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Contextualizing Bias Crimes: A Social & Theoretical Perspective

Alexander Tsesis
Loyola University Chicago, School of Law, atsesis@luc.edu

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FREDERICK M. LAWRENCE. *Punishing Hate: Bias Crimes under American Law*. Cambridge, Mass.: Harvard University Press, 1999. Pp. ix–269. $18.95 paper.

I. INTRODUCTION

Most states have adopted bias crime statutes that enhance the penalties of convicted persons whose wrongdoing was motivated by prejudice against a group with salient characteristics.[1] Nevertheless, some writers and legislators continue to dispute the legitimacy of those laws. Proponents have expanded their advocacy to the national arena, arguing that currently available criminal civil rights laws are insufficient.[2] On August 4, 1999, Frederick M. Lawrence testified before the House of Representative's Committee on the Judiciary in favor of enacting a proposed federal bias crime statute (Lawrence

Alexander Tsesis is a visiting scholar with the Institute for Legal Studies at the University of Wisconsin Law School and visiting assistant professor with the Chicago-Kent College of Law. He wishes to thank Brad Hooker, Philip Pettit, Chin Liew Ten, and Shelly Kagan for helpful conversations on philosophical aspects of this project. He also benefited from discussions with Frederick M. Lawrence and Andrew Taslitz on criminal motive and intent.

1. These statutes, and even their definitions for "bias crime," or the alternative "hate crime," vary substantively from state to state. For a comparative analysis of state laws see Jenness and Grattet 2001, 73-101. Jacobs and Potter argue that these sorts of crimes cannot be accurately tracked because of the states' definitional discrepancies (1998, 29–44).

2. In 1993, Frederick M. Lawrence published an article containing a list of federal criminal civil rights statutes. Those statutes, which are still good law, include 18 U.S.C. § 241 (conspiracy to violate civil rights), 18 U.S.C. § 242 (deprivation of rights under color of law), 18 U.S.C. § 245 (intimidation, interference, or injury of federally protected activities). Lawrence devotes chapter 6 of *Punishing Hate* to discussing historical and contemporary issues surrounding the federal prosecution of bias crimes.

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1999–2000), known as the Hate Crimes Prevention Act (HCPA). The act would have amended title 18, section 245, to require federal prosecution of some bias crimes over which federal courts currently have no jurisdiction. At present, the Department of Justice can prosecute bias crimes only when the perpetrator willfully selects a victim because of his or her race, color, religion, or national origin and if the attack takes place while the victim is exercising a federally protected right. The HCPA would have extended coverage to persons victimized because of their sexual orientation and disability. Further, the HCPA would have removed the jurisdictional requirement that the victim be engaged in a federally protected activity. Persons convicted under the proposed act would have been subject to enhanced penalties. The Senate initially passed the measure, but it failed to win enough support in the House and the congressional conference committee eliminated the measure from the final version of the appropriation bill.[3]

That same year, Harvard University Press published Lawrence's book *Punishing Hate*, which provides a sociological and foundational theory of bias crime law. The elegance of the book lies in Lawrence's concise yet comprehensive style. *Punishing Hate* addresses three main questions: Ought a society devoted to equality punish bias crimes differently from other crimes; that is, should it enhance penalties for already existing crimes when they are motivated by bias? May a country committed to freedom of expression enhance the punishment of bias crime? And, do the federalist provisions in the Constitution prevent the national government from prosecuting and punishing bias crimes (p. 2)? For the last decade, Lawrence has been, arguably, the most influential authority on these subjects, providing intellectual sustenance both for his supporters and detractors.

In determining which groups should be protected by bias crime legislation, the key element, Lawrence argues, should be whether the perpetrator was *motivated* by bias (p. 64). While he does not define *bias*, he contextually appears to mean hatred for a statutorily protected group.[4] Lawrence's deepest reflections about that topic are his consideration on the mental states of persons who commit bias crimes, along with his discussion on the psychology of ethnocentrism (pp. 29–39, 41–44, 58–63, 64–73, 106–9).

Lawrence believes persons who are motivated by discriminatory animus warrant more severe punishment because they commit more dangerous crimes than individuals whose crimes are not so motivated (p. 63). Throughout the book he argues that when persons are targeted on the basis of their

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3. The measure was reintroduced by Congresswoman Sheila Jackson Lee under the title Hate Crimes Prevention Act of 2001 (introduced in the House), 107th Congress, 1st Sess., H.R. 74. Congress has yet to vote on the 2001 bill.

4. In his most direct statement about the meaning of *bias*, Lawrence adopts the definition of the Hate Crime Statistics Act of 1990, which refers to it as a "negative opinion or attitude toward a group of persons based on their race, religion, ethnicity/national origin, or sexual orientation" (p. 35).

group status characteristics, they suffer more harm than those sustaining injuries from parallel crimes: "This is why bias crimes warrant enhanced punishment" (p. 95). I will follow his lead, primarily focusing on enhancement statutes. This should not, however, be construed to mean that there is only one legal strategy for addressing bias crimes. In a recent study of state statutes, Valerie Jenness and Ryken Grattet identify five types of bias crime statutes—those that (1) criminalize the interference with civil rights; (2) create new criminal categories; (3) embed provisions in statutes that refer to other sections of the criminal code; (4) reclassify crimes committed because of the victims' group status; and (5) enhance criminal penalties (2001, 79–86). All of these are differing approaches to punishing crimes committed from bias motives. Some writers, like Susan Gellman and John S. Baker (Gellman 1991; Baker 2000), raise First Amendment concerns about including motive as a component of bias crime laws, and, in this essay, I will examine whether punishing criminals more harshly because of their motives is constitutionally justifiable.

Lawrence also surveys the underlying justification for bias crime laws from the perspectives of retributive and consequentialist theories of punishment (pp. 45–51, 52). Retributivists believe criminal sentences should be commensurate with the culprit-inflicted harm, while consequentialists hold that the severity of sentences should be based on deliberations about how best to deter future crimes. Lawrence does not explicitly embrace either perspective, preferring instead to show that bias crime laws are consistent with both schools of thought (p. 63). Lawrence asserts that proportionality figures prominently in both theories, but he fails to evaluate whether either of them sufficiently explains why enhanced punishment of bias crimes is justifiable: "Proportionality is a key element on the justification for punishment. Whether through the retributive argument, . . . through the position advanced by . . . utilitarian theorists, . . . or through the contemporary eclectic theorists . . . some crimes are [inescapably] worse than others and must be punished more severely as a result (pp. 50–51). This conclusion leaves unanswered whether punishment for bias crimes can be made proportional by looking only at the gravity of the crime, which would be a retributive position, or, as consequentialists would claim, that the social good it can achieve must be the foremost part of the equation. Lawrence's neutrality on this point is politic but not adequately reflective. Rather than taking a definitive position, he seeks to demonstrate that both of the dominant punishment theories support the enactment of enhancement statutes. Lawrence's approach leaves unexamined whether either school of thought best justifies bias crime statutes, particularly when they conflict. This essay argues that a mixed theory of punishment, which synthesizes retributivist and consequentialist ideas, most convincingly explains why bias crimes should be punished more severely than crimes not motivated by bias. Lawrence briefly discusses the mixed theory, but does not formally adopt it. For now, we need

only be aware of retributivist and consequentialist claims, I will later have occasion to analyze them.

Retributivist theory justifies punishment in terms of its relationship to past acts. Retributivists believe that punishment should be both deserved by an offender for his or her wrongdoing and proportionate to the offence committed (McCloskey 1965, 250–51; Ten 1987, 5); it should inflict pain against convicted wrongdoers in return for the suffering they caused (Primoratz 1989, 147). A primary implication of this theory is that it advocates punishing criminals irrespective of (or at least ambivalent with regard to) whether that course of action is useful for achieving broader social goods.

Consequentialist theories of punishment, by contrast, justify punishment in terms of its potential to deter, incapacitate, and rehabilitate perpetrators—its potential to produce good consequences. Within the context of criminal justice, the good consequentialists seek is public safety, and laws must employ techniques most likely (or at least as likely as any other) to improve crime prevention.[5] Policymakers and adjudicators can gauge the appropriate severity of punishment by determining its likelihood of reducing crime.

I think a mixture of these two theories best explains why enhanced punishments for bias crimes are legitimate. The differences between retributivist and consequentialist theories can be bridged by legislation that expresses social disapprobation of bias crimes.[6] Retributivism appeals to the empathic insight that the guilty should be punished, while consequentialism reflects government's obligation to design a criminal justice system that assures citizens' security. Lawrence's argument in *Punishing Hate* would have been even more powerful had he taken this approach. The mixed theory comports with his judgment that bias crime laws punish culprits not only because the harms bias crimes cause exceed those of parallel crimes (p. 4), but also because they express some of the highest social values, namely, the importance of intergroup harmony and equality (p. 8).[7]

Before addressing the theoretical issues more fully, I begin by examining what distinguishes bias-motivated crimes from other criminal offenses. I then discuss the constitutionality of the motive element in bias crime stat-

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5. Classically, consequentialists, like Jeremy Bentham and Henry Sidgwick, considered social happiness or pleasure to be the greatest good that punishment should achieve. Modern theories have adopted a more pluralistic approach to defining "the good," acknowledging the desirability of factors other than just pleasure but continuing to maintain the ethical primacy of pursuing good results (Kagan 1998, 61–63; Lichtenberg 1983, 545).

6. Proponents of the mixed theory, like H. L. A. Hart, consider the combination of consequentialist and nonconsequentialist elements as necessary for a "morally tolerable account" of punishment to "exhibit . . . a compromise between distinct and partly conflicting principles" (Hart 1968, 1).

7. Lawrence's belief that punishment for bias crimes, like other criminal sanctions, plays the indispensable, expressive role of condemning the wrongdoing (p. 163) is reminiscent of Emile Durkheim's idea that criminal laws play an important role in manifesting social disapprobation (see, e.g., Durkheim [1893] 1933, 108–9).

utes. Last, I weigh retributivist and consequentialist theories and explain why Lawrence's conclusions would be strengthened by adopting a mixed perspective on punishment. I hope this essay will go some way toward showing that bias crime laws can be justified on a sound theoretical foundation rather than on political vicissitudes.

II.   THE DISTINGUISHING FEATURES OF BIAS CRIMES

Before discussing bias crime legislation in the context of various theories of criminal justice, we must know a bit about bias offenses and laws against them. The most extensive compilation of demographic data on bias crimes is that mandated by the Hate Crime Statistics Act of 1990 (HCSA), which requires the FBI's Uniform Crime Reports Section to collect data about the prevalence of bias crimes in the United States. The HCSA defines bias crimes as "traditional offenses motivated by the offender's bias" (Federal Bureau of Investigation 2000, 1).[8] The FBI's yearly report is compiled from statistics voluntarily provided by state and local agencies. The information so obtained has thus far been inconclusive about whether bias crime incidents are on the rise because "methodologies are both too new and too badly flawed to give us an accurate picture of changes over time" (Perry 2001, 11). While the number of reported bias crimes continues to grow, so too does the number of agencies reporting to the FBI. Further, the lack of reporting conformity marginalizes the importance of the yearly report. Lawrence, too, acknowledges that "these statistics remain inconsistent and incomplete" (p. 20).

The ambiguity in the FBI's method of data collection raises skepticism in some critics of bias crime laws. John S. Baker Jr., for example, argues against bias crime laws in part because no empirical evidence exists indicating that there is a "'hate crime' epidemic." Instead, he writes, "advocacy groups, the media, politicians and academic commentators" have manufactured an artificial crisis in order to further their agendas (2000, 1199–1202). Baker's premises are too conspiratorial—purporting a subculture of self-interested professionals who flout an unsubstantiated perspective—to undermine the legitimacy of bias crime statutes. His approach leaves untouched the underlying purposes behind bias crime policies, which are, after all, designed to reduce the risk to individuals and increase safety, regardless of

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8. The HCSA uses *hate crime* rather than *bias crime*. Various writers have defended adopting one or the other of these terms. Either of them can refer to codified statutory guidelines for sentencing persons who are found guilty of committing crimes motivated by prejudice against a statutorily protected group. The controversy about which term more accurately describes a culprit's state of mind is somewhat semantic. I prefer *bias crime* because it indicates that discriminatory wrongdoing is not always accompanied by the feeling of hatred (it may, for instance, mainly be fueled by disrespect). For a discussion about this controversy see Wang 1999, 800–801, 895–97.

whether the number of victims of bias crimes is growing. Proof that there is an increasing incidence of crimes motivated by bias could only bolster the need for criminal legislation against them, but the argument in favor of those laws can be embraced even if there is no "epidemic."[9]

Lawrence does not formulate a "definitive list of characteristics" of groups that might properly be included in bias crime statutes (p. 13). He settles, instead, on describing "the proper methodology for going about the business of constructing such a list." He suggests that the state legislature or city council should include criteria accounting for statewide and local "social divides" (p. 13). This approach carries the risk that local prejudices will produce divergent legal standards. The advantage of a federal law, such as the proposed HCPA, is that it would protect groups even if state and local legislatures excluded them. Lawrence suggests including gender and sexual orientation as protected classes under a federal statute, both of which many states currently include in the status provisions of their bias crime statutes (pp. 14–20; Jenness and Grattet 2001, 94–97). In deciding on the scope of coverage, Lawrence implies, legislators must include groups who have historically been subject to widespread attacks, such as racial and ethnic groups. To this I would add that the categories of covered persons should reflect the understanding that copycat crimes are often based on condescending cultural prejudices.

Bigots are motivated by inflammatory prejudices that inaccurately stereotype whole groups of people.[10] Typically, bigots consciously select targets who are the subjects of widely held stereotypes (Kleg 1993, 155).[11] These

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9. "Epidemic" seems to have been first used, sardonically, by Jacobs and Potter in their opposition to bias crime legislation: "Advocacy groups for gays and lesbians, Jews, blacks, women, Asian Americans, and disabled persons have all claimed that recent unprecedented violence against their members requires special hate crime legislation. . . . Journalists and academics have accepted the existence of a hate crime epidemic. . . . Minority groups have good reasons for claiming that we are in the throes of an epidemic. An 'epidemic' demands attention, remedial actions, resources, and reparations. . . . The uncritical acceptance of a hate crime epidemic may well have negative sociopolitical ramifications. This pessimistic and alarmist portrayal of a fractured warring community is likely to exacerbate societal divisions and contribute to a self-fulfilling prophecy. It distorts the discourse about crime in America, turning a social problem that used to unite Americans into one that divides us" (1998, 63–64). Jacobs and Potter's, as well as Baker's, use of the term is meant to trivialize the argument by overinflating the claims of Lawrence and other advocates of bias crime legislation.

10. Prejudiced stereotypes are filled with derogatory connotations about groups whom bigots brand unworthy of fair treatment. Individuals who internalize those stereotypes sometimes begin to perceive the despised groups as legitimate targets of aggression and channel their personal frustrations against them (Delgado and Stefancic 1996, 478). Those stereotypes can provide perceivers with rationalizations for committing crimes against the derogated group (Hamilton and Trolier 1986, 143–44). For a more in-depth study of stereotyping and its effect on cultural prejudices see Tsesis 2002, ch. 7.

11. Social context is an evocative backdrop that can offer bias-motivated criminals a pretext for attacking members of a particular group (p. 41; Young 1990, 61). The violence is committed against them for no other reason than their possession of salient characteristics, whether they be racial, religious, national, gender, or other traits evoking bias animus. A survey of history seems to reveal that certain groups are targeted in unique circumstances: during economic crises, Jews are at greater risk because of the traditional stereotype that Jews

attacks are unlike ordinary crimes, which tend to be random or arise from personal conflicts (Lawrence 1994, 343). Bias crimes isolate victims because they commonly reflect the intolerant sentiments of many people, rather than only the culpability of an individual committing a particular act (Uhrich 1999, 1506–7). The perpetrators of prejudice-motivated crime tend to cause more long-term harms than other criminals (Weiss, Ehrlich, and Larcom 1991–92, 27).

Victims of racial animus are often forced to make life-altering decisions, such as moving from their neighborhoods, changing jobs, or avoiding public places, to decrease existing or anticipated threats (*Encyclopedia of Social Work*, 1990 supp., s.v. "ethnoviolence"; Wexler and Marx 1986, 210; Wang 1997, 123). For instance, homosexuals are often inhibited in expressing themselves for fear that revealing their sexual orientation will make them more vulnerable to attacks (Herek 1989, 948). Lawrence rightly concludes that the stigma that typically accompanies bias crimes can lead to "humiliation, isolation, and self-hatred" (p. 41).

Bias crimes are distinct from others because of their effects on both individuals and the targeted community and on the overall social stability. Victims are doubly traumatized. They experience stress both because of the underlying crime and for being singled out because of their race, ethnicity, nationality, gender, or sexual orientation. Persons define themselves, to some greater or lesser extent, by their membership in those groups. Thus, crimes motivated by those characteristics hurt persons both materially and existentially. For fear of being victimized, out-group members sometimes even try to efface their identities, for instance by denying their Jewishness, in order to avoid being associated with the denigrated group (Fanon 1967, 50–51, 191–93; Sartre 1948). The targeted community understands that the conduct is meant to intimidate them and cause them to lose heart in accomplishing their goals, whether that means joining a profession that has historically been dominated by a more powerful group or living in a community that has always been racially or ethnically exclusionary. And, on a social level, bias crime adds to intergroup tensions, reducing the degree of trust and cooperation among various groups and thereby diminishing the exchange of creative ideas for improving essential governmental functions such as the provision of health care and other human services (Scotting 2001, 862–66).

Perpetrators intend not only to harm the individuals they attack but also to terrorize the vulnerable community. For example, the purpose of burning a cross in front of a black church or spray painting a swastika on a synagogue is not only to drive out their members from a neighborhood

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hoard goods to the detriment of other groups; blacks are more likely than other groups to be unjustifiably attacked by vigilantes avenging the rape of a white woman; and gays are the more likely targets of hoodlums wanting to prove their manhood to domineering friends.

but also to make other blacks or Jews living nearby apprehensive for their safety (p. 42). Lawrence recognizes that bias crimes are unique because they make more perilous the lives of out-group members:

> 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. (P. 63)

Augmented penalties are, therefore, warranted for the commission of bias crimes because they are more damaging than their parallel counterparts.[12]

After explaining why he regards bias crimes as more dangerous and thinks penalties for committing them should be more severe than those imposed for committing the underlying crimes alone, Lawrence turns to one of the most controversial parts of his argument. Throughout *Punishing Hate*, and with greatest emphasis in chapter 4, Lawrence argues that "[b]ias motivation of the perpetrator, and not the resulting harm to the victim, is the critical factor in determining an individual's guilt for a bias crime" (p. 64). The "mental state of the actor," not the result of criminal conduct, is the "most compelling basis for deciding whether an individual has committed a bias crime" (Lawrence 1994, 368–69). Lawrence's formulation raises the question, Do bias crime laws violate the First Amendment by punishing people for their beliefs? Some critics embrace an absolutist First Amendment reading, asserting that bias crime laws chip away at free speech protections. Steven G. Gey, for example, states that making motive an important element in bias crime legislation "would permit the government to punish antisocial beliefs and expression without establishing the existence of a threatened harm independent of the one already punished by the original criminal charge" (Gey 1997, 1069–70; see also Jacobs and Potter 1998, 111–29; Gellman 1991, 333–34).

Motive ordinarily plays no role during criminal trials in determining a defendant's guilt. The state must show that the elements of a crime were committed and that the perpetrator had the requisite mental state.[13] Typically, intent is distinguished from motive. Whether an actor had the requisite culpability to be convicted for the crime is a matter of intent, while motive relates to the reason that a person committed the act. "Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is

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12. Lawrence further believes that bias crimes can adversely reverberate to society as a whole, not only to out-group members (pp. 43–44).
13. The influential Model Penal Code provides four levels of culpability: purpose, knowledge, recklessness, and negligence (1985, § 2.02(2)).

done or omitted" (*Black's Law Dictionary*, 6th ed., s.v. "intent"). Lawrence, however, believes that the "formal distinction between intent and motive fails" (p. 109) and regards it as formulaic (p. 93).[14] He proposes, instead, a two-tiered model for adjudicating whether a defendant had the requisite culpability for bias crime. Under his system, the prosecution must first prove the *mens rea* of a parallel crime, for instance battery, and, second, show that in committing that crime the defendant was motivated by bias (p. 95). As with other adjudications requiring proof of motive, such as capital murder-for-profit sentencing hearings,[15] the prosecution can use circumstantial evidence to prove that the crime was motivated by bias (p. 66). For example, biased motive could be inferred if a person attacked members of a specific out-group and perpetrated a crime while repeatedly shouting discriminatory epithets.

Criminal law recognizes that some crimes hurt both individuals and society more than others. In fact, to obtain a conviction for some offenses, known as "specific intent" crimes, a prosecutor must prove that, beyond the requisite state of mind (*mens rea*), the defendant had an additional reason (motive or underlying purpose behind the volition) for acting. The added impetus alters the classification of the crime. For example, breaking and entering, which is a general intent crime, is the unauthorized intrusion into a statutorily defined structure (e.g., a house). On the other hand, persons can be convicted for a burglary, which carries a stiffer penalty than breaking and entering, only if their intent to make an unauthorized entry is coupled with the goal of committing a felony therein, as opposed to a misdemeanor or petty offense (Finkelstein 2000, 911; Kadish and Schulhofer 1995, 218; Taslitz 1999, 754). Similarly, treason requires supplying aid *in order to help the enemy* (18 U.S.C.A. § 2381 [2001]; Hart 1968, 125). Further, motive is a relevant aggravating factor in the sentencing phase of persons found guilty of murder for hire (*United States v. Fontenot*, 14 F.3d 1364, 1373 [9th Cir. 1994]). Criminal law considers the motive to commit murder for pecuniary

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14. This dichotomy between motive and intent somewhat artificial, as Lawrence points out in an article published after *Punishing Hate*. There he continues to assert that the "distinction between intent and motive fails" (Lawrence 1999–2000, 157). He makes two defenses for incorporating motives into bias crime statutes against the charge that doing so violates the First Amendment. On the one hand, "[p]urely as a matter of positive law, concern with the punishment of motivation is misplaced. Motive often determines punishment" in criminal statutes (1999–2000, 155). In the alternative, Lawrence argues that "[w]hat is a matter of intent in one context may be a matter of motive in another" (1999–2000, 157). The latter alternative rejects the assertion that "motive" is distinguishable from the requisite *mens rea* (mental state) of an offense. "The formal distinction ... turns entirely on what are considered to be the elements of the crime" (1999–2000, 156–57). Thus, Lawrence argues, somewhat persuasively I believe, that bias crimes may be described as either motivated by biased animus or as intentionally targeting persons belonging to a statutorily protected group (1999–2000, 157).

15. The legislative determination that murder for pecuniary profit should aggravate the imposed punishment indicates society's conviction that murder for money is worse than killing for other reasons (Steiker 1999, 1866–67).

gain to be an aggravating factor because it poses an even greater social danger than homicide committed for other reasons (Steiker 1999, 1866–67). Courts also augment the punishment of individuals convicted of murdering with the motive to collect insurance (McCord 1998, 23).

The offender's mental state also has a bearing on the punishment imposed for other criminal conduct. A perpetrator's motive for committing homicide determines whether he is guilty of first-degree murder, second-degree murder, involuntary manslaughter, or voluntary manslaughter. Indeed, the Supreme Court has held that a trial court hearing evidence in a capital case can constitutionally consider whether a defendant was motivated by racial hatred to decide whether the crime warrants the death penalty (*Barclay v. Florida*, 463 U.S. 939, 949–50 [1983]). The culprit's motive is also decisive in other sentencing decisions: A person who kidnaps another to commit a sexual battery incurs more severe punishment than he or she would for other forms of kidnaping (*In re Joshua H.*, 13 Cal. App. 4th 1734, 1737 (1993); pp. 106–7). The use of motive is unquestioned in convictions for murder, burglary, and kidnaping because it has so long been a part of the law that its presence has become intrinsic to those crimes. Courts factor motive into such a variety of criminal sentencing decisions that the controversy about its validity as a factor in bias crime legislation seems to primarily reflect the latter's relative novelty (Steiker 1999, 1869).[16]

Just as in other criminal cases that require the prosecution to establish motive, bias motive may be proven beyond a reasonable doubt by direct or circumstantial evidence. Material evidence, such as the defendant's statements made during the commission of the crime, can be used as evidence of bias animus.

The United States Supreme Court weighed in on the issue of constitutionality in *Wisconsin v. Mitchell* (508 U.S. 476 [1993]), finding that the First Amendment does not prohibit states from enforcing penalty-enhancement laws with a bias motive component. The case arose when black youths, who had just seen the movie *Mississippi Burning*, attacked a while male. Mitchell, who instigated the violence, told the groups "There goes a white boy; go get him" (508 U.S. 480). The defendant was charged with violating a Wisconsin criminal statute that enhanced penalties for anyone who "[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" (508 U.S. 480, quoting Wis. Stat. § 939.645(1)(b) [1990]).

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16. Courts have upheld the constitutionality of criminal civil rights statutes in numerous contexts. These federal statutes prohibit persons with racist, bigoted, and xenophobic motives from interfering with, injuring, and intimidating victims to prevent them from engaging in any enumerated acts, including fair housing practices, and from interfering with victims' privileges and immunities under color of law (18 U.S.C. § 245(b)(2) (enumerating acts); 18 U.S.C. § 242 (under color of law); 42 U.S.C. § 3631 (fair housing)).

The Wisconsin Supreme Court had reversed the conviction, finding that the enhancement statute violated the First Amendment by punishing some but not all points of view (*Wisconsin v. Mitchell*, 169 Wis. 2d 153, 163 [1992]). To the contrary, the United States Supreme Court found that motive under the Wisconsin statute "plays the same role . . . as it does under federal and state antidiscrimination laws" (508 U.S. 487). The statute "aimed at conduct unprotected by the First Amendment" (508 U.S. 487). Chief Justice Rehnquist, who wrote for the unanimous Court, placed special emphasis on title 7 of the Civil Rights Act of 1964, which prohibits employment discrimination (42 U.S.C. § 2000e-2(a)(1)). Employers can fire persons at will, unless their termination decisions are based on the employee's race, color, gender, national origin, or religion (Kalam 2000, 599). Lawrence elaborates on this point, writing that this distinction can only be understood in the context of particular legal strictures against bias-motivated firings. "[T]he only way to determine whether such a firing is legal or not" he writes, "is to inquire at some level into the motivation of the employer" (p. 107). The Court found that the Wisconsin legislature's conclusion that bias crimes "inflict greater individual and societal harm" is a constitutionally legitimate reason for enhancing the penalties for their perpetration (508 U.S. 486). The Supreme Court reaffirmed its commitment to this principle in 2000, holding that a statute can augment the penalties imposed on criminals motivated by racial hatred, so long as the prosecution can prove beyond a reasonable doubt that the defendant committed the crime with a bias motive (*Apprendi v. New Jersey*, 530 U.S. 466, 471–72, 476 [2000]).

Critics of the *Mitchell* decision argue that it is unrealistic to assume that bias animus can be proven. James Morsch, for instance, argues that the subjectivity of personal motives makes the job of proving bias crime cases almost impossible; people's motives are only known to them "as personality and psyche" (Morsch 1991, 667–68). Similarly, Craig L. Uhrich states that "the issue of punishing motive as an element of the crime is one with which the criminal law is not adequately equipped to deal" (1999, 1528). Their conclusions, however, overlook that the determination of motive, as we saw earlier, has not proven problematic in the context of other criminal cases.

Other critics, most prominently Jacobs and Potter, rhetorically question whether "punishing crimes motivated by politically unpopular beliefs more severely than crimes motivated by other factors itself violates our First Amendment traditions" (1998, 129). Bias crime legislation does not increase punishment for persons who simply *express* their prejudices; it only increases punishment for those whose *wrongdoing* is motivated by prejudices (Phillips and Grattet 2000, 580). The relevant question is not simply whether the defendant hated members of the attacked group but whether the crime was motivated by his or her bias animus.

The First Amendment tradition incorporates not only the ideals of free speech but also those of equal protection. Andrew E. Taslitz (2000), for

example, acknowledges that bias crime statutes have an expressive compo-
nent but concludes that they can withstand First Amendment scrutiny. He
asserts that, originally, the First Amendment was indifferent to violence
perpetrated against blacks, the Constitution having been ratified to placate
Southern slavocracy.[17] But the Reconstruction amendments changed this
dynamic, and under the equal protection clause, bias-motivated violence is
no longer protected as a legitimate form of self-expression. Taslitz concludes
that the constitutional right to free speech does not extend to "racially-
subjugating expressive violence" (Taslitz 2000, 1379–98). Taking Taslitz's
reasoning a step further, legislation against bias-motivated wrongdoing is in
keeping with the constitutional tradition of protecting vulnerable minorities
against the whims of powerful in-groups.[18]

Lawrence further divides bias-motivated crimes into two categories.
The first he calls the "discriminatory selection model." Culpability is deter-
mined, based on that model, by whether the offender discriminatorily se-
lected a victim: "it is irrelevant why an offender selected his victim on the
basis of race or group; it is sufficient that the offender did so" (p. 30). This
model, which is based on the type of statute the Court upheld in Mitchell
(p. 30), "enhances the maximum penalty for conduct motivated by a dis-
criminatory point of view more severely than the same conduct engaged in
for some other reason or for no reason at all" (508 U.S. 485). The second
is the "racial animus" model, which focuses on whether "a defendant has
acted out of hatred for the victim's racial group or the victim for being a

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17. In its original form the Constitution contained several provisions protecting slavery,
such as the three-fifths clause, fugitive slave clause, and the slave importation clause. The
three-fifths clause reduced blacks to three-fifths the value of whites for purposes of representa-
tion; the fugitive slave clause prohibited nonslaveholding states from emancipating runaway
slaves and required their return to slave owners; and the slave importation clause coun-
tenanced continuation of the African slave trade until 1808. See U.S. Constitution, art. 1,
§ 2, cl. 3, partly repealed by U.S. Constitution, amend. 14, § 2; U.S. Constitution, art. 4,
§ 2, cl. 3, affected by U.S. Constitution, amend. 13 and art. 1, § 9, cl. 1, which lapsed (see
generally Finkelman 1992, 969–70).

18. In Justice Louis Brandeis's concurrence to Whitney v. California, he explains this
purpose is intrinsic to the First Amendment: "Recognizing the occasional tyrannies of govern-
ing majorities, [the founding fathers] amended the Constitution so that free speech and assem-
bly should be guaranteed" (274 U.S. 357, 377 [1927] [Brandeis, J., concurring], overruled on
other grounds by Brandenburg v. Ohio, 395 U.S. 444 [1969]). Brandeis's insight, however,
fails to recognize that, even after the passage of the First Amendment, governing majorities
continued to tyrannize the black minority. The drafters of the Constitution did not incorpo-
rate any protections for their slaves' speech rights. Rather, they envisioned the First Amend-
ment as a constraint against the censorship of the "political, scientific, and artistic discourse
that they and their class enjoyed" (Delgado and Yun 1994, 881–82). James Madison, who
was a principle architect of the First Amendment, was a slave owner, even though he recog-
nized the institution was the nation's "original sin" (Madison 1867, 3:190). Before the Recon-
struction amendments were ratified, violence against blacks was legally condoned in the South
in spite of constitutional protections on speech. And even after their ratification, bigots main-
tained the upper hand there with the passage of the black codes and the rise of the Ku Klux
Klan.

member of that group" (p. 29). Lawrence's use of *racial animus* is more narrow than the scope of group categories Lawrence refers to in other parts of the book.[19] Calling it a "bias animus" model would have better served his design to capture the hatred involved in attacks against persons based on their race, national origin, sexual orientation, and gender. In spite of this minor terminological flaw, Lawrence accurately identifies two analytically distinct approaches to bias crimes. For clarity, in my discussion here, I will stick to his term for the second model.

The racial animus model emphasizes the centrality of the perpetrator's hateful attitude. In contrast, under the discriminatory selection model, a person may be guilty for attacking a member of an out-group even when the offender has no generalized hatred for that group. For instance, a person may steal from blacks in a community where law enforcement agents are members of the Ku Klux Klan, knowing that neither the immediate victims nor the black community will be able to turn for protection to the police. Such a person may have little or no hatred for blacks but rather may want to exploit cultural prejudices for personal, criminal gain. According to the first model, the intentional selection of blacks qualifies the act as a bias crime. On the other hand, someone who attacks blacks to express his or her racist convictions commits a racial animus type crime. Lawrence prefers the racial animus model. He writes that when discriminatory selection is not accompanied by animus it should either not be punished as a bias crime or be classified as "a lower grade of bias crime" (p. 79). Lu-in Wang, another advocate for bias crime laws, offers a different perspective. Contrary to Lawrence's preference for the racial animus model, Wang believes laws should reflect that persons more often commit crimes against out-groups for opportunistic reasons than because of hate (1999, 815, 899). She argues that limiting enhancement statutes to "animus-motivated crimes" is problematic because the "racial animus requirement would exclude from enhanced punishment those criminals who have some reason other than group-based animus for targeting certain social groups." Many of those crimes, Wang points out, are committed not by ideologues but by people motivated by greed or bravado (1997, 129). Lawrence's and Wang's views are not wholly incompatible, because, where an opportunistic crime is accompanied by animus, Lawrence would agree that it is a bias crime, although a less dangerous crime than one driven primarily by group hatred. However, where a perpetrator is unaware of the victim's group status and acts instead from wholly material interests or the desire to increase his or her standing among violent friends, Lawrence would not classify that as a bias crime (pp. 174–75). I would add

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19. Possibly, this is an inadvertent inconsistency resulting from the fact that five out of the seven chapters of *Punishing Hate*, including the one in which the two categories of bias crimes appear, previously appeared in journal form.

that enhancement statutes should reflect that bigots are not always moti-
vated by animus but may also be motivated by some other prejudiced atti-
tude, such as the disrespect for members of the targeted out-group.

A more difficult question is how to respond to crimes in which bias
is one of several motivating factors. In these cases, Lawrence writes, "bias
motivation must be a substantial motivation for the perpetrator's criminal
conduct" (p. 10).[20] A trier of fact, then, must decide whether bias was a
trivial or substantial factor in choosing a particular victim (Phillips and
Grattet 2000, 581). In my view, if any variety of bigotry can be proved
beyond a reasonable doubt to be a substantial contributing motive for a
criminal act, such wrongdoing is a bias crime.

This brief survey should suffice to create a foundation for my assessment
of the theoretical foundations of bias crime statutes. Before explaining why
I believe a mixed theory of punishment best vindicates the legitimacy of
those laws, I turn to some analysis of retributivist and consequentialist argu-
ments.

III.   THEORETICAL GROUNDING

In this section I deal with the theoretical justification for punishing
persons who commit wrongful acts with a discriminatory motive more
harshly than people who commit crimes without that motive. In chapter 3 of
Punishing Hate, Lawrence articulates the legitimate governmental purposes
behind penalty enhancement statutes; ultimately, those laws must both con-
demn bias-motivated acts and improve pubic safety. Lawrence asserts that
"theories of proportionality and harm" warrant enhancing the punishments
for injuries sustained from bias crime and focuses on the two dominant
schools of punishment theory: retributivism and consequentialism (pp. 46–
51). As we saw in the introduction to this essay, the former focuses on ren-
dering just deserts for past crime, while consequentialism aims at tailoring
punishment to "improve the overall welfare of society" (pp. 45–46).[21]

My intent here is not to present an exhaustive discussion of these theo-
ries but to demonstrate that the policies behind bias crime legislation are
based on rational aims of criminal justice. I hope to show that bias crime
legislation that punishes persons proportionately for past crimes and that is
also likely to decrease the frequency of bias crimes in the future provides
the most viable approach to realizing Lawrence's hope of putting an end to

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20. Similarly, the California Supreme Court held that where there are several concurrent
causes of the crime, conviction requires proof that bias was a "substantial factor in bringing
about the offense" (*People v. Superior Court* (Aishman), 10 Cal. 4th 735, 736 [Cal. 1995]).
21. As Alfred C. Ewing, a leading theorist in this field, points out, both theories have an
educative component. Punishments can provide "a kind of moral education" about wrongful
conduct when they are "substantially just" and aim to achieve future good (Ewing 1927, 300).

bias offenses (p. xi). In his discussion of punishment theories, Lawrence concludes that no single theory persuasively explains why society should more severely punish crimes motivated by bias. Instead, he is content with a discussion about how other theorists have argued that proportionately greater punishment can be supported by either a retributivist, consequentialist, or mixed theory of punishment (pp. 50–51). While he discusses these three theories, Lawrence nowhere explicitly follows any one of them, and this lack of commitment to a perspective of why enhancement statutes are legitimate makes his argument less persuasive than it could otherwise have been.

Lawrence begins his discussion of punishment theory by examining retributive theory, which "offers a justification of proportionality that is inherent in the very nature of punishment" (p. 46). Retributivists believe punishment is the necessary response to crime, regardless of whether it achieves anything socially beneficial. They claim that a just desert for a wrongful act should be gauged by the severity of a crime. The focus of punishment is on retribution for misdeeds; the social utility of the punishment is not relevant (Cotton 2000, 1315–16; Uhrich 1999, 1504; Murphy 1985, 158–59). Any good that the criminal law might achieve, such as increased security, is said to be of secondary importance. When applied to bias crime, the retributivist theory maintains that if a crime is motivated by bias, it should be more severely punished because it has caused greater harm. Whether enhancement statutes are likely to decrease future risks to outgroups is deemed to be irrelevant in deciding on the appropriate level of punishment.

The most commonly held version of retributive justice is lex talionis, the right of retaliation, which advocates rendering punishments that are commensurate with the crime—the death penalty for murder, flogging for battery, and so forth. Lex talionis largely went out of repute because theorists recognize that inflicting suffering from revenge could never undo the evil done. Sophisticated retributivists find reasons other than mere retaliation for punishing wrongdoers (pp. 46–47; Primoratz 1989, 12). In recent years, the vengeance form of retributivism has, for the most part, been supplanted by Kantian concepts of retributive justice. The prevalent approach now professes that criminal punishments should be imposed in order to affirm the criminal's dignity as a rational and autonomous person. The aim is to render judgement against someone deserving punishment for committing a culpable act. A court is required to impose full satisfaction for crimes, even for a relatively minor misdemeanor, regardless of any benefit that could be derived from the imposition of a more lenient outcome, such as a period of supervision followed by dismissal of the charges. Proportionate retribution must be imposed regardless of its usefulness, even though "this does not exclude utility but only makes it secondary" (Kant [1797] 1965, 99–108, 131–33). Exacting a punishment that diminishes social welfare, say by harsh

penalty statutes that contain no procedure for weighing extenuating circumstances (such as the amount of grief a particularly harsh judgment would cause the criminal's family or whether the penalty is unnecessarily harsh to incapacitate the offender from committing future crimes against the community), seems unnecessarily callous (Eckhoff 1983, 12). Without a careful analysis of the social consequences of a contemplated punishment, the imposed penalty may be counterproductive to the fair administration of criminal justice.

In a seminal article, Herbert Morris argues that persons may be justly punished for violating criminal laws in order to counteract the unfair advantages culprits attain through the offense. Morris believes that the punishment "restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt" (1968, 478). Morris is on the right track. Punishing a person for a bias crime might restore some of the community equilibrium and reapportion the unfair in-group advantage gained by organized violent acts. That good, however, can only come in the future, and then the justification is not merely retributive. The advantage gained from putting a criminal in jail can never undo the specific harm. Society can only hope that incarceration will rehabilitate—or at least temporarily incapacitate—the convicted person and inhibit others from taking unfair advantage.

The retributive conception that thinks of punishment as a way of showing respect to culprits, by treating them as autonomous persons who can recognize that they deserve the punishments they were dealt, is admirable but also incomplete. Appeal to a bigot's sense of compassion for the victim, for instance by testimony of affected persons during the sentencing phase, may go some way to making perpetrators feel remorseful and understanding the gravity of their crimes. Further, the criminal justice system can appeal to defendants as rational persons by affording them procedural protections against wrongful punishments and providing them with a right to an appeal. These can help show a criminal the wrongs associated with bias crimes are based on reasonable social aims. However, forced rehabilitation, which claims to respect criminals without seeking to educate them, discounts defendants' mental faculty (Braithwaite and Pettit 1990, 29, 128–29). In enhancing the penalties of persons convicted for bias crimes, it is unrealistic to believe that they will all think being behind bars for a longer period of time is a respectful gesture. It is more realistic to believe that society will be able to convince some but not all culprits that bias-motivated actions are egregious. A punishment scheme must, then, appeal coercively to those who commit bias crimes who will not be convinced by rational arguments.

While retributive theory correctly emphasizes the need for individualized justice, it gives no guidance in deciding whether enhancement statutes can effectuate a more secure communal life. The retributivist theory provides reasons for judging cases on their merits rather than exploiting persons

as mere quanta in utility calculations. Its focus on individuals as autono-
mous, responsible agents accurately explains why mentally competent indi-
viduals should be held responsible for committing bias crimes: We expect
denizens to understand that it is irrational and harmful to attack persons
based on their having salient group characteristics. Retributive theory, how-
ever, fails to explain what good society may expect to achieve by imposing
different gradations of punishment. The reason lies in the anticipated bene-
fits of a criminal justice system, which includes specific deterrence of culprits
and general deterrence of other unscrupulous persons. So, to divide the fair
administration of the criminal justice system from the resulting social bene-
fits is to split the necessary means from the ultimate goal.

After his discussion of retributive theory, Lawrence turns his attention
to a consideration of consequentialist theories of punishment (pp. 48–50).
Classic consequentialists hold that punishment must serve at least three
purposes: deterring would-be wrongdoers, rehabilitating convicted crimi-
nals, and imprisoning criminals to prevent them from engaging in future
crimes (Hodgson 1967, 91). Consequentialist theory lends itself to empirical
studies since it predicts what policies would result in the best outcomes (Wil-
liams 1972, 92; Wendel 2000, 135). Its perspective is broader in scope than
retributive theory because consequentialism regards punishments not as re-
sponses to isolated occurrences, otherwise they would be unnecessary since
the inflicted harm cannot be undone, but as means to achieving some social
good. Punishment is only warranted if it can bring about some good, particu-
larly increased security (Bentham 1843, 396; Bagoric and Amarasekara
2000, 131).

Punishments for bias crime would be justified under the consequen-
tialist theory so long as they helped decrease the crime rate. At first look
this view is appealing because a punishment scheme that reduces bias crime
would clearly be socially beneficial. However, as Lawrence points out, a con-
sequentialist perspective that is concerned only with the likelihood of the
offender committing future crime is problematic (p. 48); enhancement stat-
utes would be untenable if they were instituted solely based on their util-
ity function, without regard to proportionality. For example, the state may
be more likely to prevent misogynistic crimes if a conviction for purse
snatching, when committed out of gender animus, carried a mandatory sen-
tence of life imprisonment and the sentence was known to always be en-
forced. However, our sense of justice recoils from this result because fair
sentencing gradations should not only be based on the likelihood of pre-
venting later crimes but also on the degree to which a penalty is commensu-
rate with the injured rights.

Another criticism which is often leveled against the consequentialist
theory of punishment is that it could achieve its intended effect by punishing
either an innocent or a guilty person (Pugsley 1979, 393). If all that matters
is deterrence, bigots could be dissuaded from acting on their prejudices even

if judges convicted people they knew to be innocent. As long as no one discovered the cynical plot, the greater good—a reduced occurrence of bias crimes and an increased level of safety—could be achieved at the cost of only a few innocent persons being fraudulently sentenced. Consequentialists typically respond to this allegation by drawing attention to the breakdown of trust in the legal system and the reduced sense of security other innocent people would feel if and when they found out about the state perpetrated ruse (see, e.g., Lyons 1974, 346–47; Pearl 1982, 280–81). Indeed, punishing the innocent would not really increase public safety; to the contrary, it would increase anxiety. But even though it can respond convincingly to the innocent victim argument, consequentialism does not explain why the government breaches a public trust by punishing the innocent. That reason is beyond the scope of utility-maximization considerations; it is found in a *prima facie* ethical rule that legislatures must institutionalize substantive and procedural legislation against punishing persons who are not guilty of wrong-doing.

While bias crime prevention clearly should be a principal goal of enhancement statutes, sentences should also be proportionate to an act that infringes on other people's rights. A theory of punishment should integrate those concerns into a beneficial policy. That theory must redress the rights of victims while not trampling the rights of the guilty. The foundation of such a theory, I believe, lies in a form of consequentialism that integrates retributivist concerns for fundamental rights.

Recent consequentialist scholarship recognizes the insufficiency of seeking only to maximize overall pleasure and adopts a broader conception of teleological goods. Thus, Lawrence's statement that consequentialism "draws its justification from a utilitarian rationale" (p. 46) is not precise. Consequentialism goes beyond utilitarianism in reflecting not only on what increases pleasure but also which laws will assure an equitable and fair distribution of social benefits. Pluralistic consequentialism acknowledges the value of developing a governmental strategy for redressing wrongdoing that is likely to augment physical security but also recognizes that legislators must formulate policies for assuring that well-being is equitably and fairly distributed.[22] Discriminatory impediments to a more vulnerable group's ability to share in the common good, such as the use of public places of accommodations, are socially undesirable. Even if removing discriminatory hurdles and providing special opportunities to oppressed groups will reduce overall hap-

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22. Pluralistic consequentialists continue to recognize, along with their traditional utilitarian colleagues, that government is obligated to improve their subjects' pleasure. However, they embellish this view with the realization that other goods, such as the fair administration of justice or the heightened commitment to equality, are valuable policy matters that are worth achieving, even when they are not accompanied by heightened utility (Kagan 1998, 61–63). This broader concept of what is good continues to maintain that the state must pursue ends which are likely to augment overall (human) well-being (Griffin 1992, 118–19).

piness, such a course may be the right one to take.[23] As John Rawls points out, even if both masters and slaves live better than they would have in a state of nature, that does not make slavery just because "[t]he benefits and burdens of social cooperation are unjustly distributed" ([1967] 1999, 135).

In his classic study on the two concepts of rules, Rawls explains how punishments can function both prospectively and retrospectively. He points out that legislators formulate the institution of punishment according to how it can best further social interests, while judges must make impartial retributive decisions based on particular cases (Rawls [1955] 1999, 22–23). Thus, in the context of bias crime legislation, the legislature should consider how to improve safety and deter future crime, while the trier of fact must weigh evidence to decide whether the defendant committed a crime with substantially biased motives.

Rawls's perspective of consequentialist punishment parries the criticism of criminal theorists like R. A. Duff, who characterize consequentialism as disrespectful of culprits because it does not treat them as a moral agents who are capable of rational reform (Duff 1996, 48–50). The sentencing stage is the opportunity for the convicted to offer mitigating evidence against a harsh penalty that would not serve any reformative function. That is also when the prosecution can indicate the extent to which the defendant committed the crime from bias animus, whether he or she was trying to incite intergroup conflict or committing an isolated act, and whether the defendant is a recidivist. But the sentence is not merely reformatory, otherwise, as C. L. Ten points out, persons who sincerely repent before being sentenced should not be institutionally punished (Ten 1990). Legislators enact bias statutes not only to reform criminals by appealing to their rational faculty but also to deter them and others by threatening with incarceration those persons who will persist in bias motivated wrongdoing, even after being exposed to rational persuasion. Penalty enhancement statutes can be designed to both deter criminals and treat them fairly.[24]

The crux of my argument is that a mixed theory of punishment, which acknowledges the communicative role of enhancement statutes, can best justify bias crime legislation. Lawrence falls short of explicitly adopting that

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23. In making this estimation, an ethical consequentialist needs to take care not to replace one prejudice with another, because that will again lead to discrimination and detract from the equitable distribution of social goods.

24. The criminal justice system should attempt to appeal to the criminal's empathic sense. The instructive element of punishment should make clear, through workshops and enhanced penalties, the degradation associated with his or her prejudiced behavior.

In part, enhancement statutes appeal to people's imaginations. The law anticipates that upon seeing how much a convicted person is forced to suffer for acting on bigotry, others will develop an aversion for experiencing the same suffering by imagining themselves in the convict's place. They will then be more likely to eschew bias crime (concerning the deterrent effect of empathy see Kupperman 1982, 324–25). On the other hand, cruel and unusual punishment will likely have the opposite effect: people will feel sorry for the mistreated convict, and then the deterrent effect of empathy will be lost.

position. As H. L. A. Hart put it, "a plurality of different values and aims," reflecting retributive and consequentialist principles "are relevant at different points in any morally acceptable account of punishment" (1968, 3). Pure consequentialism leaves open the possibility that bias crime statutes will serve a deterrent role through unnecessarily harsh penalties and the persecution of innocent persons for the sake of some presumed greater good. With pure retributive theory, the problem lies in explaining why enhancement statutes are necessary at all: If punishing offenders for committing a bias crime is meant solely to requite them as moral agents, who will acknowledge their wrong when it is pointed out, then why not educate them about the harm their crime caused without taking away the amenities of civil society, such as liberty and franchise.[25] Bias crime legislation, like all criminal law, should both respect convicted persons as rational individuals (Duff 1986, 298–99) and penalize them forcefully enough to deter others from later acting on bias animus.

It follows that punishment decisions are best made with an eye to retributive and consequentialist predicates. The retributivist perspective has the advantage of paying attention to rights, both those of the victim and the accused, and the consequentialist has the superiority of distinguishing the means and ends of punishment. When these two are combined, punishments for bias crimes can more effectively protect human rights and further general welfare.[26]

The differing gradations of punishment should communicate the extent of harm done and the sought-after aim. Lawrence regards bias crimes as more harmful than parallel crimes both because of the "culpability of the offender and harm caused to the society" (p. 51). Once a court has determined beyond a reasonable doubt that the defendant is responsible for the crime and

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25. Herbert Morris made significant arguments for a paternalistic system of punishment that can lead a guilty person to comprehend the evil committed to others, elicit a sense of guilt about the crime, "reject the disposition to do what is wrong," and be conscious of his or her worth as a responsible individual who is accountable for wrong actions (Morris 1981, 263–64, 271). His theory, however, does not explain how long to incarcerate nonresponsive criminals who do not change their disposition (Sprigge 1965, 275). For this, a deterrent concept of punishment is necessary in which grades of punishment incorporate generalizations about how best to prevent future crime.

26. Those two ideals are asserted in the U.S. Constitution, in the human rights protections of the due process and equal protection clauses and the government's requirement to assure overall well-being in the preamble's general welfare clause. There is also some indication that the Framers intended government both to maximize social welfare and protect individual rights. See, e.g., The Federalist No. 31, at 194 (Alexander Hamilton) (stating that the object of government should be "the public good and . . . the sense of the people"); The Federalist No. 44, at 280 (James Madison) (noting that "the rights of Humanity must in all cases be duly and mutually respected"); The Federalist No. 47, at 289 (James Madison) (arguing that the public good is the supreme object that government should pursue); The Federalist No. 62, at 380 (probably James Madison) (stating that "[a] government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained"), all in Clinton Rossiter ed. 1961.

any mitigating circumstances have been taken into account, the institution of enhanced penalties for bias crime, which is meant to send a message about society's lack of tolerance for it, must govern the parameters within which final punishment will be set. Enhanced punishment regimens express that "causing physical injury to a victim because of the perception that the victim belongs to one of the specified groups creates a harm to society distinct from and greater than the harm caused by the assault alone" (*Oregon v. Plowman*, 838 P.2d 558, 563–64 [Or. 1992]). Communication through punishment appeals to persons' rational faculty, putting them on notice of the elevated penalties and thereby coercing them not to commit those wrongful acts.[27]

The vitality of bias crime legislation lies in its ability to express the government's commitment to protecting human rights and increasing the overall good. Enhancement statutes send the message that bias crime is particularly egregious, and criminal punishments play an essential role in relating what interpersonal behavior will not be tolerated by the polity. Laws aimed at preventing persons from acting on their bigotry can help reduce intolerance by altering social outlooks (Matsuda 1989, 2360–61; Abel 1998, 97). Lawrence, too, holds that view; he writes that bias crime legislation "constitutes a societal condemnation of racism, religious intolerance, and other forms of bigotry that are covered by that law." Enhanced punishment schemes denounce biased attitudes and announce the values society seeks to cultivate are "racial harmony and equality" (p. 167).[28] The extent to which a polity recognizes the risks associated with bias "is a significant statement of its values and its sense of equality" (p. 3).

As persuasive as *Punishing Hate* is, Lawrence's examination of bias crime legislation could have been even more difficult to gainsay had he systematically developed it in the context of a mixed theory of punishment. On close examination, that approach, with its mandate that the proportionality of sentences reflect the intertwined government obligations to redress the infringement of fundamental rights and to increase public safety, most convincingly explains the relevance of bias crime legislation. Such legislation communicates society's great disapprobation of crimes motivated by bias animus and seeks to deter their commission. On the one hand, Lawrence's explanation of enhancement statutes from both the retributivist and conse-

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27. The coercive message of bias crime statutes is preferably only a preliminary step to instilling an aversion to bias-motivated wrongdoing. But those laws will be required so long as persons who reject the rational message of bias crime statutes can be swayed by the deterrent lesson of enhancement statutes. It strikes me that shifting the "behavioural disposition or deliberative habits" of criminally disposed bigots will require some rehabilitative program, which will need to be parsed in another article, that will sensitize them to the plight of the group whose member(s) they attacked. Socialization is more likely to have a lasting effect on persons' characters than mere coercive action (Braithwaite and Pettit 1990, 81–82).

28. Here, Lawrence would have been more comprehensive if he used "intergroup harmony" rather than "racial harmony," since he believes bias crime legislation should include protections for a variety of historically disadvantaged groups (pp. 11–20).

quentialist perspectives is politic because it might well sway academics from both schools of thought. On the other, we must look beyond the commendable aim of gaining widespread support for bias crime legislation to discovering the most persuasive justification for it.

A multifaceted society should enact legislation that punishes bias-motivated criminal behavior severely enough to increase the public safety of its citizenry. The mixed theory approach serves a civic purpose, because when vulnerable groups feel secure they are more likely to live productive lives, and when criminals perceive that they are treated with dignity they are more prone to reform their prejudiced behavior.

IV. CONCLUSION

Punishing Hate shows Lawrence to be the leading United States scholar on social and theoretical principles underlying bias crime legislation. The book details why bias crimes differ from parallel crimes, how they cause more damage than other crimes, their constitutionality, and the role of the federal government in their prosecution.[29] Its ideas are the culmination of years of study and writing on the subject. The thesis of the book would, however, be strengthened by a consistent application of the mixed theory of criminal punishment, but this is a very modest criticism. Whether I am correct must now await empirical research to determine whether an enhanced punishment scheme that respects convicted persons as moral agents capable of reform in fact deters them and others from committing bias crimes.

REFERENCES

Abel, Richard L. 1998. *Speaking Respect, Respecting Speech*. Chicago: University of Chicago Press.

American Law Institute. 1985. *Model Penal Code*. Philadelphia: American Law Institute.

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29. Hate speech is another subject Lawrence deals with in *Punishing Hate*, but the scope of this essay is insufficient for the extensive treatment that subject requires. In brief, Lawrence searches for "a framework for upholding and enforcing bias crimes while at the same time protecting racist speech as a form of free express." He assumes that hate speech, or "racist speech" as he calls it, is constitutionally protected (p. 82). The distinction between hate speech and bias crime, he argues, is that "[f]ree expression protects the right to express offensive views but not the right to behave criminally" (p. 7). Persons are convicted of bias crime if they have the requisite *mens rea* for a parallel crime coupled with a bias motive for committing it (p. 95). On the other hand, Lawrence argues, while hate speakers are motivated by bias animus, they lack the *mens rea* to commit a parallel crime. "The speaker of racist speech, however, does not seek to cause injury to a particular victim and thus lacks the *mens rea* associated with a parallel crime" (p. 96). Lawrence's treatment of the subject overlooks the long-term dangers posed by persons and organizations who disseminate substantially dangerous biased invective. I have dealt with this subject at length elsewhere (Tsesis 2002, 140–47; Tsesis 2001, 849–58; Tsesis 2000, 737–40).

Bagoric, Mirko, and Kumar Amarasekara. 2000. The Errors of Retributivism. *Melbourne University Law Review* 24:124–89.

Baker, John S., Jr. 2000. *United States v. Morrison* and Other Arguments against "Hate Crimes" Legislation. *Boston University Law Review* 80:1191–1225.

Bentham, Jeremy. 1843. The Principles of Penal Law. In *The Works of Jeremy Bentham*, ed. John Bowring. Edinburgh: W. Tait.

Braithwaite, John, and Philip Pettit. 1990. *Not Just Deserts: A Republican Theory of Criminal Justice*. New York: Oxford University Press.

Cotton, Michele. 2000. Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment. *American Criminal Law Review* 37: 1313–62.

Delgado, Richard, and Jean Stefancic. 1996. Ten Arguments against Hate-Speech Regulation: How Valid? *Northern Kentucky Law Review* 23:475–90.

Delgado, Richard, and David H. Yun. 1994. Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation. *California Law Review* 82:871–92.

Duff, R. A. 1986. *Trials and Punishments*. New York: Cambridge University Press.

———. 1996. Penal Communications: Recent Work in the Philosophy of Punishment, *Crime and Justice* 20:1–89.

Durkheim, Emile. [1893] 1933. *Division of Labor in Society*, trans. George Simpson. Glencoe, Ill.: Free Press.

Eckhoff, Torstein. 1983. Justifications of Punishment. In *Philosophy and the Criminal Law*, ed. Antony Duff and Nigel Simmonds. Totowa, N.J.: Rowman and Littlefield.

Ewing, A. C. 1927. Punishment as a Moral Agency: An Attempt to Reconcile the Retributive and the Utilitarian View. *Mind* 36:292–305.

Fanon, Frantz. 1967. *Black Skin, White Masks*, trans. Charles Lam Markmann. New York: Grove Press.

Federal Bureau of Investigation. 2000. Hate Crime Statistics. In *Federal Bureau of Investigation, Uniform Crime Report*. Washington, D.C.: Federal Bureau of Investigation.

Finkelman, Paul. 1993. The Color of Law. *Northwestern University Law Review* 87:937–91.

Finkelstein, Claire. 2000. The Inefficiency of Mens Rea. *California Law Review* 88:895–920.

Freeman, Samuel, ed. 1999. *Collected Papers of John Rawls*. Cambridge, Mass.: Harvard University Press.

Gellman, Susan. 1991. Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws. *UCLA Law Review* 39:333–96.

Gey, Steven G. 1997. What if *Wisconsin v. Mitchell* Had Involved Martin Luther King Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes. *George Washington Law Review* 65:1014–70.

Griffin, James. 1992. The Human Good and the Ambitions of Consequentialism, *Social Philosophy and Policy* 9:118-32.

Hamilton, D. L., and T. K. Trolier. 1986. Stereotypes and Stereotyping. In *Prejudice, Discrimination, and Racism*, ed. John F. Dovidio and Samuel L. Gaertner. Orlando, Fla.: Academic Press.

Hart, Herbert L. A. 1968. *Punishment and Responsibility*. New York: Oxford University Press.

Herek, Gregory M. 1989. Hate Crimes against Lesbians and Gay Men: Issues for Research and Policy. *American Psychologist* 44:948–55.

Hodgson, David H. 1967. *Consequences of Utilitarianism: A Study in Normative Ethics and Legal Theory*. Oxford, England: Clarendon.

Jacobs, James B., and Kimberly Potter. 1998. *Hate Crimes: Criminal Law and Identity Politics*. New York: Oxford University Press.

Jenness, Valerie, and Ryken Grattet. 2001. *Making Hate a Crime*. New York: Russell Sage Foundation.

Kadish, Sanford H., and Stephen J. Schulhofer. 1995. *Criminal Law and Its Processes: Cases and Materials*. Boston: Little, Brown.

Kagan, Shelly. 1998. *Normative Ethics*. Boulder, Colo.: Westview Press.

Kalam, Murad. 2000. Hate Crime Prevention. *Harvard Journal on Legislation* 37:593–605.

Kant, Immanuel. [1797] 1965. *The Metaphysical Elements of Justice*, trans. John Ladd. Indianapolis: Bobbs-Merrill.

Kleg, Milton. 1993. *Hate Prejudice and Racism*. Albany: State University of New York Press.

Kupperman, J. J. 1982. Utilitarianism Today. *Revue Internationale de Philosophie* 36:318–30.

Lawrence, Frederick M. 1993. Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crime. *Tulane Law Review* 67:2113–2224.

———. 1994. The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes. *Michigan Law Review* 93:320–81.

———. 1999–2000. The Case for a Federal Bias Crime Law. *National Black Law Journal* 16:144–68.

Lichtenberg, Judith. 1983. The Right, the All Right, and the Good. *Yale Law Journal* 92:544–63.

Lyons, William. 1974. Deterrent Theory and Punishment of the Innocent. *Ethics* 84:346–48.

Madison, James. 1867. Letter from James Madison to General Lafayette (25 Nov. 1820). In *Letters and Other Writings of James Madison*. Vol. 3. Philadelphia: Lippincott.

Matsuda, Mari J. 1989. Public Response to Racist Speech: Considering the Victim's Story. *Michigan Law Review* 87:2320–81.

McCloskey, H. J. 1965. A Non-Utilitarian Approach to Punishment. *Inquiry* 8:249–63.

McCord, David. 1998. Imagining a Retributivist Alternative to Capital Punishment. *Florida Law Review* 50:1–143.

Morris, Herbert. 1968. Persons and Punishment. *Monist* 52:475–501.

———. 1981. A Paternalistic Theory of Punishment. *American Philosophical Quarterly*. 18:263–71.

Morsch, James. 1991. The Problem of Motive in Hate Crimes: The Argument against Presumptions of Racial Motivation. *Journal of Criminal Law and Criminology* 82:659–89.

Murphy, Jeffrie G. 1985. Retributivism and the State's Interest in Punishment. In *Criminal Justice*, ed. J. Roland Pennock and John W. Chapman. New York: New York University Press.

Pearl, Leon. 1982. A Case against the Kantian Retributivist Theory of Punishment: A Response to Professor Pugsley. *Hofstra Law Review* 11:273–306.

Perry, Barbara. 2001. *In the Name of Hate: Understanding Hate Crimes*. New York: Routledge.

Phillips, Scott, and Ryken Grattet. 2000. Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law. *Law and Society Review* 34:567–606.

Primoratz, Igor. 1989. *Justifying Legal Punishment*. Atlantic Highlands, N.J.: Humanities Press.

Pugsley, Robert A. 1979. Retributivism: A Just Basis for Criminal Sentences. *Hofstra Law Review*. 7:379–405.

Rawls, John. [1955] 1999. Two Concepts of Rules. In Freeman 1999.

———. [1967] 1999. Distributive Justice. In Freeman 1999.

Sartre, Jean-Paul. 1948. *Anti-Semite and Jew,* trans. George J. Becker. New York: Schocken Books.

Scotting, Troy A. 2001. Hate Crimes and the Need for Stronger Federal Legislation. *Akron Law Review* 34:853–92.

Sprigge, T. L. S. 1965. A Utilitarian Reply to Dr. McCloskey. *Inquiry* 8:264–91.

Steiker, Carol S. 1999. Punishing Hateful Motives: Old Wine in a New Bottle Revives Calls for Prohibition. *Michigan Law Review* 97:1857–73.

Taslitz, Andrew E. 1999. Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong. *Boston College Law Review* 40:739–85.

———. 2000. Hate Crimes, Free Speech, and the Contract of Mutual Indifference. *Boston University Law Review* 80:1283–1398.

Ten, C. L. 1987. *Crime, Guilt, and Punishment.* New York: Oxford University Press.

———. 1990. Positive Retributivism. *Social Philosophy and Policy* 7:194–208.

Tsesis, Alexander. 2000. The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech. *Santa Clara Law Review* 40: 729–86.

———. 2001. Hate in Cyberspace: Regulating Hate Speech on the Internet. *San Diego Law Review* 38:817–74.

———. 2002. *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements.* New York: New York University Press.

Uhrich, Craig L. 1999. Hate Crime Legislation: A Policy Analysis. *Houston Law Review* 36:1467–1529.

Wang, Lu-in. 1997. The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime. *Southern California Law Review* 71:47–135.

———. 1999. The Complexities of "Hate." *Ohio State Law Journal* 60:799–900.

Weiss, Joan C., Howard J. Ehrlich, and Barbara E. K. Larcom. 1991–92. Ethnoviolence at Work. *Journal of Intergroup Relations* 18(Winter):21–33.

Wendel, W. Bradley. 2000. Value Pluralism in Legal Ethics. *Washington University Law Quarterly* 78:113–213.

Wexler, Chuck, and Gary T. Marx. 1986. When Law and Order Works: Boston's Innovative Approach to the Problem of Racial Violence. *Crime and Delinquency* 32:205–23.

Williams, Bernard. 1972. *Morality: An Introduction to Ethics.* New York: Harper and Row.

Young, Iris Marion. 1990. *Justice and the Politics of Difference.* Princeton, N.J.: Princeton University Press.