue with a swastika. Suppose further that he then argued that he did so only to impress his friends and not out of any animosity toward Jews. The Unknowingly Offensive Actor has now become the Violent Show-Off — but is he liable for a bias crime? He is not, and the key to understanding why lies in first understanding why the question is not as difficult as it first appears.

The difficulty in acquitting the Unknowingly Offensive Actor of a bias crime when he chooses not only to paint a swastika but also to target a synagogue for his crime stems from the fact that it is difficult to believe that he sincerely lacked racial animus. The location of a swastika is often the key to determining whether a particular act of vandalism was racially motivated or mere thrill seeking.²¹⁹ Discriminatory selection of a victim is often powerful evidence of

218. See *supra* text accompanying notes 209-12.

219. See Green & Abelson, *supra* note 209, at 22 (noting that the factors used to determine whether vandalism involving the use of swastikas represents an anti-Semitic attack, as opposed to an attempt to shock adults generally, include accompanying messages of intimidation and location of the graffiti in Jewish cemeteries or synagogues, or in Jewish-owned homes).

racial animus toward the victim's group. But a Violent Show-Off may truly act without animus. In this case, he appears to be a bias criminal only because of the choice of means by which his friends will be impressed. Nevertheless, the substance of the friends' choice, which is irrelevant to the Violent Show-Off's purpose, cannot transform his culpability into that necessary for a bias crime.²²⁰

A further level of refinement in this hypothetical, however, confounds such a straightforward theoretical disposition. This level of refinement springs from questioning the supposition that underpins the Violent Show-Off — namely, that he truly acts without racial animus. We must ask whether this is possible. On the surface, the Violent Show-Off could sincerely state that he bears no ill will toward the racial group he selects. Beneath this assertion, however, is his knowledge that his friends do bear such animus and his willingness to proceed with the crime under these circumstances. Viewed in this manner, the nexus between the Violent Show-Off and racial animus is sufficiently close to distinguish him from the Unknowingly Offensive Actor and to make him guilty of a bias crime. His knowledge of the animus that ultimately drives his violent act may allow the inference that he has acted purposely with regard to a racially motivated attack.²²¹ But the Violent Show-Off is a bias criminal only if he meets the elements of a racial animus model statute. If he is separated from the racial animus of his friends, then he is identical to the Unknowingly Offensive Actor and similarly not guilty of a bias crime.

The guilt of the Violent Show-Off, however conceived, is separate from that of his friends, for they may very well be guilty of bias crimes. Suppose that the Violent Show-Off's friends encourage him to select a victim of a particular race out of animus for that group. They are guilty of solicitation or complicity in the commission of a bias crime.²²² The Violent Show-Off, however, lacks the animus of his accomplices and thus does not share their guilt for the bias crime.²²³ He is guilty only of the lesser-included parallel offense that he intended to commit.

220. See *supra* text accompanying notes 192-94.

221. See, e.g., *People v. Beeman*, 199 Cal. Rptr. 60, 67 (1984) ("An act which has the effect of giving aid and encouragement, and which is done with knowledge of the criminal purpose of the person aided, may indicate that the actor intended to assist in fulfillment of the known criminal purpose. However . . . the act may be done with some other purpose which precludes criminal liability.").

222. See MODEL PENAL CODE §§ 2.06, 5.02 (1962). See generally Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571 (1961).

223. See DRESSLER, *supra* note 114, §§ 29.05, 30.05, at 384-85, 422-23.

The racial animus model of bias crimes more appropriately defines a bias crime. Many cases of discriminatory victim selection are in fact also cases of racial animus; most cases in which the perpetrator selected his victim on the basis of race may fit comfortably within both models. This demonstrates the continued significance of discriminatory selection in a bias crime regime that embraces the racial animus model. Discriminatory selection may often act as persuasive evidence of racial animus that may not be proven by any other means. A showing of discriminatory selection of a victim will often be powerful evidence for the much more subtle and difficult showing of racial animus. But discriminatory selection is only evidence of racial animus. If we know that discriminatory selection exists without animus in a particular case, then the selection ought not be used as a surrogate for racial animus and should not be punished.²²⁴ As we punish bias crimes, we must understand precisely what we are punishing: purposeful, conscious criminal conduct grounded in the racial animus of the perpetrator.

CONCLUSION

It has been forty years since Gordon Allport asked whether America would continue to make progress toward tolerance and stand as a "staunch defender of the right to be the same or different," or whether "a fatal retrogression [would] set in."²²⁵ Laws that identify racially motivated violence for enhanced punishment are only one means of answering Allport's call, but they do constitute a critical element in the defense of the "right to be the same or different." Racially motivated violence is different from other forms of violence. Bias crimes are worse than parallel crimes. They are worse in a manner that is relevant to setting levels of criminal punishment. The unique harms caused by bias crimes not only justify their enhanced punishment but compel it.

224. An alternative use of the discriminatory selection model that I neither endorse nor reject is that discriminatory victim selection, in the absence of racial animus, might be seen as a lower grade of bias crime than true cases of racial animus. Under this approach, discriminatory selection would amount to a wrong in and of itself but a wrong of less seriousness than that of racial animus.

A more promising alternative lies in allowing discriminatory selection in the absence of racial animus to give rise to civil but not criminal liability. This approach is similar to the civil liability in other civil rights contexts — liability predicated upon unintentional conduct with discriminatory results. *See, e.g.,* Strauss, *supra* note 78, at 956-59 (arguing that discriminatory intent for purposes of the Equal Protection Clause requires neither animus nor conscious awareness of discrimination).

225. ALLPORT, *supra* note 2, at 518.

Bias crime laws ought to single out criminal conduct that is motivated by racial animus. Discriminatory selection of a victim will ordinarily be part of racial animus. Indeed, the proof of animus in the prosecution of a bias crime will likely begin with evidence relating to victim selection. Elements of proof, however, must not be confused with the gravamen of the crime. The gravamen of a bias crime is the animus of the accused.

The punishment of hate will not end racial hatred in society. If, however, the United States is to be a "staunch defender of the right to be the same or different," it cannot desist from this task.