



April 2014

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Recommended Citation

Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punching Bias Crimes and Protecting Racist Speech*, 68 Notre Dame L. Rev. 673 (1993).

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Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech

Frederick M. Lawrence*

Despise evil and ungodliness, but not men of ungodliness or evil. These, understand.¹

Not since the Nazis threatened to march in Skokie,² have we focused so much on the hate crimes/hate speech paradox.³ How

* Associate Professor of Law, Boston University. B.A., Williams College; J.D., Yale Law School. My thanks to Jack Beermann, Ron Cass, Alan Feld, and Prina Lahav for their help on this project. I am also grateful to the participants of the Boston University School of Law Faculty Workshop to whom an earlier version of this Article was presented. The comments received during and subsequent to that workshop presentation were extremely helpful. I am particularly grateful to Joe Brodley, Avi Soifer, and Ken Simons for their careful reading of this Article and their insightful comments. I would also like to acknowledge the contributions of the members of my Civil Rights Crimes seminar in the fall of 1992. My appreciation as well to Kelly McEnaney for her diligent research and fine editorial assistance. Finally, I wish to acknowledge the support for this project provided by a Boston University School of Law Summer Research grant.

1 WILLIAM SAROYAN, *THE TIME OF YOUR LIFE* xxvii (1941).

2 The "Skokie cases" consisted of two cases arising out of the attempt by the Nazi National Socialist Party of America to hold a march in the predominantly Jewish Chicago suburb of Skokie, Illinois in 1977 and 1978. The first case involved a state court injunction prohibiting the Nazi party from holding the march or exhibiting Nazi symbols or other materials that would promote hatred of Jews. An Illinois appellate court refused to stay the injunction and the United States Supreme Court, per curiam, by a 5-4 vote, reversed the denial of the stay and remanded the case to the Illinois state courts for further proceedings. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). On remand, the injunction was modified by an appellate court, 366 N.E.2d 347 (Ill. App. Ct. 1977), and ultimately fully vacated by the Illinois Supreme Court. 373 N.E.2d 21 (Ill. 1978).

The second Skokie case involved three ordinances enacted by the village of Skokie in May, 1977. The ordinances, which established a permit system for assemblies of more than fifty persons, required applicants to obtain insurance in the amount of \$350,000 and barred permits for assemblies that would, *inter alia*, incite hatred of an ethnic, religious, or racial group. Each ordinance was struck down as unconstitutional. *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). See generally DONALD A. DOWNS, *NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT* (1985); JAMES L. GIBSON & RICHARD D. BINGHAM, *CIVIL LIBERTIES AND NAZIS: THE SKOKIE FREE SPEECH CONTROVERSY* (1985); DAVID HAMLIN, *THE NAZI SKOKIE CONFLICT: A CIVIL LIBERTIES BATTLE* (1981).

3 In this Article, I refer to "hate crimes" as "bias crimes" and to "hate speech" as "racist speech." I prefer these terms because "hate" says too much and too little about

is it possible to protect victims of bias-motivated violence while also protecting the right of the racist to express his beliefs?

The paradox has deep roots. Racially motivated violence excites an extraordinary level of public condemnation, arousing passions that exceed the reaction to other forms of large-scale violence or human tragedy.⁴ Yet the right to free expression of

the relevant criminal conduct or speech. What makes racially motivated violence is distinct, for example, is that the perpetrator is drawn to commit the offense by the victim's race, ethnicity, religion, or national origin. Whether this qualifies as "hate" is quite beside the point. Similarly, while many instances of personal, violent crimes involve hate as a motive, unless a bias motive exists as well, they would not be considered civil rights crimes. See Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. at n.5 (forthcoming June 1993).

I use the term "race" in "racially" motivated violence or "racist speech" inclusively, not exclusively. It thus encompasses motivation based not only on race, but also on the color, ethnicity, religion, or national origin of the victim. As suggested by the title of this Article, however, I will describe the conflict between the goals of punishing bias crimes without punishing the holding of racist opinions as the "hate crimes/hate speech paradox."

4 Compare the attention given to the murder of Carol Stuart, initially thought to have been committed by a black man in Boston, or the killing of Michael Griffith when chased onto a highway by a group of taunting, bat-swinging white men in Howard Beach, New York to that given the myriad violent crimes that occur in those cities on a regular basis. See, e.g., Donald Baer, *The Day of "Man as Man,"* U.S. NEWS & WORLD REP., Jan. 22, 1990, at 10 (story on the Stuart murder after Charles Stuart committed suicide); Montgomery Brower et al., *A Dark Night of the Soul in Boston*, TIME, Nov. 13, 1989, at 52 (story on the Stuart murder); Peter S. Canellos & Irene Sege, *Couple Shot After Leaving Hospital; Baby Delivered*, BOSTON GLOBE, Oct. 24, 1989, at 1 (story reporting the murder of Carol Stuart); Peter J. Howe & Jerry Thomas, *Reading Woman Dies After Shooting in Car*, BOSTON GLOBE, Oct. 25, 1989, at 1 (same); *Killing of Pregnant Woman Stirs Outrage*, L.A. TIMES, Oct. 26, 1989, at A20 (same); *Woman Shot in a Robbery Gives Birth and Then Dies*, N.Y. TIMES, Oct. 25, 1989, at A1 (same); see also Dan Collins, *A Bitter Bite of the Big Apple*, U.S. NEWS & WORLD REP., Jan. 12, 1987, at 24 (story on the death of Michael Griffith); *4 Youths Charged in Attack on Blacks*, CHI. TRIB., Dec. 23, 1986, at 4 (same); John Goldman, *Trial & Error*, LIFE, Jan. 1988, at 90 (same); *Howard Beach: Pointing the Finger*, U.S. NEWS & WORLD REP., Feb. 23, 1987, at 9 (same); Terry E. Johnson & Peter McKillop, *Howard Beach: An Angry Tide*, NEWSWEEK, Jan. 12, 1987, at 25 (same); Robert D. McFadden, *Black Man Dies After Beating by Whites in Queens*, N.Y. TIMES, Dec. 21, 1986, at A1 (same); *New Details Given in Queens Attack*, N.Y. TIMES, Dec. 29, 1986, at A1 (same); Ronald Smothers, *New Coalition Condemns Howard Beach Assaults*, N.Y. TIMES, Dec. 24, 1986, at B4 (same).

Additional proof for the assertion in the text is found in the Rodney King beating, although this requires additional explanation. The officers charged with the beating of Rodney King were not accused of doing so with racial motivation under either California or federal law. Moreover, it is at least an open question as to whether the California state court jury that acquitted the officers might have done so regardless of King's race and that of the defendants. Nonetheless, the aftermath of the acquittal in the state trial was so dominated by the racial overtones of the case as to make clear that it was seen—rightly or wrongly—as a case involving racial motivation. Perhaps the scale of the rioting in Los Angeles would have drawn the public attention that it did, regardless of the surrounding racial issues. I believe, however, that in large measure it was precisely

ideas, no matter how distasteful or hateful, is a fundamental constitutional principle.⁵ The question of how much intolerance a liberal democracy should tolerate has fueled debate for years.⁶ Consideration of bias crimes and racist speech focuses this question in a compelling form.

Bias crimes and racist speech have spawned a great deal of scholarly attention.⁷ Although initial judicial consideration of this debate has centered around state university speech codes,⁸ the scope of the debate has now broadened.

Last year, in *R.A.V. v. City of St. Paul*,⁹ the United States Supreme Court considered the constitutionality of a modern bias crime law¹⁰ for the first time. In the following months, the highest courts of Wisconsin and Ohio decided similar cases.¹¹ In

the racial issues so thoroughly interwoven throughout the Rodney King incident that caused the nation to hold its collective breath during the Los Angeles riots of late April and early May 1992.

5 See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) ("If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."), *overruled by* *Girouard v. United States*, 328 U.S. 61 (1946).

6 See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN SOCIETY* (1986); ROBERT P. WOLFF ET AL., *A CRITIQUE OF PURE TOLERANCE* (1969).

7 See generally Symposium, *Campus Hate Speech and the Constitution in the Aftermath of Doe v. University of Michigan*, 38 WAYNE L. REV. 1309 (1991); 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, *The State of Civil Liberties: Where Do We Go From Here?*, 27 HARV. C.R.-C.L. L. REV. 309 (1992); Symposium, *Hate Speech After R.A.V.: More Conflict Between Free Speech and Equality*, 18 WM. MITCHELL L. REV. 889 (1992); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); 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); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Ronald J. Rychlak, *Civil Rights, Confederate Flags, and Political Correctness: Free Speech and Race Relations on Campus*, 66 TUL. L. REV. 1411 (1992); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990); R. George Wright, *Racist Speech and the First Amendment*, 9 MISS. C. L. REV. 1 (1988).

8 See *infra* text accompanying notes 39-43.

9 112 S. Ct. 2538 (1992).

10 See *infra* note 44 and accompanying text; cf. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952).

11 *Wisconsin v. Mitchell*, 485 N.W.2d 807 (Wis.) (striking down the penalty enhancement provision of Wisconsin law for bias crimes), *cert. granted*, 113 S. Ct. 810 (1992);

R.A.V.,¹² the Supreme Court 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 gender."¹³ In *Wisconsin v. Mitchell*,¹⁴ the Wisconsin Supreme Court struck down a "penalty enhancement"¹⁵ law that increased the level of punishment for certain crimes if committed with bias motivation, while in *Ohio v. Wyant*,¹⁶ the Ohio Supreme Court struck down that state's ethnic intimidation statute.¹⁷ In each case, the majority held that the bias crime law under review, while understandable and even noble in purpose, were impermissible interferences with First Amendment freedoms.¹⁸ The Supreme Court has now re-entered the fray as it has decided to review the decision in *Mitchell*.¹⁹

This Article argues that the apparent paradox of seeking to punish the perpetrators of racially motivated violence while being committed to protecting the bigot's rights to express racism is a false paradox. Put simply, we are making this problem harder than it needs to be. We must focus on the basic distinction between bias crimes—such as racially motivated assaults or vandalism—and racist speech. Not only is it possible to maintain this distinction, it is imperative that we do so. I will demonstrate that the problems left unresolved by *R.A.V.* and within the bias crime debate are best addressed by establishing this distinction. Focusing on the criminal law aspects of *R.A.V.* does not ignore the serious constitutional

Ohio v. Wyant, 597 N.E.2d 450 (Ohio), *petition for cert. filed*, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992) (No. 92-568) (striking down Ohio's ethnic intimidation statute).

12 The defendant-petitioner Robert Viktora was a minor at the time that the case was first litigated, hence the use of his initials in the case name. Since that time, Viktora's name has been widely reported because he has attained the age of majority. See, e.g., Linda Greenhouse, *Supreme Court Roundup*, N.Y. TIMES, June 11, 1991, at A20; Tony Mauro, *Cross-Burning Law Collides With Freedom of Speech*, USA TODAY, Dec. 4, 1991, at A5; Derrick Z. Jackson, *A Palace of Hate*, BOSTON GLOBE, June 24, 1992, at 17; Don Terry, *The Supreme Court*, N.Y. TIMES, June 23, 1992, at A16. For consistency, the case itself will nonetheless be referred to as "R.A.V."

13 ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990); see *infra* note 49 for the full text of the St. Paul Bias-Motivated Crime Ordinance.

14 485 N.W.2d 807 (Wis.), *cert. granted*, 113 S. Ct. 810 (1992).

15 See *infra* notes 65-67, 70-73 and accompanying text.

16 597 N.E.2d 450, 458 (Ohio), *petition for cert. filed*, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992) (No. 92-568).

17 See *infra* notes 68-69 and accompanying text.

18 See *R.A.V.*, 112 S. Ct. at 2550, 2558; *Wyant*, 597 N.E.2d at 459; *Mitchell*, 485 N.W.2d at 815, 817.

19 *Mitchell*, 485 N.W.2d at 807.

dimensions of the case. Bias crimes do raise complex questions of free expression that I will address. I mean to emphasize, however, that there has been a persistent tendency among courts and scholars to characterize incorrectly the issue raised by the St. Paul ordinance. As a result, the distinction between bias crimes and racist speech is blurred, or even denied.

This tendency transcends the ordinary divisions within legal thought. Justice Scalia treated *R.A.V.* as a pure case of racist speech. Ronald Dworkin similarly defined the question in *R.A.V.* as "whether a state may constitutionally make an assault a special crime, carrying a larger sentence, because it is intended to express a conviction the community disapproves of."²⁰ Both Justice Scalia and Professor Dworkin incorrectly viewed *R.A.V.* as posing solely speech issues. Once *R.A.V.* is framed in this manner, the outcome is largely determined and the fate of bias crime laws sealed. We naturally invoke content neutrality and the doctrine that *all* views much be protected, particularly those that society detests.²¹ This is the approach followed in *R.A.V.*, *Mitchell*, and *Wyant*.

The scholarly debate over racist speech and bias crimes also has failed to explore the distinction. Foreshadowing the holdings in *R.A.V.*, *Mitchell*, and *Wyant*, Susan Gellman argued that racist speech restrictions and bias crimes are both unconstitutional interferences with free expression.²² At the other end of the spectrum, Mari Matsuda, among others, has argued that racist speech is unprotected by the First Amendment.²³ Ironically, these opposing positions share a common premise: that proscription of bias crimes involves regulation of expression and is either (1) impermissible; or (2) requires a justification for suppressing expression. Even those who have sought a middle ground, such as Toni

20 Ronald Dworkin, *The Coming Battles over Free Speech*, N.Y. REV. BOOKS, June 11, 1992, at 55, 58.

21 See *supra* note 5.

22 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).

23 Matsuda, *supra* note 7; see also 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); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431.

Massaro,²⁴ wind up searching for a permissible suppression of speech—albeit a narrowly defined one.²⁵

I wish to probe for a different middle ground, one that provides a framework for upholding and enforcing bias crimes while at the same time protecting racist speech as a form of free expression. Part I of this Article explores the false paradox of hate crime and hate speech, and proceeds to discuss briefly the context of bias crime laws and the explosion of legislation and enforcement in this area. Using *R.A.V.*, *Mitchell*, and *Wyant* as points of departure, it then turns to the standard First Amendment challenge to these laws.

Part II begins the search for a resolution of the paradox, that is, a theory by which bias crimes may be prosecuted while racist speech is not. I first consider two promising, yet flawed, bases for distinguishing bias crimes and racist speech. The first rests upon the proposed distinction between “expression” and “conduct.” Although it is tempting to assert that racist speech is “expression” and is thereby protected, whereas bias crimes are “conduct” that may be criminalized, this is a distinction that will not hold. The second flawed approach rests upon the distinction between pure bias crime statutes and penalty enhancement statutes.²⁶ This Article demonstrates that, although there is a descriptive difference between these categories of bias crimes,²⁷ it is not one that will bear any normative weight. This proves to be a distinction without a difference. A firmer basis for the distinction between bias crimes and racist speech must be found elsewhere.

24 Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 221 (1991). In his recent article on *R.A.V.*, Akhil Amar also assumes that bias crimes and racist speech inseparably raise the same First Amendment issues. He goes on to argue that racist speech should be seen as implicating not only First Amendment values but also the values embodied in the Reconstruction Amendments. See Akhil R. Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 151-60 (1992).

25 In the text, I have chosen several representative examples of the trend toward an analysis of bias crimes that ends with a discussion of racist speech. I should add, however, that there are several recent articles that, far from conflating bias crimes and racist speech, choose to focus on racist speech alone and have done so thoughtfully and with great insight. See, e.g., Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887 (1992); Kretzmer, *supra* note 7, at 445; Robert C. Post, *Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991); see also Avi Soifer, *The Substance of Pluralism: Keeping Company in American Law and Letters* 374-82 (1993) (unpublished manuscript, on file with author). These are not part of the trend that I criticize.

26 See *infra* notes 35-36, 90-98 and accompanying text.

27 See *infra* text accompanying notes 96-97.

In Part III-A, the search continues with an exploration of the differences between the non-bias element of bias crimes and racist speech: the “parallel crime” that is included in the bias crime,²⁸ and the parallel behavior that is part of racist speech. The parallel behavior of racist speech is expression, a form of behavior that, however offensive, is not made criminal in our legal system. Bias crimes, however, have parallel crimes that are punishable. This is true even when the parallel crime consists solely of speech. Speech that is intended to frighten another into a state of serious fear is a verbal assault that is criminally proscribable.

Part III-B further develops the concept of verbal assault and offers a re-working of the “fighting words” doctrine established in *Chaplinsky v. New Hampshire*.²⁹ *Chaplinsky* is best understood today as placing outside the reach of the First Amendment words that are intended to and have the effect of creating fear of injury in the addressee. Words that have the effect and even the intent to hurt the target’s feelings, however unfortunate, do not come under this understanding of “fighting words.”

I then return to the context of bias motivation. The proposed understanding of “fighting words” is consistent with a distinction between prosecutable bias crimes and protected racial speech that does not rely on a simplistic understanding of the speech-conduct dichotomy. Racially targeted behavior that is intended to create fear in its victim, and does so in fact, is a bias crime whether the behavior is primarily verbal or physical. Racially targeted behavior that vents the actor’s racism and perhaps disturbs the addressee greatly is racial speech that is protected by the First Amendment.

Part IV addresses the two prime arguments that have been advanced against the punishment of bias crimes. The first argument is based on the doctrine of content neutrality. Part IV-A demonstrates that the proposed distinction between bias crimes and racist speech does not run afoul of the requirements of the doctrine. The second argument, discussed in Part IV-B, is based on the purported distinction between “intent” and “motivation” that asserts that an actor may be punished criminally on the basis of his intent, but not his motivation. There are two flaws with this

28 I have developed elsewhere at length the distinction between parallel crimes and civil rights crimes, of which bias crimes are one category. See Lawrence, *supra* note 3. The distinction is discussed in sufficient detail for present purposes *infra* notes 91-97 and accompanying text.

29 315 U.S. 568 (1942).

argument. First, motivation is frequently a basis for criminal punishment. Second, the distinction between motivation and intent is not clear, and these concepts are more properly seen as descriptive points on a continuum whose normative weight must be found elsewhere.

R.A.V. threatens to halt the past decade's efforts to identify, investigate, and prosecute bias crimes.³⁰ Understood in light of the framework developed in this Article, this result is not constitutionally mandated.

I. THE HATE CRIMES/HATE SPEECH PARADOX

During the 1980s, public concern over the level of racially motivated violence in the United States rose dramatically.³¹ Whether such concern was spawned by an actual increase in the level of violence, by an increased level of public awareness, or by both is difficult to know. Whatever the genesis, this past decade saw the most significant legislative response to the problem of bias crime since Reconstruction. Prior to 1980, only five states had any type of bias crimes statutes.³² At the present time, thirty-one

30 In response to anticipated questions, for example, the FBI sent 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.

31 See ANTI-DEFAMATION LEAGUE, 1992 AUDIT OF ANTI-SEMITIC INCIDENTS (1993) (discussing increases in bias crimes); *Deadly Hate Violence at Record Levels Across the Nation in 1992*, KLANWATCH INTELLIGENCE REP. (Southern Poverty Law Project, Montgomery, Ala.), Feb. 1993, at 1 (discussing increases in bias crimes); see also S. REP. NO. 21, 101st Cong., 1st Sess. (1989), reprinted in 1990 U.S.C.C.A.N. 158 (legislative history of the Federal Hate Crimes Statistics Act); 131 CONG. REC. E512-02 (1985) (remarks of Rep. Kennelly introducing the hate crime statistics legislation).

32 Most of the pre-1980 bias crime statutes were enacted to combat the activities of the Ku Klux Klan. As a result, most of the laws addressed cross-burning and the wearing of hoods or masks in public. CONN. GEN. STAT. ANN. § 46a-58 (West 1991) (criminalizing "[d]eprivation of rights" through the use of a burning cross, enacted 1949); FLA. STAT. ANN. § 876.20 (West 1991) (criminalizing wearing a mask or placing an exhibit for the purpose of intimidation, enacted 1951); GA. CODE ANN. § 16-11-37(b)(1) (Michie 1990) (criminalizing the burning of a cross with the intent to terrorize, enacted 1968); GA. CODE ANN. § 16-11-38 (Michie 1990) (criminalizing the wearing of a hood or mask which conceals one's identity, enacted 1986); N.C. GEN. STAT. §§ 14-12.7 to 14-12.10 (1991) (criminalizing the wearing of hoods or masks, enacted 1953); N.C. GEN. STAT. § 14-12.12 (1991) (criminalizing cross-burning, enacted 1953); VA. CODE ANN. § 18.2-422 (Michie 1991) (prohibiting wearing masks or hoods in specific circumstances, enacted 1950); VA. CODE ANN. § 18.2-423 (Michie 1991) (criminalizing cross-burning, enacted 1950).

The cross-burning statutes will be addressed with the "pure bias crime" statutes, *infra* note 98. The majority of the "mask statutes" fall outside the scope of this Article since

states have such laws³³ and federal bias crime legislation has been

they generally do not require that the prohibited action be coupled with violence or threats of violence. *See, e.g.*, GA. CODE ANN. § 16-11-38 (Michie 1990) (criminalizing the wearing of a hood or mask which conceals one's identity, enacted 1986). For a discussion of these statutes, *see* Wayne R. Allen, Note, *Klan, Cloth and Constitution: Anti-Mask Laws and the First Amendment*, 25 GA. L. REV. 819 (1991).

The statutes which couple the mask prohibition with racial threats or violence will be discussed with other bias crime statutes. FLA. STAT. ANN. § 876.20 (West 1991); VA. CODE ANN. § 18.2-423 (Michie 1991).

Only one state had a statute prior to 1980 that addressed the problem of assaults perpetrated on individuals because of their race outside the traditional forum of Ku Klux Klan assaults. CONN. GEN. STAT. ANN. § 53-57 (West 1991) (criminalizing ridicule of an individual based on race, color or creed, enacted 1949).

33 CAL. PENAL CODE § 422.6 (West 1991) ("Interference with exercise of civil rights," enacted 1987); CAL. PENAL CODE § 422.7 (West 1991) ("Aggravating factors for punishment," any racially motivated crimes not covered by § 422.6 have the penalty increased, enacted 1987); COLO. REV. STAT. ANN. § 18-9-121 (West 1990) ("Ethnic intimidation—injury, fear or property damage," enacted 1988); CONN. GEN. STAT. ANN. § 53-37a (West 1991) ("Deprivation of civil rights by person wearing mask or hood," enacted 1982); D.C. CODE ANN. § 22-3112.2 (1991) ("Defacing or burning cross or religious symbol; display of certain emblems," enacted 1983); FLA. STAT. ANN. § 775.085 (West 1990) ("Evidencing prejudice while committing offense," enacted 1991); IDAHO CODE § 18-7902 (1991) (harassment based on race, color, religion, etc., enacted 1983); ILL. REV. STAT. ch. 38, para. 12-7.1 (1991) (commits assault, battery, etc., based on race, enacted 1983); IOWA CODE ANN. § 708.2C (West 1992) ("Assault in violation of individual rights," lists penalties, enacted 1992); IOWA CODE ANN. § 712.9 (West 1992) (penalty enhancement statute, enacted 1992); IOWA CODE ANN. § 729A.2 (West 1992) (defines hate crimes for use in this and other statutes, enacted 1992); ME. REV. STAT. ANN. tit. 17, § 2931 (West 1989) ("Harassment based on characteristics," interference with free exercise of rights; enacted 1987); MD. CRIM. LAW CODE ANN. § 470A (1989) ("Crimes against religious property, institutions, or persons," enacted 1988); MASS. GEN. L. ch. 265, § 39 (1989) ("Assault or battery for purpose of intimidation," enacted 1983); MICH. COMP. LAWS § 750.147b (1991) ("Ethnic intimidation"—causes or threatens harm to person or property motivated by race, color, religion, gender, or national origin, enacted 1988); MO. REV. STAT. § 574.090 (1989) ("Ethnic intimidation in the first degree," enacted 1988); MO. REV. STAT. § 574.093 (1989) ("Ethnic intimidation in the second degree," enacted 1988); MONT. CODE ANN. § 45-5-221 (1992) (malicious intimidation or harassment relating to civil or human rights, enacted 1989); MONT. CODE ANN. § 45-5-222 (1992) (sentence enhancement for offenses committed because of victim's race, enacted 1989); N.H. REV. STAT. ANN. § 651:6(I)(g) (extended terms of imprisonment for crimes motivated by hostility to race, religion, etc., enacted 1990); N.J. REV. STAT. § 2C:33-11 (1982) ("Defacement or damage of property by placement of symbol," enacted 1981); N.J. STAT. ANN. § 2C:44-3(e) (West 1992) (criteria for sentencing defendants acting with ill will, hatred, or bias due to race, color, religion, sexual orientation, or ethnicity, enacted 1990); N.Y. PENAL LAW § 240.31 (McKinney 1989) ("Aggravated harassment in the first degree," commits personal or property damage based on race, etc., enacted 1982); OHIO REV. CODE ANN. § 2927.12 (Anderson 1987) ("Ethnic intimidation," committing other crimes motivated by race, enacted 1987); OKLA. STAT. tit. 21, § 850 (1990) ("Malicious intimidation or harassment because of race," etc., enacted 1987); OR. REV. STAT. § 166.155 (1990) ("Intimidation in the second degree," tampers with property or person due to race, etc., enacted 1981); 18 PA. CONS. STAT. § 2710 (1991) ("Ethnic intimidation," commits any crime with malicious intent due to race, enacted 1982); R.I. GEN. LAWS § 11-42-3 (1991)

proposed.³⁴

Bias crime laws may be divided into "pure bias crimes" and "penalty enhancement" laws.³⁵ Pure bias crimes are free-standing criminal prohibitions of racially targeted violence. Penalty enhancement laws authorize an increased level of criminal punishment when a crime is committed with racial motivation. The distinction between these two categories is useful to understand what is at stake in any particular bias crime statute. I will demonstrate below, however, that the distinction between pure bias crimes and penalty enhancement crimes is of no real relevance for purposes of the present inquiry.³⁶

Bias crime law has been the subject of great controversy precisely because it implicates two of our most cherished values: equal treatment of citizens and free expression. The state may not punish a person for holding an opinion regardless of how obnoxious that opinion may be to the general public or how good a predic-

("Ethnic or religious intimidation," enacted 1982); R.I. GEN. LAWS § 11-53-2 (1991) ("Threat by terror," burning crosses, displaying Nazi swastikas, etc., enacted 1981); R.I. GEN. LAWS § 11-53-3 (1991) ("Threats to immigrants," enacted 1983); TENN. CODE ANN. § 39-17-309 (1991) (intimidation due to race, religion, etc., enacted 1988); UTAH CODE ANN. § 76-3-203.3 (1992) (committing a "primary offense" (assault, trespass, etc.) with the intent to intimidate or terrorize, enacted 1992); VT. STAT. ANN. tit. 13, § 1455 (1991) ("Hate motivated crimes," increases penalties for violations of other crimes if committed with a racist motivation, enacted 1989); WASH. REV. CODE ANN. § 9A.36.080 (West 1991) ("Malicious harassment," intimidation because of race, includes cross-burning or defacing with swastika etc., enacted 1981); W. VA. CODE § 61-6-21 (1991) ("Prohibiting violations of an individual's civil rights," injury or intimidation, based on race, religion, etc., enacted 1987); W. VA. CODE § 61-6-22 (1991) ("Wearing masks, hoods or face coverings," enacted 1988); WIS. STAT. ANN. § 939.645 (West 1991) ("crimes committed against certain people or property," enacted 1988).

34 As of the time of writing, H.R. 4797, a bill that would enact federal bias crime legislation, has been proposed by Congressman Charles E. Schumer, the Chairman of the House of Representatives Subcommittee on Crime and Criminal Justice. Hearings have been held on this bill and no further legislative action has been taken. Although there is no pure federal bias crime statute, there are federal proscriptions against racially motivated interference with certain legal rights and a narrow category of crimes committed under color of law that are racially motivated. See 18 U.S.C. § 245(b)(2) (1988) (proscribing force or intimidation against a victim because of the victim's race and because the victim is engaged in one of certain enumerated activities); *id.* § 242 (proscribing disparate punishment of persons based on race or national origin).

35 "Pure bias crimes" proscribe specified racially motivated behavior directed at a person or property. An example of a pure bias crime is to be found in the St. Paul, Minnesota ordinance that was struck down by the Supreme Court in *R.A.V.* See *infra* note 49, for the full text of the ordinance. "Penalty enhancement laws" increase the criminal sanction (fine and/or term of incarceration) for certain crimes when those crimes are committed with racial motivation. Penalty enhancement laws were at issue in both *Mitchell* and *Wyant*. See *infra* text accompanying notes 102-07.

36 See *infra* Part II-B.

tor holding this belief might be for future anti-social conduct. It is striking that Chief Justice Vinson, not renowned as a strong advocate of a robust view of the First Amendment,³⁷ saw no need to provide any support for his assertion that "[o]f course we agree that one may not be imprisoned or executed because he holds particular beliefs."³⁸ It is clear that a racist may not be punished merely for believing in racism.

"Belief . . . is the first stage in the process of expression."³⁹ No law has sought to punish mere belief in racism. Regulation of the succeeding stages of expression have, however, occurred. The contemporary debate over the hate crimes/hate speech paradox began in the context of university speech codes. Concerned over the increase in racial tensions on campuses, many schools adopted policies proscribing the expression of racial or religious bigotry.⁴⁰ These codes received a mixed scholarly reception.⁴¹ None, however, has survived a First Amendment challenge in court. Thus far they have been viewed as prohibitions of speech based solely on the content of that speech.⁴² Although sympathetic with the goals

37 See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951) (Vinson, C.J., plurality opinion). In *Dennis*, the plurality of the Court applied the "clear and present danger" standard to permit the prosecution of leaders of the Communist Party. According to Chief Justice Vinson, the teaching of Marxist-Leninist doctrine by the Communist Party from 1948 to 1951 posed a sufficiently clear and present danger of an overthrow of the American government to warrant prosecution of the party's leaders. *Id.* at 517. Vinson's use of the "clear and present danger" test has been justly criticized as an interpretation that "virtually abandoned the element of 'clear,' greatly subordinated the element of 'present,' and overemphasized the element of the seriousness of the 'evil.'" THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 114 (1970).

38 *American Communications Ass'n v. Douds*, 339 U.S. 382, 408 (1950).

39 EMERSON, *supra* note 37, at 21.

40 Campus speech codes vary in terms of scope; some proscribe bias as to race, religion, gender, national origin, and sexual orientation. See *REGULATING RACIAL HARASSMENT ON CAMPUS: A LEGAL COMPENDIUM* (Thomas P. Hustoles & Walter B. Connolly, Jr. eds., 1990); Ken Emerson, *Only Correct*, *NEW REPUBLIC*, Feb. 18, 1991, at 18 (discussing the University of Wisconsin speech policy); Jon Wiener, *Free Speech for Campus Bigots*, *NATION*, Feb. 26, 1990, at 272 (discussing the University of Michigan speech policies).

41 Compare Delgado, *supra* note 7, Lawrence, *supra* note 23, and Matsuda, *supra* note 7 with Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 *HARV. C.R.-C.L. L. REV.* 371 (1992) and Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 *DUKE L.J.* 484.

42 See *UWM Post, Inc. v. Board of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (striking down the speech code at University of Wisconsin as violation of students' First Amendment right of free expression); *Doe. v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (striking down speech code at University of Michigan as violation of students' First Amendment right of free expression); see also Robert A. Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech": The View From Without and Within*, 53 *U. PITT. L. REV.* 631 (1992) (arguing that public university speech codes nec-

of the campus speech codes, the district court that struck down the regulations adopted by the University of Michigan ruled that the regulations impermissibly interfered with the First Amendment.⁴³

University speech codes have no direct analog in general society. There has been no contemporary attempt by any state to apply a racist speech code to the general public.⁴⁴ Beginning with the *R.A.V.* case, courts moved beyond the setting of the university and confronted general bias crime laws for the first time since the dramatic legislative activity in this arena. The Court's decision in *R.A.V.* is certain to play a critical role in shaping the current bias crime debate.⁴⁵ Along with state cases such as *Wyant*

essarily violate the First Amendment).

Campus speech codes at private universities do not implicate the First Amendment and are largely inapposite to the issue of bias *crime* laws at issue in this Article. See Ira C. Lupu, *Statutes Revolving in Constitutional Orbits*, 79 VA. L. REV. 1, 9-10 (1993) (discussing impact of decision interpreting First Amendment on conduct of private universities).

⁴³ See *University of Mich.*, 721 F. Supp. at 861-67; see also Comment, *First Amendment—Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech: Doe v. University of Michigan*, 103 HARV. L. REV. 1397 (1990).

⁴⁴ Group libel laws, by punishing the dissemination of racially slanderous or inflammatory statements, have functioned as a type of public racist speech code. EMERSON, *supra* note 37, at 393; see Soifer, *supra* note 25, at 374-82. The Supreme Court approved the use of these statutes in *Beauharnais v. Illinois*, 343 U.S. 250 (1952). The Court held that, just as interpersonal libel fell outside the protection of the First Amendment, group libel was similarly unprotected.

The ability to use group libel statutes to enforce a speech code has been severely undercut by subsequent decisions. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), for example, the Court held that libel was not completely outside the scope of First Amendment protections. The Court further applied the *New York Times* rule to the context of criminal libel laws, stating that the First Amendment "also limits state power to impose criminal sanctions for criticism of the official conduct of public officials." *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964). Both decisions cast doubt on the premise in *Beauharnais* that libel falls outside the domain of the First Amendment.

Moreover, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Court restricted the power of the state to regulate expression to words that incite or produce "imminent lawless action." *Id.* at 447; see also *infra* note 109. This would appear to leave out the power to punish words that cause harm because "a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group on which he willy-nilly belongs, as to his own merits." *Beauharnais*, 343 U.S. at 263 (Frankfurter, J.).

The combined effect of these decisions appear to preclude a state from using group libel statutes to create a de facto speech code. Nonetheless, these statutes still exist in a number of states. See EMERSON, *supra* note 37, at 369; MASS. ANN. LAWS ch. 272, § 98C (Law. Co-op 1992). Since *Beauharnais*, however, no conviction under a group libel statute has been judicially upheld.

⁴⁵ See *Wisconsin v. Mitchell*, 485 N.W.2d 807, 814-15 (Wis.) (citing the *R.A.V.* decision), cert. granted, 113 S. Ct. 810 (1992); *Ohio v. Wyant*, 597 N.E.2d 450, 458 (Ohio) (citing the *R.A.V.* decision), petition for cert. filed, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992)

and *Mitchell*, it provides the best point of departure for an examination of the First Amendment issues that underpin the hate crimes/hate speech paradox.

The Supreme Court was unanimous in striking down the St. Paul ordinance at issue in *R.A.V.*, but agreed about little else. Four Justices concurred in the judgment of the Court, but did so solely on the grounds of overbreadth.⁴⁶ It is safe to assume that these Justices would have upheld a narrowly-drawn bias crime statute. The other five members of the Court, in the majority opinion of Justice Scalia, reached further and found that the St. Paul ordinance—and presumably any bias crime law—was an unconstitutional content-based regulation of speech.⁴⁷

The facts of the *R.A.V.* case require only brief amplification.⁴⁸ Robert Viktora, then a minor, was accused of burning a cross on the lawn of Russell and Laura Jones and their children, an African-American family that had recently moved into the neighborhood. Viktora was charged with violating St. Paul's Bias-Motivated Crime Ordinance.⁴⁹ In moving to dismiss the indictment, Viktora asserted both that the ordinance was overbroad and that it was an unconstitutional, content-based restriction on speech. The Minnesota Supreme Court rejected the overbreadth challenge because it construed the language "arouses anger, alarm or resentment in others" in the ordinance as applying only to

(No. 92-568); see also ANTI-DEFAMATION LEAGUE, *supra* note 31.

46 *R.A.V.*, 112 S. Ct. at 2558-60 (White, J., concurring in the judgment); *id.* at 2561 (Blackmun, J., concurring in the judgment); *id.* at 2571 (Stevens, J., concurring in the judgment).

Justices Blackmun and O'Connor joined Justice White's concurring opinion in full. Justice Stevens joined Justice White's opinion only in part and filed a separate concurring opinion in which Justices White and Blackmun joined in part.

Justice Blackmun filed a separate brief concurring opinion in which he reiterated some of Justice White's arguments and added a barbed observation as to the underlying basis for the majority's opinion. "I fear," Justice Blackmun wrote, "that the Court has been distracted from its proper mission by the temptation to decide the issue over 'politically correct speech' and 'cultural diversity,' neither of which is presented here." *Id.* at 2561.

47 *Id.* at 2538-50.

48 See *supra* note 13 and accompanying text.

49 The St. Paul Bias-Motivated Crime Ordinance provides:

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.

ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990).

"fighting words," and therefore not to any expression protected by the First Amendment.⁵⁰ Although a minority of the Supreme Court held that this limiting construction by the Minnesota court did not save the ordinance from overbreadth,⁵¹ Justice Scalia was prepared to accept that all of the expression reached by the ordinance was proscribable. He thus had to reach the content-based challenge, and it is to that challenge that I now turn.

Justice Scalia proposed a limited categorical approach to the First Amendment.⁵² Accepting that "fighting words," along with other categories of expression such as obscenity and defamation, are not entitled to full First Amendment protection, Justice Scalia went on to assert that these forms of expression nevertheless enjoy some limited protection. These categories of speech, he wrote, are not "entirely invisible to the Constitution."⁵³ Expression within one of these categories may be proscribed, but *only* on the basis of its categorical nature and not on the basis of its content. "Fighting words" are "analogous to a noisy sound truck." the state may regulate or even ban this form of expression altogether, but not on the basis of the content of the message.⁵⁴ According to

50 See *In re Welfare of R.A.V.*, 464 N.W.2d, 507, 510 (Minn. 1991). The Minnesota Supreme Court in *R.A.V.* relied upon the earlier construction of the St. Paul Bias-Motivated Crime Ordinance in *In re Welfare of S.L.J.*, 263 N.W.2d 412 (Minn. 1978). In both cases, the court invoked the fighting words doctrine created in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and limited the St. Paul Ordinance to "conduct that itself inflicts injury or tends to incite immediate violence." See *R.A.V.*, 464 N.W.2d at 510-11.

51 See *R.A.V.*, 112 S. Ct. at 2558-60 (White, J., concurring).

52 The categorical approach to First Amendment jurisprudence assigns certain forms and types of expression to categories that receive less protection than does general expression. For a strong defense of the categorical approach, see 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.

Categorical First Amendment methodology has been criticized as well. See, e.g., Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (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) (general categorical methodology violates personal autonomy that is critical to First Amendment); Pierre J. Schlag, *An Attack On Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983) (categorical approach is inherently not viable 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 as non-neutral and therefore inappropriate as basis for determining First Amendment protection).

For a synthesis of the categorical approach and methodologies based on contextual balancing of interests, see John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1481 (1975).

53 *R.A.V.*, 112 S. Ct. at 2540.

54 *Id.* at 2545 (citing *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in the result)).

Justice Scalia, expression operates either in the full light of the First Amendment or in the shadow of that Amendment but never wholly outside of its protection.⁵⁵ Regardless of the First Amendment status of a category of expression, according to Justice Scalia, content-based regulations are the greatest evil and are "presumptively invalid."⁵⁶

I suggest below that Justice Scalia's approach in *R.A.V.* is thoroughly flawed as applied to bias crimes because, in this context, it misconceives the requirements of the content-neutrality doctrine.⁵⁷ It is important to recognize precisely what this approach is or, more importantly, what it claims *not* to be. It does not purport to require the state to proscribe all forms of proscribable speech or none at all. Rather, Justice Scalia identified several exceptions to the general unacceptability of content-based restrictions on expression. Under the first set of exceptions, choices may be made as to which forms of speech to proscribe so long as they do not address the content of the expression. For example, the regulations upheld in *Sable Communications, Inc. v. FCC*,⁵⁸ restricted obscene communications when the medium of communication was the telephone.⁵⁹ According to Justice Scalia, the provisions at issue in *Sable* permissibly regulated the medium but not the message.

55 Justice Scalia takes as metaphor, not as literal statements of law or policy, such pronouncements by the Court that some expression falls "not within the area of constitutionally protected speech" or outside the protection of the First Amendment. *Id.* at 2543 (citing *Bose Corp. v. Consumers Union of United States, Inc.* 466 U.S. 485, 504 (1984) (commercial speech); *Roth v. United States*, 354 U.S. 476, 483 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (fighting words)).

56 *Id.* at 2542. The requirement of content-neutrality is one of the fixed points in First Amendment analysis. Ordinarily, content-based regulations of expression are presumptively invalid. *See, e.g.*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 112 S. Ct. 501 (1991); *Police Dep't v. Mosley*, 408 U.S. 92 (1972); *RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY* 46 (1992); *LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW* 789-825 (2d ed. 1988); Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 14. Only a limited number of categorical exceptions to this general rejection of content-based regulations have been recognized, and these exceptions have been narrowed over time. *See Miller v. California*, 413 U.S. 15 (1972) (obscenity); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (narrowing permissible scope of state libel law); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (same). A third categorical exception, that of "fighting words" under *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), will receive detailed attention *infra* Part III-B. *See also Ely, supra* note 52, at 1497-98.

57 *See infra* text accompanying notes 145-62.

58 492 U.S. 115 (1989).

59 *See id.* at 124-26 (cited in *R.A.V.*, 112 S. Ct. at 2545).

Justice Scalia would also exempt from the content-neutrality rule regulations that address content solely for the very reason the entire "class of speech at issue is proscribable" in the first place. Justice Scalia provided two examples of this type of exception. First, a regulation prohibiting only obscenity "which is the most patently offensive *in its prurience*" would be permissible.⁶⁰ The second, and somewhat more curious example is that of threats of physical violence directed at the President of the United States.⁶¹

Justice Scalia found that the St. Paul ordinance did not fall within either exception. Rather, when he applied his approach to the St. Paul ordinance, he concluded that the city had established a regulation aimed directly at racist speech and biased beliefs rather than at "fighting words" generally or at a sub-group of "fighting words" selected for reasons other than the content of those words. He thus held that the ordinance impermissibly chose sides in the debate over racial or religious prejudice. In what is now perhaps the most famous sentence in his *R.A.V.* opinion, Justice Scalia wrote: "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."⁶²

Justice Scalia's majority opinion thus does not permit any distinction between racist speech and bias crimes. The effort of the state to punish bias crime, in his view, is unavoidably infected with the impermissible attempt to suppress racist speech. This view was adopted, with some modification, by the courts in *Wisconsin v. Mitchell*⁶³ and *Ohio v. Wyant*.⁶⁴

The facts of these two cases may be briefly summarized. In the *Wisconsin* case, the defendant was Todd Mitchell, a nineteen-year-old black man, who was convicted of aggravated battery for his role in the severe beating of Gregory Riddick, a fourteen-year-old white male. Under *Wisconsin* law, this crime carries a maximum sentence of two years.⁶⁵ *Wisconsin's* penalty enhancement

60 *R.A.V.*, 112 S. Ct. at 2545-46 (emphasis in original).

61 *Id.* at 2545-46. As will be discussed below, it is not at all self-evident why a special crime prohibiting only threats against the President springs from the "very reason" that the entire class of threats of physical violence is proscribable. See *infra* text accompanying notes 157-62.

62 *R.A.V.*, 112 S. Ct. at 2548.

63 485 N.W.2d 807 (Wis.), cert. granted, 113 S. Ct. 810 (1992).

64 597 N.E.2d 450 (Ohio), petition for cert. filed, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992) (No. 92-568).

65 WIS. STAT. ANN. §§ 939.05, 939.50(3)(e), 940.19(1m) (West 1991) (sentence for complicity in aggravated battery is two years).

law, however, provides that the potential penalty for a racially motivated aggravated battery is seven years.⁶⁶ In addition to his conviction for battery, Mitchell was found to have acted out of racial bias in the selection of the victim. Facing a possible seven year sentence, he was sentenced to four years incarceration.⁶⁷

Wyant arose out of a series of cases commenced under Ohio's ethnic intimidation law.⁶⁸ The charges brought against David Wyant, a white male, were based upon his use of vulgar and

66 WIS. STAT. ANN. § 939.645 (West 1991) 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 which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

(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 commented 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 commented 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.

Id. The statute was amended in 1991, effective May 14, 1992. The amended subsection (1)(b) now provides:

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

Id. (West 1992) (emphasis added to new language).

⁶⁷ *Mitchell*, 485 N.W.2d at 807.

⁶⁸ Three other cases were consolidated in the *Wyant* appeal to the Ohio Supreme Court. In each case, the indictment for ethnic intimidation was dismissed on the grounds that the ethnic intimidation statute was unconstitutional. Accordingly, the facts of these cases are not given in the opinion of the Supreme Court of Ohio. See *Wyant*, 597 N.E.2d at 451.

threatening language directed at a black couple, Jerry White and Patricia McGowan, at a campsite. The Ohio statute is a penalty enhancement law applicable to a number of personal and property crimes which, if committed "by reason of the race, color, religion, or national origin of another person or group of persons," are elevated to the next grade of offense.⁶⁹

The decision in *Mitchell*, announced the day after *R.A.V.*, adopted much the same approach as did Justice Scalia. The Wisconsin court held that the penalty enhancement law "punishes the defendant's biased thought . . . and thus encroaches upon first amendment rights."⁷⁰ Because Todd Mitchell's conduct—regardless of motivation—was punishable as an aggravated battery, the court held that the only basis for the enhanced sentence was Mitchell's beliefs. "The hate crimes statute," the court stated, "enhances the punishment of bigoted criminals because they are bigoted."⁷¹ Not only would this constitute an impermissible interference with Mitchell's own right to his ideas, the court held, but it would chill the holding and expression of similar ideas by others for fear of providing evidence for a future bias crime charge.⁷²

In addition to tracking the holdings in *R.A.V.* and *Mitchell*, the Ohio Supreme Court bolstered its conclusion with an additional argument rooted less in First Amendment jurisprudence than in criminal law doctrine. The court argued that punishing motive was the equivalent of thought control.⁷³

It is sufficient here to note the common thread that runs through Justice Scalia's opinion in *R.A.V.* and those in *Mitchell* and

69 OHIO REV. CODE ANN. § 2927.12 (Baldwin 1992) provides:

(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin or another person or group of persons.

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.

Id.

70 *Mitchell*, 485 N.W.2d at 812.

71 *Id.* at 814.

72 *Id.* at 815-16; see Gellman, *supra* note 22, at 360-61 (discussing potential chilling effect of bias crime laws).

73 *Ohio v. Wyant*, 597 N.E.2d 450, 454 (Ohio) ("The same crime can be committed for any of a number of different motives. Enhancing a penalty because of motive therefore punishes the person's thought, rather than the person's act or criminal intent."), *petition for cert. filed*, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992) (No 92-568).

Wyant.⁷⁴ All conclude that bias crimes—pure bias crimes and penalty enhancement laws—inevitably represent an unconstitutional regulation of racist speech and thought. It is therefore seen to be impossible to separate racist speech from bias crimes. Because the former must be protected under the First Amendment, the latter may not be punished. I share the conclusion of those who assert that racist speech may not be regulated.⁷⁵ If there were no meaningful distinction between bias crimes and racist speech, I would share the position of those who assert that bias crimes do not survive First Amendment scrutiny. Indeed, the search for this distinction is animated by the goal of determining if bias crime laws are constitutional.

II. RESOLVING THE HATE CRIMES/HATE SPEECH PARADOX: A DETOUR DOWN TWO DEAD ENDS

The search for a distinction between protected racist speech and proscribable bias crimes begins with brief consideration of two unsuccessful approaches: the purported distinctions between (1) speech and conduct and (2) pure bias crimes and penalty enhancement laws.

A. *Speech vs. Conduct*

It is tempting to distinguish bias crimes from racist speech by describing bias crimes as conduct and racist speech as strictly expression. This approach was explored by Thomas Emerson, among others.⁷⁶ Despite substantial scholarly criticism,⁷⁷ the purported

⁷⁴ I discuss the strength and viability of the position adopted by the court in *Wyant*, *infra* Part IV-B.

⁷⁵ See, e.g., SMOLLA, *supra* note 56, at 156-69; Massaro, *supra* note 24, at 218-19 (“[A] conservative reading of contemporary constitutional law reveals that hate speech cannot be suppressed” unless it falls within the narrow bounds of “fighting words.”). *But see* Lawrence, *supra* note 23, at 449-57; Matsuda, *supra* note 7, at 2320-81.

It is beyond the scope of this Article to construct a full critique of those who have argued that racist speech itself may be punished. I have argued elsewhere that any theory that limits the protection of expression based upon the results of that expression will be seriously flawed. See Frederick M. Lawrence, *The Coastwise Voyager and the First Amendment*, 69 B.U. L. REV. 897, 920-22 (1989). For purposes of the present project, I will assume that First Amendment doctrine ought not to permit punishment of racist speech and thought. Put somewhat differently, I intend to show that this assumption does not require the conclusion drawn by others that bias crime laws are thus similarly unconstitutional.

⁷⁶ See EMERSON, *supra* note 37, at 80-90; see also Anthony S. Winer, *The R.A.V. Case and the Distinction Between Hate Speech Laws and Hate Crime Laws*, 18 WM. MITCHELL L.

dichotomy and its role as a tool in constitutional analysis has a remarkable sticking quality. In his *R.A.V.* opinion, for example, Justice Scalia distinguished impermissible content-based restrictions from other restrictions, such as laws against treason, that are "directed not against speech but against conduct."⁷⁸ More recently, the Supreme Court of Oregon upheld that state's bias crime law because it was a law "directed against conduct not a law directed against the substance of speech."⁷⁹

Professor Emerson did not suggest that a perfect distinction could be drawn between speech and action. He conceded that "[t]o some extent expression and action are always mingled; most conduct includes elements of both."⁸⁰ Nonetheless, Emerson proposed that a sufficiently workable dichotomy exists between speech and action to permit judicial inquiry into which element was "predominant" in any particular behavior. Although the Supreme Court never explicitly adopted Emerson's proposal, it did draw on the distinction between speech and conduct in an effort to place certain behavior beyond the protected bounds of "expression."⁸¹

In application, however, the speech-conduct dichotomy is far too brittle. Emerson himself noted that efforts to apply the distinction will "be based on a common-sense reaction" to a great extent.⁸² Therein lies the problem. It is not just that speech and

REV. 971, 972-76 (1992).

⁷⁷ See, e.g., Ely, *supra* note 52, at 1494-96; Melville B. Nimmer, *The Meaning of Symbolic Speech under the First Amendment*, 21 UCLA L. REV. 29 (1973).

⁷⁸ *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.")

⁷⁹ See *Oregon v. Plowman*, 838 P.2d 558 (Or. 1992). The court upheld the Oregon racial intimidation law that 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." OR. REV. STAT. § 166.165(1)(a)(A) (1990). 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 at conduct" whereas the Oregon statute was "directed against the substance of speech." *Plowman*, 838 P.2d at 878.

⁸⁰ EMERSON, *supra* note 37, at 80.

⁸¹ See *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965) ("We emphatically reject the notion . . . that the [First Amendment] afford[s] the same kind of freedom to those who would communicate ideas by conduct . . . [as] to those who communicate by pure speech."); see also *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) ("Cohen's absurd and immature antic, in my view, was mainly conduct and little speech.")

⁸² EMERSON, *supra* note 37, at 80.

action are intermingled. There is a dialectic encompassing speech and conduct that precludes not only a neat separation of the two but also Emerson's efforts to determine whether act or expression is the "predominant element" in certain behavior. Consider two examples used by Emerson himself: the burning of a draft card and the assassination of the President.⁸³ To Emerson, "it seems quite clear that the predominant element [in the burning of a draft card] is expression,"⁸⁴ but that assassination is proscribable conduct.⁸⁵

Even this obvious example requires further analysis, however. It is not only obvious to Emerson that assassination must be conduct. It must be equally clear to him that what distinguishes an assassination of the President from a case of ordinary murder is also "conduct." Otherwise, it would be impermissible to punish the assassination as anything beyond any other murder. The slipperiness of the speech-conduct distinction is apparent. One could easily argue that the predominant way in which a presidential assassination differs from any other murder, and the reason it is punished more severely, is that it is the quintessential expression of a deeply held (and dangerous) opinion about the President and/or our system of government. Such may very well have been the case with the assassinations of, at least, Presidents Lincoln and McKinley.⁸⁶

Although it is harder to contend that the major part of burning a draft card is the conduct of burning,⁸⁷ it is at least plausi-

83 Laws specifically related to draft card destruction and assassination of the President have been upheld by the Supreme Court. *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding conviction for burning of a draft card); *Watts v. United States*, 394 U.S. 705, 708 (1969) (upholding facial validity of 18 U.S.C. § 871 which criminalizes threats of violence against the President of the United States; specific threat in *Watts* held to be insufficient to satisfy requirements of § 871).

84 EMERSON, *supra* note 37, at 84.

85 *Id.* at 80 (assassination of the President is given as a *reductio ad absurdum* proof that not all behavior with some expressive content may be considered expression that ought to be protected under the First Amendment).

86 There is strong support for the idea that John Wilkes Booth was predominantly motivated to express an opinion as to the conduct of the Civil War and the treatment of the southern states by Union troops. Furthermore, Leon Czolgosz's predominant motivation in the assassination of William McKinley was to further the goals of anarchism. See FINIS L. BATES, *THE ESCAPE AND SUICIDE OF JOHN WILKES BOOTH* 157-63 (1907) (discussing the motivation of Booth); 1 CHARLES S. OLCOTT, *THE LIFE OF WILLIAM MCKINLEY* 385 (1946) (discussing the motivation for the assassination of McKinley).

87 The Court in *O'Brien* actually reached that conclusion, holding that O'Brien's actions were predominantly conduct and the statute punishing draft card burning was unrelated to the suppression of expression. See *infra* note 155. Professor Emerson disagrees

ble that, both in terms of the actor's own understanding of the card burning and the state's concern with punishing this behavior, the "conduct" of no longer having a draft card predominates in the act. As Professor Ely wrote, "burning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression. It involves no conduct that is not at the same time communication, and no communication that does not result from conduct."⁸⁸

Perhaps we could even say the same of assassination. While murder usually is motivated by hatred or other feelings about the victim, a presidential assassination may be motivated by political, not personal, animus. Public action is the most direct form of communication. The act demonstrates sincerity and a strength of conviction in a way that words alone probably could not communicate.

The point here is that a simplistic distinction between speech and conduct will not add rigor to any attempt to discover how a bias crime may be distinguished from racist speech. Robert Viktora's cross burning on the lawn of the Jones family is certainly an "undifferentiated whole." It is one hundred percent action directed against the Jones and one hundred percent expression of a deeply-felt racism. Even simply flying a swastika from one's home cannot be objectively described as expression alone. It is action as well. Applying the distinction between conduct and expression requires a process that assumes its own conclusions. That which we wish to punish we will term "conduct" with expressive value, and that we wish to protect we will call "expression" that requires conduct for its means of communication. The critical decision—which behavior may be punished and which should be protected—is wholly extrinsic to this process. If a meaningful distinction between bias crimes and racist speech exists, it must be found elsewhere.⁸⁹

with the Court's decision in the *O'Brien* case and argues that the expression element clearly predominates the activity. See *supra* note 81 and accompanying text.

⁸⁸ Ely, *supra* note 52, at 1495.

⁸⁹ See also Nimmer, *supra* note 77, at 30-34 (arguing that any attempt to separate speech from "communicative conduct" will be unsuccessful).

B. *Pure Bias Crimes vs. Penalty Enhancement Laws*

The distinction between pure bias crimes and penalty enhancement laws has been asserted to distinguish constitutional from unconstitutional bias crime laws.

Unlike the speech-conduct distinction, the argument based upon the distinction between bias crimes and penalty enhancement laws is of recent origin. This argument figured prominently in testimony before the House of Representatives Subcommittee on Crime and Criminal Justice in support of the Hate Crimes Sentencing Enhancement Act of 1992,⁹⁰ a proposed federal penalty enhancement law. Both Laurence Tribe and Floyd Abrams stated that the proposed legislation was constitutional because it sought only to use bias motivation as a factor in sentencing and not as an element of a crime itself.⁹¹

In order to evaluate the usefulness of the distinction between pure bias crimes and penalty enhancement laws, it is necessary to return to definitions. Penalty enhancement laws explicitly rely upon some other criminal provision, such as assault, and increase the sentence if this assault was committed with bias motivation. Penalty enhancement laws may increase the sentence by a given length of time;⁹² or may increase the "level" of the crime by, for

90 H.R. 4797, 102d Cong., 2d Sess. (1992). The bill was reintroduced on March 1, 1993, as the Hate Crimes Sentencing Enhancement Act of 1993, H.R. 1152, 103d Cong., 1st Sess. (1993).

91 *Hate Crimes Sentencing Enforcement Act of 1992: Hearings on H.R. 4797 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 7-30 (1992) [hereinafter *Hearings*] (statements and testimony of Floyd Abrams and Laurence Tribe). In criticizing the distinction relied upon by Professor Tribe and Mr. Abrams, I should note that their testimony represents a different project from that of this Article. In their testimony, Tribe and Abrams took the Court's decision in *R.A.V.* as a given and attempted to argue that H.R. 4797 was nonetheless constitutional. This was particularly true of Tribe, who did not endorse *R.A.V.* as much as he accepted it. Abrams, both in his testimony and elsewhere, explicitly embraced the position of the majority in *R.A.V.* See *Hearings, supra*, at 22 ("I appear before you as someone who welcomed and publicly praised the Supreme Court's recent ruling in *R.A.V. v. City of St. Paul* . . . Justice Scalia's ruling for the Court . . . seemed to me not only correct but admirable."); Floyd Abrams, *Letter to the Editor*, N.Y. TIMES, July 3, 1992, at A24 (criticizing editorial which was critical of the *R.A.V.* decision).

I press the more fundamental questions as to the strength of *R.A.V.* Although I share with Abrams and Tribe a pragmatic interest in seeing a federal bias crimes law enacted, I nonetheless maintain, as argued in the text, that the distinction between pure bias crimes and penalty enhancement laws is, in the final analysis, untenable. See *infra* text accompanying notes 92-99.

92 See, e.g., MO. REV. STAT. § 574.090 (1989) (provides for increased sentences); N.H.

example, increasing a misdemeanor to a felony or a lower grade felony to one of greater severity.⁹³ Moreover, penalty enhancement crimes may mandate an enhancement of the sentence or may provide discretion to the sentencing judge to increase the penalty if she deems it appropriate.⁹⁴ All penalty enhancement laws are thus derivative of some other criminal law. Pure bias crimes, by contrast, create a free-standing prohibition of some bias-motivated conduct.

On the surface, this appears to be a distinction with significance. As Professor Tribe stated:

Enhancing a criminal sentence for any "hate crime" . . . in no way creates a "thought crime" or penalizes anyone's conduct based upon a non-proscribable viewpoint or message that such conduct contains or expresses. In this crucial respect, the trigger for enhanced punishment [laws] differs completely from the constitutionally problematic trigger for punishment under the St. Paul ordinance struck down by the Supreme Court in the *R.A.V.* case.⁹⁵

It is only in appearance, however, that pure bias crimes seem to be free-standing. If there is any distinction between pure bias crimes and penalty enhancement laws, it is only that the former rely upon other criminal statutes implicitly, whereas the reliance of the latter is explicit. This flows from the very idea of a bias crime.

A concept of two tiers is inherent in any civil rights crime, including bias crimes.⁹⁶ Every civil rights crime contains within it a "parallel" crime against person or property. In *R.A.V.*, for example, the parallel crimes of trespass and vandalism exist along side

REV. STAT. ANN. § 651:6(I)(g) (1991) (provides for increased penalties); WIS. STAT. ANN. § 939.645 (West 1991) (provides for increased sentences).

93 See, e.g., FLA. STAT. ANN. § 775.085 (West 1990) (increases level of crime); OHIO REV. CODE ANN. § 2927.12 (Baldwin 1992) (increases level of crime); VT. STAT. ANN. tit. 13, § 1455 (1991) (increases level of crime).

94 See, e.g., FLA. STAT. ANN. § 775.085 (West 1990) (mandatory penalty enhancement); N.H. REV. STAT. ANN. § 651:6(I)(g) (1991) (discretionary penalty enhancement).

95 *Hearings*, *supra* note 91, at 11-12.

96 The universe of civil rights crimes is composed of three categories: (1) racially motivated violence or "bias crimes;" (2) unjustifiable use of force under color of law, such as police brutality or "official crimes;" and (3) interference by non-state officials with the exercise of certain political or civil rights or "rights interference crimes." See Lawrence, *supra* note 3.

the bias crime charged in the case.⁹⁷ The bias crime is comprised of a parallel crime with the addition of bias motivation.

A pure bias crime, therefore, like a penalty enhancement law, is derivative of some other criminal provision. The distinction is strictly a matter of form. The nature of the derivative relationship is made explicit in the penalty enhancement law. For pure bias crimes, the derivation, although implicit, is no less real.⁹⁸ If we conclude, therefore, that pure bias crimes impermissibly punish ideas and expression, then surely penalty enhancement laws do as well. In each case, it can be said that the criminal act has already been punished through the imposition of sentence for the predicate offense (for a penalty enhancement law) or the parallel crime (for a pure bias crime). Alternatively, if there exists a constitutional basis for imposing an increased sentence under a penalty en-

97 In burning a cross on the Jones' lawn, Viktora violated Minnesota criminal law proscribing acts of trespass onto the Jones property, vandalism, and threats. See MINN. STAT. § 609.713(1) (Supp. 1993) (terroristic threats); MINN. STAT. § 609.563 (1987) (arson); MINN. STAT. § 609.595 (Supp. 1993) (criminal damage to property). The St. Paul ordinance at issue in *R.A.V.*, however, was not restricted to activities such as Viktora's. By its terms, the ordinance applied to one who places an object on public property "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." ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990). By itself, this does not involve an act of trespass, vandalism, or other parallel act. The ordinance prohibited not only bias crimes, but racist speech as well. In my view, it is impermissibly overbroad on that basis. See *infra* text accompanying notes 146-49.

98 There is another possible difference between pure bias crimes and penalty enhancement laws, but it need not detain us long. In the case of a penalty enhancement law, bias motivation will always increase the sentence, or at least the potential sentence, above that provided by law for the predicate crime. It is possible, however, that a pure bias crime statute will provide a sentence that is less than that provided for the parallel crime. In New York, for example, bias-motivated harassment is a "Class A" misdemeanor. N.Y. PENAL LAW § 240.31 (Consol. 1989) (commission of personal or property damage based on race, religion, or ethnicity is aggravated harassment in the first degree). Often the parallel crime for this personal or property crime will be a felony such as simple or aggravated assault.

This scenario is consistent with the proposition that pure bias crimes and penalty enhancement laws are equally derivative. First, the possibility exists for consecutive sentences for the pure bias crime misdemeanor and the parallel felony. The total punishment of the bias crime will therefore exceed that of the parallel crime alone. Second, if in a given jurisdiction consecutive sentences are not possible (for example, if the pure bias crime misdemeanor is treated as a lesser included offense of the parallel felony) in reality, the bias crime count would simply drop out. The bias crime charge requires the prosecution to meet the difficult burden of proving racial motivation. Because the parallel felony would carry the higher potential sentence and the bias-motivated misdemeanor would carry the more onerous burden of proof, a prosecutor would not bring bias crime charges under this law. She would rather prosecute only the parallel crime with its less exacting burden and its higher potential sentence.

hancement law, this same basis will justify the imposition of a sentence under a pure bias crime law. The distinction between the descriptions of the two types of bias crimes, therefore, cannot provide the constitutional basis for the punishment of bias crimes.

III. RESOLVING THE HATE CRIMES/HATE SPEECH PARADOX: BIAS CRIMES AND PARALLEL CRIMES

A. *The Mens Rea of Bias Crimes and Racist Speech*

If bias crimes and racist speech cannot be distinguished on a speech-conduct axis, or through reliance upon the distinction between pure bias crimes and penalty enhancement laws, can this distinction be maintained? My proposed distinction begins with the recognition that, even without the actor's racial motivation, his commission of a bias crime may be proscribed and constitutes a crime for which he may be punished. The same cannot be said of racist speech. Without racial content, there is no suggestion that speech could or should be prohibited.

In order fully to develop the implications of this observation, it is necessary to return to the concept of the bias crime as a two-tier crime. The distinction between parallel crimes and civil rights crimes is partially based on the resulting harm of the criminal act. A racially motivated assault, in addition to causing the general harm that any assault might cause, frequently also causes an additional, particularly focused psychological harm. The victim suffers for being singled out on the basis of her race, and the general community of the target racial group is harmed as well.⁹⁹ The results of bias crimes thus seem worse than those of parallel crimes. This is certainly the view of the many states that have enacted penalty enhancement provisions or pure bias crime laws for bias crimes.¹⁰⁰

The distinction between bias crimes and civil rights crimes is not result based alone. It also rests on the actor's state of mind. If the sole distinction were the resulting harm, it would be a distinction without great normative weight because results may be a matter of fortuity. It is largely for this reason that the modern trend in the study of criminal law has been toward a focus on the state

99 See ANDREW KARMEN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY 262-63 (2d ed. 1990); see also ROBERT ELIAS, THE POLITICS OF VICTIMIZATION (1986); Delgado, *supra* note 23, at 143-49; Kretzmer, *supra* note 7; cf. *infra* note 165.

100 See *supra* note 33, 92-94.

of mind or culpability of the accused. The results of the conduct are not unimportant, rather, punishment under the criminal law, whether based on a retributive or consequentialist argument, is critically linked to the actor's mental state.¹⁰¹

The results of a bias crime, however, are not a matter of fortuity but are integrally interwoven with the defendant's state of mind. The blame of the racially motivated assault perpetrator differs from that attached to the simple assault perpetrator precisely because of the actor's state of mind, not because of happenstance or coincidence. To establish a bias crime, therefore, the prosecution must prove two essentially unrelated *mens rea* elements. The first of these is the *mens rea* that is applicable to the parallel crime; for example, the specific intent to commit an assault. Because this is foundational to the bias crime, I call this the "first-tier" *mens rea* for a bias crime. In addition, the prosecution must demonstrate that the accused was motivated by bias in the

101 The focus on culpability is consistent with punishment that is grounded either in retributive goals of meting out just deserts or utilitarian goals of reducing criminal conduct. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 26-27 (1968) (specific and general deterrence, rehabilitation, and incapacitation may be seen collectively as punishment based upon crime reduction).

Nowhere is the centrality of the accused's mental state to crime utilitarian theory more clearly visible than in the influential Model Penal Code. See MODEL PENAL CODE § 7.01 (Official Draft 1985) (explicitly rejecting punishment based solely upon retributive theory). 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., *id.* § 210 (grades of criminal homicide determined by culpability of the accused). Moreover, the Code prescribes the same punishment for most crimes of attempt, solicitation, and conspiracy as for the crime attempted or solicited or that is the object of the conspiracy. *Id.* § 5.05(1). This is a marked departure from the common law, where inchoate crimes are punished less severely than the target offense. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 331, 363 (1987). See generally HART, *supra*, at 1-27; HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 9-145 (1968).

Retribution theory also centers on the culpability of the individual. This is most apparent in retributive theory that justifies punishment strictly based on the incorrect moral choice made by the individual to do wrong. See IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (John Ladd trans., 1965). 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 HERBERT MORRIS, ON GUILT AND INNOCENCE 34-36 (1976); see also GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 472-83 (1978) (discussing the relationship between wrongdoing and the consequent harm). The critical role of individual choice that underpins any deontological theory of punishment is not negated just because results are relevant to some retributivists. Choice can be understood only in the context of culpability. See Peter Aranella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1534-35 (1992).

commission of the parallel crime. This is the "second-tier" *mens rea* required for a bias crime.¹⁰² As will be demonstrated below, the second-tier *mens rea* for bias crimes may be characterized either as motive or specific intent.¹⁰³ This second-tier *mens rea* requires that the accused have purposely chosen the victim for the parallel crime because of that victim's race, religion, or ethnicity.

Now we may return to the distinction between bias crimes and racist speech. The perpetrator of each has the requisite second-tier *mens rea* of bias motivation. As to first-tier *mens rea*, however, the two perpetrators are critically different. Consider first the perpetrator of a bias crime such as the racially motivated assault in *Wisconsin v. Mitchell*.¹⁰⁴ The requisite *mens rea* for the parallel crime will generally be recklessness, knowledge, or purpose to assault another.¹⁰⁵ Regardless of the type of bias crime law, if first-

102 See Lawrence, *supra* note 3.

103 The relevance of the distinction between motive and purpose is discussed *infra* Part IV-B. See Helen L. Mazur-Hart, Comment, *Racial and Religious Intimidation: An Analysis of Oregon's 1981 Law*, 18 WILLAMETTE L. REV. 197, 204-05 (1982) (discussing relationship between motive and purpose in context of bias crimes).

104 485 N.W.2d 807 (Wis.), *cert. granted*, 113 S. Ct. 810 (1992).

105 The parallel crimes of most bias crimes are those committed against persons or property such as vandalism or assault. To be guilty of these parallel crimes, the accused must possess either a specific intent with respect to the elements of the crime or at least act recklessly.

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 a result.

MODEL PENAL CODE § 2.02(2)(b) (Official Draft 1985).

There will also be instances where the culpability for the parallel crime is less than specific intent and 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.

Id. § 2.02(c).

Consider, for example, an accused who throws rocks at a place of worship. Although specifically motivated by the religious affiliation of the institution, he did not intend to cause any actual property damage. Culpability with respect to bias is certainly

tier *mens rea* is absent, there can be no overall culpability for the bias crime.

Consider the speaker of racist speech. He lacks the first-tier *mens rea* for any parallel crime. His *mens rea*, if indeed this is even a proper term, as to his parallel behavior, is purely one of expressing himself.¹⁰⁶

This distinction, which is keyed to first-tier *mens rea*, is not a resurrection of the overly simplistic speech-conduct distinction discussed above which, as we saw, largely assumed its own conclusions.¹⁰⁷ When the distinction is grounded in a *mens rea* focused analysis, it rests more firmly. We are not concerned with whether the accused's behavior is best characterized as "speech" or "conduct." Indeed, the "perpetrator" of racist speech lacks the first-tier *mens rea* for a parallel crime whether his "speech" takes the form of thinking, talking, flying a flag, or painting a sign. His behavior—which we, along with Professor Ely, may assume is one hundred percent action and one hundred percent expression—does not implicate a parallel crime.

For purposes of testing this framework for distinguishing bias crimes and racist speech, it is helpful to turn back to the facts of *R.A.V.*, *Mitchell*, and *Wyant*. Not only do the holdings in these cases represent a judicial trend worthy of critique, but the facts of these cases cover a broad sweep of possible circumstances of bias crime commission. The facts of *Mitchell* best illustrate this dichotomy. Prior to the beating of Riddick, Mitchell and a group of about ten others were discussing the movie "Mississippi Burning," particularly a scene in which a white man beat up a young black child who was praying. Mitchell asked the group "Do you all feel hyped up to move on some white people?"¹⁰⁸ Plainly there is "bias motivation" reflected in Mitchell's comments, but just as plainly he had not yet committed any parallel crime. Had he stopped at

purposeful, but 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. CRIM. LAW CODE ANN. § 470A (1989); MO. REV. STAT. § 574.085 (1988); OHIO REV. CODE ANN. § 2927.12 (Anderson 1987).

106 This is not to suggest that the speaker's act of expressing himself is purely deontological. On the contrary, all expression has ramifications. Indeed, "[e]very idea is an incitement." *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). I do mean to argue, however, that the speaker of racist speech does not seek to cause injury to a particular victim and thus lacks the *mens rea* associated with a parallel crime of assault or a similar personal crime.

107 See *supra* text accompanying notes 76-89.

108 *Mitchell*, 485 N.W.2d at 809.

this point, his actions would have constituted racist speech but not a bias crime.¹⁰⁹ Unfortunately, he did not stop there. Mitchell intentionally directed and encouraged the group to attack Riddick and thus was a party to the beating. This intentional action constituted the first-tier *mens rea* for the parallel crime of battery. Additionally, Mitchell had purposely chosen the victim because he was white. The intentional selection of Riddick, based on his race, constitutes the second-tier *mens rea*. Mitchell's parallel crime of battery is one that merits punishment. His purposeful choice of a victim because of his race, under Wisconsin law, is an aggravated form of that parallel crime.¹¹⁰ Mitchell was not punished for his earlier racist statement, only his later criminal conduct. We can therefore conclude that Mitchell committed a bias crime, not unpunishable racist speech.¹¹¹

The case of Robert Viktora is slightly more complex. Viktora acted with the first-tier *mens rea* of purpose when he intentionally trespassed upon the lawn of his victims and committed acts of vandalism on their property. He too acted with the requisite second-tier *mens rea* by purposefully choosing his victim on the basis of race.¹¹² What makes Viktora's case more complicated than

109 I am assuming that up to this point in the events that culminated in the beating of Riddick, Mitchell's challenge to the group—were they prepared to “move on some white people”—was sufficiently removed from the subsequent attack on Riddick so as not, in and of itself, to represent a “clear and present danger” to Riddick. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In *Brandenburg*, the Court held that the power of the state to regulate expression did not reach “advocacy of the use of force or of law violation” unless the advocacy “is directed to inciting or producing imminent lawless action” and unless the advocacy “is likely to incite or produce such action.” *Id.* at 447; see, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-29 (1982); *Hess v. Indiana*, 414 U.S. 105 (1973); see also Hans A. Linde, “Clear and Present Danger” Reexamined: Dissonance in the *Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970).

110 In this Article, I seek only to show that states may constitutionally distinguish between bias crimes and parallel crimes in their criminal codes. While I briefly discuss the reasons a legislature would choose to enact laws that sanction a bias crime more severely than the parallel crime, see *supra* notes 90-99, *infra* notes 163-67, and accompanying text, an in-depth analysis is beyond the scope of this Article. It is sufficient to assume here that bias crimes may be punished differently because of the serious harm they cause to the community and the increased injury to the victim.

111 I am primarily concerned at this point to demonstrate that a workable distinction exists between that which may be protected and that which may be punished that does not rely on the speech-conduct dichotomy. This Part does not justify the punishment of the bias crime itself. This will be addressed *infra* Part IV.

112 One of Viktora's accomplices in the cross burning was Arthur Morris Miller III who, prior to the Supreme Court's opinion in *R.A.V.*, pleaded guilty to a violation of the St. Paul ordinance. Miller's plea was vacated following the Supreme Court's decision striking the ordinance down. Subsequently, Miller was indicted under federal housing law, 42 U.S.C. § 3631 (1988), for conspiring to interfere with the Jones family's right of access

Mitchell's is that Viktora did not merely commit a racially motivated trespass. He burned a cross. Whereas we might be tempted to analyze *Mitchell* under the simplistic expression-conduct distinction—Mitchell's assault of Riddick was utterly devoid of expressive content and is therefore pure "conduct"—there is no such way out when considering *R.A.V.* Certainly Viktora's conduct carried a strong communicative content. More than the straight-forward assault in *Mitchell*, it triggers unavoidable First Amendment concern.

Because his cross-burning was one hundred percent action and one hundred percent expression, we must ask precisely what is the parallel crime Robert Viktora committed in burning a cross on the Jones' lawn. Put somewhat differently, suppose that Viktora had burned the cross just outside the Jones' property line and further suppose that in St. Paul there is no local ordinance banning the burning of non-toxic materials on a public street. Is there then no parallel crime and thus no bias crime committed by Viktora?

The question is more clearly focused when we turn to the case of David Wyant, who was convicted of ethnic intimidation solely on the basis of using words in an offensive and threatening manner.¹¹³ Has Wyant committed a bias crime and if so, what is the parallel crime here? If indeed there is not a parallel crime, then Wyant's words are protected racist speech. Wyant's actions pose difficulties for categorization because they seem to involve only the speaking of words. On the surface, there is only the expression of a racist message and no parallel crime for expression of some other message. This overlooks, however, the fact that

to housing by intimidation and the threat of force. Miller ultimately pleaded guilty to the federal charge, acknowledging the crosses were burned with the intention of scaring the Jones family into moving because they were African-Americans. *A 2d Hate-Crime Charge for Man After High Court Voided the First*, N.Y. TIMES, Oct. 23, 1992, at B16.

113 *Ohio v. Wyant*, 597 N.E.2d 450 (Ohio), *cert. granted*, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992) (No. 92-568). Wyant and his family had rented adjoining campsites. They released one of the sites which thereafter was leased by Jerry White and Patricia McGowan, both of whom are black. Wyant tried unsuccessfully to re-rent the adjoining site and, when unsuccessful, rented the next site over. During the evening, White and McGowan complained to park officials about the loud music from Wyant's campsite. Wyant at first complied with an official's request to turn the music down, but fifteen or twenty minutes later turned the music on again. In a loud voice, Wyant was heard to say "We didn't have this problem until those niggers moved in next to us," "I ought to shoot that black mother fucker," and "I ought to kick his black ass." *Id.* at 450. White and McGowan complained and then left the park.

words alone may sometimes constitute a parallel crime. Actions designed to instill serious fear certainly may be criminalized. It does not matter whether this behavior takes the form of spoken words alone or physical conduct alone. Many states have some form of assault law that proscribes behavior to create fear or terror in a victim.¹¹⁴ These laws, variously enacted as "menacing," "intimidation," and "threatening" statutes, may be violated through the defendant's use of words alone.¹¹⁵

Various forms of verbal assault statutes, if sufficiently narrow in focus, have been upheld by reviewing courts. Intimidation statutes, which criminalize words used to coerce others through fear of serious harm, are constitutional so long as it is clear that the words are purposely or knowingly used by the accused to produce a fear and that the threat is real.¹¹⁶ Menacing statutes differ from intimidation statutes. Whereas the focus in intimidation stat-

114 See, e.g., MODEL PENAL CODE § 211.1(1)(c) (Official Draft 1985) ("A person is guilty of assault if he . . . attempts by physical menace to put another in fear of imminent serious bodily injury"); *id.* § 211.3 (a person is guilty of a "terroristic" threat when one "threatens to commit any crime of violence with the purpose to terrorize another"); *id.* § 250.4(2) (one is guilty of harassment for taunting another in a manner likely to provoke a violent response); see also IOWA CODE ANN. § 708.1(2) (West 1989); FLA. STAT. ANN. § 784.011 (west 1992).

115 See generally KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 90-104 (1989) (discussing the punishment of threats); SMOLLA, *supra* note 56, at 48-50 (government interest in restricting speech is highest where that speech threatens physical harm); Greenawalt, *supra* note 7, at 298 (speech that is intended primarily to hurt the listener has limited expressive value and may properly subject the speaker to criminal punishment).

116 The Montana Intimidation Statute, for example, provides as follows:

- (1) A person commits the offense of intimidation when, with the purpose to cause another to perform or to omit the performance of any act, he communicates to another, under circumstances which reasonably tend to produce a fear that it will be carried out, a threat to perform without lawful authority any of the following acts:
 - (a) inflict physical harm on the person threatened or any other person;
 - (b) subject any person to physical confinement or restraint; or
 - (c) commit any felony.
- (2) A person commits the offense of intimidation if he knowingly communicates a threat or false report of a pending fire, explosion, or disaster which would endanger life or property.

MONT. CODE ANN. § 45-5-203 (1991). An earlier version of this statute required only a threat without any requirement that there be a reasonable tendency that the threat would produce fear. This earlier version was held to violate the First Amendment in a federal habeas corpus proceeding. See *Wurtz v. Risley*, 719 F.2d 1438 (9th Cir. 1983). The statute was amended to conform with the court's decision and has not been challenged since. See also *State v. Lance*, 721 P.2d 1258 (Mont. 1986) (upholding § (1)(b) of the unamended statute).

utes is upon coercion, the gravamen of menacing is the specific intent to cause fear.¹¹⁷ Finally, "terroristic threatening" statutes are similar to intimidation laws in that they criminalize the use of fear to achieve specific results.¹¹⁸ In each case, verbal assault statutes make words alone the basis for a criminal charge when those words are used purposely or knowingly to create fear in another.

Returning to Wyant's case, our attention is refocused on his first-tier *mens rea*. If Wyant intended his abusive language to create fear in White and McGowan or if Wyant knew that his language would do so, he committed a parallel crime of verbal assault. Accordingly, if he did so with racial motivation, he committed a bias crime. If, on the other hand, Wyant lacked the requisite first-tier *mens rea* for a verbal assault, then rather than commit a bias crime, Wyant expressed a racist message. By "expression of a racist message," I am not invoking the rejected speech-conduct distinction. It does not matter whether the racist speech takes the form of a racial epithet or burning a cross on one's own property. Analogous behavior is a crime only when the actor's purpose is to put his victim in a state of fear of imminent serious harm. When he does so with racial motivation, it is a bias crime. Thus, the epithet when screamed at the victim in a menacing manner, or the cross when burned on the lawn of a black family to terrorize them, becomes not racist speech but a bias crime.¹¹⁹

117 The Colorado Menacing Statute, for example, provides that: "A person commits the crime of menacing if, by any threat or physical action, he knowingly places or attempts to place another person in fear of imminent serious bodily injury." COLO. REV. STAT. § 18-3-206 (1992); see, e.g., *People v. McPherson*, 619 P.2d 38 (Colo. 1980) (construing Colorado menacing statute); *State v. Garcias*, 679 P.2d 1354 (Or. 1984) (upholding Oregon menacing statute, OR. REV. STAT. § 163.190(1) (1992), against First Amendment challenge).

118 The Alaska Terroristic Threatening Statute, for example, provides that a person commits the crime of terroristic threatening if the person:

- (1) knowingly makes a false report that a circumstance dangerous to human life exists or is about to exist and
 - (A) places a person in fear of physical injury to any person;
 - (B) causes evacuation of a building; or
 - (C) causes serious public inconvenience; or
- (2) with intent to place another person in fear of death or serious physical injury to the person or the person's immediate family, makes repeated threats to cause death or serious physical injury to another person.

ALASKA STAT. § 11.56.810 (1989); see, e.g., *Allen v. State*, 759 P.2d 541 (Alaska Ct. App. 1988) (upholding constitutionality of Alaska Terroristic Threatening Statute); *Thomas v. Commonwealth*, 574 S.W.2d 903 (Ky. 1978) (upholding constitutionality of Kentucky Terroristic Threatening Statute, KY. REV. STAT. ANN. § 508.080 (Baldwin 1984)).

119 See Lawrence, *supra* note 23, at 435.

B. A New Understanding of "Fighting Words"

I will now place the understanding of verbal assaults in general, and verbal bias crimes in particular, within the broader context of First Amendment law. Far from being dissonant with contemporary First Amendment doctrine, the identification of the verbal assault, as distinct from protected speech, provides a firm basis for a reworking of the long-established but thinly constructed "fighting words" doctrine.¹²⁰ From its introduction to the present day, the definition and scope of "fighting words" have been unclear at best.¹²¹

Before proposing a reformulation of the fighting words doctrine, this Part will review the creation of the doctrine in *Chaplinsky v. New Hampshire*¹²² and the doctrinal difficulties apparent since then. Over time, the Court has reinterpreted *Chaplinsky*, both directly and indirectly, such that the fighting words exception as originally understood lacks coherence as valid First Amendment doctrine.

In 1942, Walter Chaplinsky was convicted of violating a New Hampshire ordinance that made it illegal to "call . . . [anyone] by any offensive or derisive name."¹²³ Chaplinsky, a Jehovah's Wit-

120 The term "fighting words" was introduced into First Amendment discussion in the Supreme Court's decision in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

121 See, e.g., Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531 (1980) (arguing that the fighting words doctrine cannot withstand First Amendment scrutiny and ought to be abandoned); Thomas F. Shea, "Don't Bother to Smile When You Call Me That"—*Fighting Words and the First Amendment*, 63 KY. L.J. 1, 15-16 (1975) (arguing that the Supreme Court has *de facto* abandoned the fighting words doctrine). But see Philip Weinberg, *R.A.V. and Mitchell: Making Hate Crime a Trivial Pursuit*, 25 CONN. L. REV. 299 (1993) (arguing that *R.A.V.* misapplied the fighting words doctrine, which allows regulation of racist speech and bias crimes).

122 315 U.S. 568 (1942).

123 Chaplinsky was convicted under an ordinance that provided:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

N.H. REV. STAT. ANN. § 570:2 (1986).

This law still exists in New Hampshire although with slight modification. Currently, the New Hampshire disorderly conduct statute provides:

A person is guilty of disorderly conduct if:

- I. He knowingly or purposely creates a condition which is hazardous to himself or another in a public place by any action which serves no legitimate purpose; or

ness, had been distributing religious literature on the streets of Rochester, New Hampshire, on a busy Saturday afternoon.¹²⁴ A resentful crowd gathered around Chaplinsky, and a city marshal arrived at the scene telling the crowd that Chaplinsky was permit-

II. He:

- (a) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or
- (b) Directs at another person in a public place obscene, derisive, or offensive words which are likely to provoke a violent reaction on the part of an ordinary person; or
- (c) Obstructs vehicular or pedestrian traffic on any public street or sidewalk or the entrance to any public building; or
- (d) Engages in conduct in a public place which substantially interferes with a criminal investigation, a fire fighting operation to which RSA 154:17 is applicable, the provision of emergency medical treatment, or the provision of other emergency services when traffic or pedestrian management is required; or
- (e) Knowingly refuses to comply with a lawful order of a peace officer to move from any public place; or

III. He purposely causes a breach of the peace, public inconvenience, annoyance or alarm, or recklessly creates a risk thereof, by:

- (a) Making loud or unreasonable noises in a public place, or making loud or unreasonable noises in a private place which can be heard in a public place or other private places, which noises would disturb a person of average sensibilities; or
- (b) Disrupting the orderly conduct of business in any public or governmental facility; or
- (c) Disrupting any lawful assembly or meeting of persons without lawful authority.

IV. In this section:

(a) "Lawful order" means:

(1) A command issued to any person for the purpose of preventing said person from committing any offense set forth in this section, or in any section of Title LXII or Title XXI, when the officer has reasonable grounds to believe that said person is about to commit any such offense, or when said person is engaged in a course of conduct which makes his commission of such an offense imminent; or

(2) A command issued to any person to stop him from continuing to commit any offense set forth in this section, or in any section of Title LXII or Title XXI, when the officer has reasonable grounds to believe that said person is presently engaged in conduct which constitutes any such offense.

(b) "Public place" means any place to which the public or a substantial group has access. The term includes, but is not limited to, public ways, sidewalks, schools, hospitals, government offices or facilities, and the lobbies or hallways of apartment buildings, dormitories, hotels or motels.

V. Disorderly conduct is a misdemeanor if the offense continues after a request by any person to desist; otherwise, it is a violation.

Id. § 644:2.

It is noteworthy that, although *Chaplinsky* has had an illustrious history as the source of the "fighting words" doctrine, there are no other reported New Hampshire cases prosecuted under the disorderly conduct statute for the use of "fighting words."

¹²⁴ *Chaplinsky*, 315 U.S. at 569-70.

ted to pass out his leaflets but warning Chaplinsky that the crowd was "getting restless and that he would better go slow."¹²⁵ Some time later, a disturbance did occur and Chaplinsky was escorted by a police officer toward the police station. On route, Chaplinsky encountered the city marshal and said "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."¹²⁶ It was for these words that Chaplinsky was charged with violating the New Hampshire ordinance.

In a brief opinion for a unanimous Court, Justice Murphy upheld Chaplinsky's conviction. Citing only Professor Chafee's *Free Speech in the United States*¹²⁷ for support, Justice Murphy embraced a categorical approach to First Amendment jurisprudence¹²⁸ and asserted that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"¹²⁹

In the course of the opinion, two largely overlapping definitions for the term "fighting words" were proffered by Justice Murphy. The first was defined in two parts: "fighting words" are "those which [1] by their very utterance inflict injury or [2] tend to incite an immediate breach of the peace."¹³⁰ The second definition, which came from the construction placed upon the New Hampshire law by that state's highest court, was restricted to the second clause: "The statute's purpose was to preserve the public peace. The direct tendency of [the proscribed] conduct . . . is to provoke the person against whom it is directed to acts of violence."¹³¹ The first definition provides two possible meanings: (1) words that inflict injury and (2) words that tend to incite an immediate breach of the peace. The New Hampshire court's construction only contains the breach of the peace concept, and Justice Murphy incorporated this construction into his conclusion. In

125 *State v. Chaplinsky*, 18 A.2d 754, 758 (N.H. 1941), *aff'd*, 315 U.S. 568 (1942).

126 *Chaplinsky*, 315 U.S. at 569.

127 ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941).

128 *See supra* note 52 (discussing proponents and critics of categorical approaches to the First Amendment).

129 *Chaplinsky*, 315 U.S. at 571-72 (citations omitted).

130 *Id.* at 572.

131 *State v. Chaplinsky*, 18 A.2d 754, 758 (N.H. 1941) (quoting *State v. Brown*, 38 A. 731, 732 (N.H. 1895)), *aff'd*, 315 U.S. 568 (1942).

sum, the Court upheld the prosecution of Chaplinsky and the statute under which it was brought because: "It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace."¹³² An understanding of fighting words as those that "by their utterance inflict injury" was rejected.¹³³

The fighting words exception that emerged from *Chaplinsky*, therefore, was limited to words so insulting as to threaten a breach of the peace. The only defendant whose conduct has ever been found by the Supreme Court to constitute the use of "fighting words" was Walter Chaplinsky himself. The Court narrowed the standard each time it applied it thereafter.

In *Cohen v. California*,¹³⁴ for example, the Court upheld the right of Paul Robert Cohen to wear his now-famous "Fuck the Draft" jacket in a Los Angeles courthouse. Cohen had been convicted under a California breach of the peace statute for "offensive conduct" that was defined as "behavior which has a tendency to provoke others to acts of violence or in turn disturb the peace."¹³⁵ The Supreme Court found that Cohen's jacket did not constitute "fighting words." The Court reasserted the holding in *Chaplinsky* that states were "free to ban the simple use, without demonstration of additional justifying circumstances, of so-called 'fighting words,'" and recognized that the phrase used by Cohen "is not uncommonly employed in a personally provocative fashion."¹³⁶ Nonetheless, the Court refused to uphold the defendant's conviction for use of fighting words. The Court held that to constitute fighting words, an individual must direct "personally abusive epithets" at a specific individual.¹³⁷

Three years after *Cohen*, in *Lewis v. New Orleans*,¹³⁸ it appeared that even "abusive epithets" might not be enough to constitute "fighting words" absent an actual fist fight. Supporting the

132 *Chaplinsky*, 315 U.S. at 573.

133 See Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Interment*, 106 HARV. L. REV. 1129, 1137-40 (1993).

134 403 U.S. 15 (1971).

135 *Id.* at 17 (quoting *People v. Cohen*, 81 Cal. Rptr. 503, 506 (1969) (emphasis in original)).

136 *Id.* at 20.

137 *Id.*; see Ely, *supra* note 52, at 1492-93 (After *Cohen*, "'fighting words' are unprotected, but that category is no longer to be understood as a euphemism for either controversial or dirty talk but requires instead an unambiguous invitation to a brawl.").

138 415 U.S. 130 (1974).

Court's *per curiam* opinion that the Louisiana statute at issue in *Lewis* was facially overbroad, Justice Powell stated that

words may or may not be "fighting words," depending upon the circumstances of their utterance. It is unlikely, for example, that the words said to have been used here would have precipitated a physical confrontation between the middle-aged woman who spoke them and the police officer in whose presence they were uttered.¹³⁹

"Fighting words" can only be uttered to those individuals who are predisposed to fight.¹⁴⁰

The logical weaknesses in the fighting words doctrine were present at its creation in *Chaplinsky*. Once the Court abandoned a reading of "fighting words" based on "[words] which by their very utterance inflict injury" in favor of those that "tend to incite an immediate breach of the peace," the "fighting words" doctrine was doomed to virtual insignificance. Reading "fighting words" as those likely to inspire violence by the addressee has several problems. First, taken literally, this would provide precisely the kind of "heckler's veto" that the Supreme Court properly rejected more than twenty years ago.¹⁴¹ Second, this interpretation of "fighting words" protects those addressees who need it least, namely those able to fight back. The problem is not merely that the standard of the reasonably pugilistic addressee is probably male-centered.¹⁴² The problem is that the most severely injured victim of "fighting

139 *Id.* at 135.

140 See Gard, *supra* note 121, at 550-57; Note, *supra* note 133, at 1133-34.

141 See HARRY KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 140-45 (1965) (creating term "heckler's veto" for ability of hostile crowd to silence the speaker using potential for disturbance as justification). The Court has repeatedly refused to sacrifice freedom of speech to the veto of any angry crowd. While recognizing the need to preserve public safety, see *Feiner v. New York*, 340 U.S. 315 (1951) (holding that incitement to riot was outside the protections of the First Amendment), and *Niemotko v. Maryland*, 340 U.S. 268 (1951) (Frankfurter, J. concurring) (interrupting speech sometimes necessary to preserve the peace). The Court has refused to allow suppression of speech solely because the crowd was offended or violent. See *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (holding that state could not prohibit parade solely because of the possibility of violence among the bystanders); *Edwards v. South Carolina*, 372 U.S. 299 (1963) (holding that state could not order dispersal of civil rights demonstrators on grounds of the state house because of the presence of known troublemakers in a hostile but orderly crowd of spectators); *Garner v. Louisiana*, 368 U.S. 157 (1961) (holding that a state could not prohibit sit-ins solely because other citizens would become angry and possibly violent); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (holding that freedom of speech included the right to express unpopular ideas).

142 See, e.g., GREENAWALT, *supra* note 115, at 295-98 (fighting words doctrine is "androcentric").

words," the person who is reasonably and sincerely placed in great fear of imminent serious bodily harm, is the person least likely to fight back.

The "fighting words" doctrine finds a much firmer footing in the concept of verbal assault developed above. If *Chaplinsky* is to maintain any contemporary vitality, the doctrine must be understood to place outside the reach of the First Amendment those words that are intended to and have the effect of creating fear of injury in the addressee. Words that have the effect, and even the intent, to hurt the addressee's feelings, however unfortunate, do not come under this understanding of "fighting words."¹⁴³

I conclude this Part by returning to the context of bias motivation. The proposed understanding of "fighting words" is consistent with a distinction between prosecutable bias crimes and protected racist speech. The theory does not rely on the speech-conduct dichotomy. Racially targeted actions that are intended to create fear in the addressee and that in fact do so may be constitutionally treated as a bias crime whether the behavior is primarily by the use of words or by physical act. Racially targeted behavior that vents the actor's racism is racial speech that is protected by the First Amendment, even if it disturbs or insults the observer greatly.¹⁴⁴

IV. THE ROLE OF CONTENT NEUTRALITY AND THE INTENT/MOTIVATION DISTINCTION

The first three Parts of this Article have demonstrated that a meaningful distinction exists between bias crimes and racist speech. Moreover, bias crimes may be punished without removing First Amendment protection from racist speech. In this final Part, I turn to two sets of arguments that have been advanced in oppo-

143 Among the kinds of speech that I conclude should not be considered proscribable "fighting words" may very well be speech that may be regulated under some other aspect of First Amendment doctrine. Libelous speech, for example, may give rise to recovery in tort even though it would not constitute the kind of verbal assault that ought to be recognized as "fighting words."

144 The understanding of fighting words proposed in this Article is restricted to verbal assaults that are directed at an identifiable victim who is placed in fear of imminent serious bodily harm. I thus exclude speech that, although deeply offensive to a group, cannot be said to place the members of that group in such particularized and directed fear of harm. This approach is consonant with such holdings as *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978), and dissonant from *Beauharnais v. Illinois*, 343 U.S. 250 (1952), a case that is now largely discredited. See *supra* note 44.

sition to the constitutionality of bias crime laws. The first, discussed in Part IV-A, returns us to Justice Scalia's argument in *R.A.V.* that the St. Paul ordinance was impermissibly based on the content of speech.¹⁴⁵ The second, discussed in Part IV-B, attacks bias crimes on the theory that these criminal proscriptions impermissibly punish an actor's motivation.

A. *Bias Crimes and Content Neutrality*

Writing for the majority in *R.A.V.*, Justice Scalia accepted the Minnesota Supreme Court's construction of the St. Paul ordinance as a regulation applying only to "fighting words."¹⁴⁶ He held, however, that the ordinance violated principles of content neutrality because the ordinance applies only to bias-motivated "fighting words."

Those who wish to use "fighting words" in connection with other ideas to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.¹⁴⁷

Justice Scalia thus held that "fighting words" could "be regulated because of their constitutionally proscribable content,"¹⁴⁸ but they could not be further regulated based on the content of the offensive message.¹⁴⁹

At one level, Justice Scalia is correct: content neutrality places certain restrictions upon the state's ability to proscribe "fighting words." Surely, a state could not criminalize only those "fighting words" that are addressed toward members of a particular political

145 See *supra* text accompanying notes 18, 52-56.

146 *R.A.V.*, 112 S. Ct. at 2542 (citing *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510-11 (Minn. 1991)).

147 *Id.* at 2547.

148 *Id.* at 2545.

149 As a preliminary matter, the majority's use of "fighting words" in *R.A.V.* is perfectly consistent with the reformulation of that doctrine proposed in Part III-B of this Article. See *supra* text accompanying notes 120-43. The majority's opinion reaffirmed *Chaplinsky* as valid constitutional doctrine and, by implication, would have upheld an ordinance that prohibited all "fighting words" without regard to their content. "Fighting words," as understood by the majority, "constitute 'no essential part of any exposition of ideas.'" *R.A.V.*, 112 S. Ct. at 2544 (quoting *Chaplinsky*, 315 U.S. at 572 (emphasis omitted)). The analysis proposed above focuses on the *mens rea* of the actor and defines "fighting words" as those utterances intended to threaten. Threats have never been understood to play any "essential role" in the "exposition of ideas."

party. To do so would be to establish a plain legislative preference for one political party over another, or all others. Such approval and disapproval of a set of political ideas by the state is anathema to basic First Amendment principles.¹⁵⁰

To accept some role of content neutrality, however, does not require the all or nothing-at-all approach of Justice Scalia. It is not necessary to prohibit all "fighting words," or none. Were that the case, virtually all criminal law would raise issues of content neutrality. A state may properly make a judgment that within the universe of assaults, some are worse than others. An assault with a deadly weapon is, in most states, some form of aggravated assault.¹⁵¹ The crime is more serious because the defendant has exposed society to greater risk—even if the weapon is not actually used—and has caused greater fear in the victim. These differences justify an increased penalty for the crime.¹⁵² Similarly, a state may determine that assaults based on race or religion are worse than comparable assaults that are not¹⁵³ because these assaults cause greater societal harm and injury to the victims.

The initial response to this argument is that the actor who assaults with a deadly weapon has not sought to "express" anything. The state has made no content-based determination when it seeks to punish this actor more severely than one who commits a simple assault. This response, however, is flawed in that it essentially relies on the discredited expression-conduct distinction.¹⁵⁴ Once it is recognized that any public act contains both expressive and conduct elements, it is impossible to rationalize certain legislative determinations as going only to conduct and others as implicating only expression.

150 See *supra* note 56.

151 ALA. CODE § 13A-6-20 (1992) (first degree assault defined by use of a dangerous weapon); ALASKA STAT. § 11.41.200 (1992) (first degree assault defined by causing injury by means of dangerous instrument); ARIZ. REV. STAT. ANN. § 13-1204 (1992) (aggravated assault defined as use of a dangerous weapon); CAL. PENAL CODE § 245 (West 1992) (assault with deadly weapon considered aggravated assault); FLA. STAT. ch. 784.021 (1991) (aggravated assault defined as use of a dangerous weapon); GA. CODE ANN. § 16-5-21 (Michie 1992) (aggravated assault defined as use of a dangerous weapon); IDAHO CODE § 18-905 (1992) (aggravated assault defined as use of a dangerous weapon); ILL. REV. STAT. ch. 38, para. 12-2 (1992) (aggravated assault defined as use of a dangerous weapon).

152 Although I have framed this moral intuition in terms of a harms-based retributive theory of punishment, it could be formulated to equal effect in a utilitarian deterrence-based model which seeks to punish in order to deter criminal conduct.

153 See *infra* notes 156-60 and accompanying text.

154 See *supra* Part II-A.

The recognition that expression and conduct are analytically inseparable does not deprive the First Amendment of vigor, however. It does strongly suggest that the traditional content-neutrality inquiry poses the wrong question. The proper inquiry is that articulated by the Court in *United States v. O'Brien*.¹⁵⁵ "[A] governmental regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest [that] is unrelated to the suppression of free expression."¹⁵⁶

The *O'Brien* test requires more than a mere articulation of some legitimate interest by the state. A state could always claim an interest. As Professor Ely observed, "Restrictions on free expression are rarely defended on the ground that the state simply didn't like what the defendant was saying."¹⁵⁷ The state must therefore be able to advance a nonpretextual justification for the distinctions drawn in its criminal law, a justification that stands independent of any effort to suppress the expression of ideas.

Consider the example of the federal criminal law that explicitly defines the assassination or threatened assassination of the President of the United States as a crime that is unlike any other murder.¹⁵⁸ In *R.A.V.*, Justice Scalia explicitly stated that this statute satisfied the requirements of content-neutrality because the distinction at issue "consists entirely of the very reason the entire class of speech at issue is proscribable."¹⁵⁹ This reasoning warrants closer analysis. According to Justice Scalia, threats of physical violence are exempt from First Amendment protection in the first place in order to protect the public "from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."¹⁶⁰ These three reasons, he held, "have special force when applied to the person of the

155 391 U.S. 367 (1968).

156 *Id.* at 377. In *O'Brien*, the Court concluded that regulations prohibiting the destruction of draft cards furthered the important governmental interest of maintaining selective service records, an interest found to be unrelated to the suppression of expression. *Id.* at 382.

157 See Ely, *supra* note 52, at 1496.

158 See 18 U.S.C. § 871 (1988) (criminalizing threats of violence against the President of the United States). Section 871 has been challenged and upheld by the Supreme Court. *Watts v. United States*, 394 U.S. 705 (1969) (upholding facial validity of statute; specific threat in *Watts* held to be insufficient to satisfy requirements of section 871); see also *supra* text accompanying notes 80-83.

159 *R.A.V.*, 112 S. Ct. at 2545; see *supra* text accompanying note 61.

160 *R.A.V.*, 112 S. Ct. at 2546; see Larry Alexander, *CRIM. JUST. ETHICS*, Summer/Fall 1992, at 49, 50-51 (bias crimes are more harmful than parallel crimes but not necessarily along the "dimension of harm that makes assaults proscribable").

President."¹⁶¹ The government could not, however, "criminalize only those threats against the President that mention his policy of aid to inner cities."¹⁶²

Justice Scalia's analysis constructs three levels of specificity at which threats might be criminalized:

- (1) all threats of physical violence against another person;
- (2) all threats of physical violence against the President of the United States; and
- (3) all threats of physical violence against the President of the United States because of a particular policy.

Whereas both (1) and (2) are permissible, (3) is not. Although I share these conclusions, Justice Scalia's own reasoning in *R.A.V.* provides insufficient support for them. Format (2) is considered "content-neutral" because it springs from the very reasons that threats are outside the First Amendment. But a threat against the President could be better described as being comprised of two components. The first is a simple threat against a person. The punishment of this component of the threat against the President is fully covered by format (1). The second component of the threat against the President is a particularly virulent opposition to the President. This opposition might stem from a single policy of the President or from an array of causes. Seen in this light, (2) is no more content-neutral than (3). Formats (2) and (3) differ only in their level of specificity, not in their "neutrality" as to content.

The acceptability of (1) and (2) and the impermissibility of (3) may be better understood through application of the *O'Brien* test as developed above. The state can articulate numerous reasons for format (1) other than the suppression of expression. These in fact are the reasons set out by Justice Scalia: the need to protect the populace from the fear of violence, from the negative consequences of this fear, and from the possibility that the threatened violence may occur. Similarly, these are legitimate reasons for format (2). The federal government reasonably fears that violence directed against the President will cause serious harm to the nation. This avenue of expressing opposition to the President, therefore, is foreclosed. Finally, format (3) may not be justified by legitimate reasons. By criminalizing threats against the President only insofar as they are based on opposition to a particular policy,

161 *Id.*

162 *Id.*

the government would be expressing a preference for certain policies as against others and acting only to suppress opposition to those policies. Under the *O'Brien* standard, this is not allowed.

I now return to the context of bias crimes. Here too, the critical question is not whether bias crime laws are in some technical sense content-neutral. Clearly they are not. Bias crime laws select a sub-set from the universe of parallel crimes. They do so on the basis of the actor's selection of a victim because of race, religion, or ethnicity. But we saw that the government may select a sub-set from all threats of violence and do so on the basis of the actor's motivation when that motivation leads to the discriminatory selection of the President as the victim.

We must subject bias crime statutes to the same test that explained the permissibility of the laws punishing threats directed against the President. We must ask whether bias crime statutes further an important interest unrelated to the suppression of racist speech. I believe the evidence is compelling that they do. Among the state interests served by laws particularly targeting bias crimes are: the need to deter generally a rapidly increasing form of crime¹⁶³ and specifically to deter a perpetrator with a high degree of potential dangerousness;¹⁶⁴ and the desire to address a crime that has a particularly injurious effect both on the victim¹⁶⁵ and the targeted group.¹⁶⁶ Indeed, these are among

163 There is ample evidence upon which a state could rely to support a finding that bias crimes are increasing in frequency. See *supra* note 4. For federal legislation requiring reporting of hate crimes, see Hate Crime Statistics Act, 104 Stat. 140 (codified as amended at 28 U.S.C. § 534 (1988)). See also ANTI-DEFAMATION LEAGUE, *supra* note 31, at 44-45; *Hate Crime Legislation Under Attack*, KLANWATCH INTELLIGENCE REP. (Southern Poverty Law Project, Montgomery, Ala.), Feb. 1993, at 9, *supra* note 31. A legislative conclusion that a type of crime is occurring more frequently may justify an increased penalty over otherwise similar crimes. See, e.g., *Weems v. United States*, 217 U.S. 349, 379 (1910).

164 A perpetrator of a crime who is motivated to select his victims on the basis of their race, religion, or ethnicity is a likely candidate to continue to commit such crimes, spurred on by the bias that—apart from the context of any particular attack—leads to a desire to search out and attack his victims. JACK MCDEVITT, *THE STUDY OF THE CHARACTER OF CIVIL RIGHTS CRIMES IN MASSACHUSETTS* (1993). Such concerns have routinely been held to support enhanced sentencing. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983); see also *Gholson v. Texas*, 542 S.W.2d 395 (Tex. 1976) (advocacy of violence against the white race and black supremacy admissible in sentencing phase of a capital trial for purpose of showing a propensity to commit future acts of violence on the part of the defendants).

165 Studies of bias crimes have demonstrated that they tend to be more violent and more vicious than other violent crimes. Typically, the perpetrators of bias crimes outnumber the victims by a ratio of roughly four to one. MCDEVITT, *supra* note 164. The dynamics of these assaults often lead to particularly horrifying results because a mob-mentality combines with the primal feelings which are believed to be the dominant forces at play

the arguments presented to the Supreme Court by the state of Wisconsin in support of its bias crime law in the *Mitchell* case.¹⁶⁷

Bias crime statutes thus stand on grounds wholly independent of efforts to suppress racist speech. The standard articulated in *O'Brien*, which ought to inform the inquiry as to the constitutionality of these criminal prohibitions, is thereby satisfied.

B. *The Punishment of Racially Motivated Violence*

The primary basis for overturning bias crime laws in *R.A.V.*, as well as in both *Mitchell* and *Wyant*, was drawn purely from First Amendment doctrine. There is an additional argument, drawn from a blend of First Amendment concerns and substantive criminal law, that was advanced by the Wisconsin and Ohio Supreme Courts. The courts in *Mitchell* and *Wyant* held that the Wisconsin and Ohio bias crime laws, respectively, impermissibly strayed beyond the punishment of act and purposeful intent and went on to punish motivation.¹⁶⁸ These holdings, however, are not required by a careful analysis of the relevant doctrines. This may be demonstrated by both descriptive and normative argument.

As a purely descriptive matter, the concern with the punishment of motivation is misplaced. Motive is often the basis for punishment. Prominent among the recognized aggravating factors that may contribute to the imposition of the death penalty in states with capital punishment are those dealing with the defendant's motivation for the homicide. Murder motivated by

when prejudice leads to acts of violence. *Id.* Moreover, the adverse psychological effects of bias crimes on victims exceed by far those suffered by the victims of parallel crimes. See, e.g., Weiss et al., *Ethnoviolence at Work*, J. INTERGROUP RELATIONS, Winter 1991-92, at 27-30.

166 Bias crimes will frequently cause an additional, and particularly focused, psychological harm upon the victim for being singled out on the basis of her race as well as a broader harm upon the general community of the targeted racial group. See KARMEN, *supra* note 99, at 262-63; see also ELIAS, *supra* note 99, at 116-24; Delgado, *supra* note 7, at 383-86; Kretzmer, *supra* note 7, at 462-63.

167 Brief for Petitioner at 13-23, *Wisconsin v. Mitchell*, 113 S. Ct. 810 (1992) (No. 92-515) (*granting cert.*). The author served as a consultant to the petitioner. The views expressed in this Article do not necessarily represent those of the Department of Justice of the state of Wisconsin.

168 "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." *Mitchell*, 485 N.W.2d at 812; see *Wyant*, 597 N.E.2d at 456-58.

profit is a significant aggravating factor adopted in most capital sentencing schemes.¹⁶⁹

Bias motivation itself may serve as an aggravating circumstance. The Supreme Court explicitly upheld the use of racial bias as an aggravating factor in the sentencing phase of a capital case in *Barclay v. Florida*,¹⁷⁰ and recently reaffirmed the *Barclay* holding.¹⁷¹ Moreover, several federal civil rights crimes statutes explicitly make racial motivation an element.¹⁷²

Finally, racial motivation is the *sine qua non* for a vast set of civil anti-discrimination laws governing, for example, discrimination in employment¹⁷³ and housing.¹⁷⁴ In the recent case of *Bray v. Alexandria Women's Health Clinic*,¹⁷⁵ the Court interpreted the scope of section 1985(3),¹⁷⁶ the civil counterpart of section 241. The Court held that a plaintiff had to prove that the defendant's actions had been motivated by "some racial[ly] . . . discriminatory

169 See, e.g., MODEL PENAL CODE § 210.6(3)(g) (Official Draft 1985) (among aggravating circumstances to be considered is whether the "murder was committed for pecuniary gain"); CONN. GEN. STAT. ANN. ch. 952, § 53a-46a (1958); DEL. CODE ANN. ch. 42, § 4209 (1974 & Supp. 1992); N.H. REV. STAT. ANN. ch. 630, § 5 (1986 & Supp. 1992); see also Eric J. Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 COLUM. L. REV. 178, 192 (1993); Note, *Hate is Not Speech: A Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314, 1323-31 (1993).

170 463 U.S. 939, 949 (1983) ("The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred" provided it is relevant to the aggravating factors.).

171 See *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). In *Dawson*, the issue was the defendant's membership in the Aryan Brotherhood. The Court held that because the defendant had been convicted of a same race murder and the prosecution did not argue that the defendant's relationship with the Aryan Brotherhood was indicative of a future propensity for violence, the evidence was irrelevant and therefore inadmissible. In reaching that holding, the Court reaffirmed their holding in *Barclay* that evidence of racial intolerance and subversive advocacy were admissible where such evidence was relevant to the issues involved. The Court held that introduction of the evidence did not necessarily infringe on the defendant's First Amendment freedom to associate. *Id.* at 1097.

172 See 18 U.S.C. § 245(b)(2) (1988) (proscribing 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. § 242 (1988) (proscribing, *inter alia*, disparate punishment of persons based on race or national origin); 42 U.S.C. § 3631 (1988) (proscribing racially motivated interference with right of access to housing by intimidation and the threat of force).

173 See, e.g., Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e (1988 & Supp. III 1992); see also *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (a disparate treatment claim requires a showing of intentional discrimination by the defendant); *Personnel Adm'r of Mass. v. Feeney*, 422 U.S. 256 (1979).

174 See Fair Housing Act of 1968, § 804, 42 U.S.C. § 3604 (1988).

175 113 S. Ct. 753 (1993).

176 42 U.S.C. § 1985(3) (1988).

animus.¹⁷⁷ If the *Wyant* and *Mitchell* courts were correct in asserting that bias crimes unconstitutionally punish motivation, then this argument should apply with equal weight to those statutory schemes that authorize civil damage awards to otherwise permissible actions, for example, discharging an at-will employee because of the employer's racial motivation.¹⁷⁸ In sum, bias motivation plays a role in criminal punishment and civil liability under numerous federal and state laws. As a descriptive matter, therefore, the *Wyant* and *Mitchell* courts' concern with punishing motivation is unwarranted.

The second flaw with the argument that motive may not be a basis for punishment is more abstract. The argument against the punishment of motive is necessarily premised on the assertion that motive can be distinguished from *mens rea* or intent. Plainly an actor's intent is a permissible basis for punishment and does in fact serve as the organizing mechanism of modern theories of criminal punishment.¹⁷⁹ On some level, motive and intent may be distinguished. Intent concerns the mental state provided in the definition of an offense in order to assess the actor's culpability with respect to the elements of the offense.¹⁸⁰ Motive, on the other hand, concerns the cause that drives the actor to further that purpose.¹⁸¹ This is the distinction relied upon by Professor Gellman in support of her argument that bias crimes impermissibly punish motive, an argument in turn relied upon by the courts in both *Mitchell* and *Wyant*.¹⁸²

177 *Bray*, 113 S. Ct. at 758 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

178 See, e.g., Weinstein, *First Amendment Challenges to Hate Crimes Legislation: Where's the Speech?*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 14-15 (First Amendment governs regulations of speech whether civil or criminal); *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (same).

Because there is no parallel crime where, for example, employment discrimination occurs, I would argue that, as a matter of criminal law doctrine, there ought to be no bias crime. But as a matter of constitutional law, the requirements of the First Amendment ought to be the same.

179 See Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 468-71 (1992); *supra* note 101.

180 See, e.g., Simons, *supra* note 179, at 467; DRESSLER, *supra* note 101, at 96-97; see also MODEL PENAL CODE § 2.02(2)(a)(i) (Official Draft 1985) (defining the mental state of "purpose" as a person's conscious object to engage in certain conduct or cause a certain result).

181 See WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 3.6, at 227-28 (2d ed. 1986); see also James Morsch, Comment, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659, 666 (1991).

182 See Gellman, *supra* note 22, at 362-79; *Mitchell*, 485 N.W.2d at 820; *Wyant*, 597

Although intent and motive are not identical, the distinction will not hold the weight that the *Mitchell* and *Wyant* courts place upon it. Motive and intent have some descriptive value, but the decision as to what constitutes each varies depending on what is being criminalized. What is a matter of intent in one context, may be a matter of motive in another.¹⁸³ Consider the bias crime of a racially motivated assault upon an African-American. There are two equally accurate descriptions of this crime: one views the bias as a matter of intent; the other as a separate matter of motive. The perpetrator of this crime could be seen as either:

- (1) possessing a *mens rea* of purpose (or knowing or recklessness) with respect to the elements of assault along with a *motivation* of racial bias; or
- (2) possessing a first-tier *mens rea* of purpose (or knowing or recklessness) with respect to the elements of the parallel crime of assault and a second-tier *mens rea* of purpose with respect to the element of discriminatory victim selection.

The defendant in description (1) "intended" to assault his victim and did so *because* he is a racist. The defendant in description (2) "intended" to assault an African-American and therefore acted with both an intent to assault and a discriminatory intent as to the selection of the victim.

Because both descriptions are accurate, Professor Gellman's argument fails. Whether bias crimes punish motivation or intent is not inherent in those prohibitions. Rather, it is a function of the way in which we choose to describe them. What Wisconsin and Ohio, and indeed more than a score of other states, seek to punish in their bias crime laws is the discriminatory selection of a victim. Nothing in criminal law doctrine bars them from doing so.¹⁸⁴

N.E.2d at 456-58.

183 See Grannis, *supra* note 169, at 189-91; Douglas N. Husak, *Motive and Criminal Liability*, CRIM. JUST. ETHICS, Winter/Spring 1989, at 3, 4-8; Jeffrie G. Murphy, *Bias Crimes: What Do Haters Deserve?*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 20, 21-23. It is noteworthy that when Professor Sayre sought a definition for *mens rea* he drew upon the concept of motivation. "*Mens rea*", Sayre wrote, involves "a general immorality of motive." Franklin B. Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399, 411-12 (1934).

184 There is yet a third argument that may be advanced in addition to the descriptive argument that motive is often a basis for criminal punishment and the normative argument that the motive-intent distinction is not fixed but contextual. It may be asserted that, in the final analysis, bias crimes do *not* punish motive. This may be illustrated through reference to *Mitchell*. It is clear that Todd Mitchell selected a white victim and

V. CONCLUSION

The clash between the values underpinning the hate crimes/hate speech paradox has produced an unusual level of explicit ambivalence. Perhaps this is not surprising. Those judges and scholars who argue that bias crime laws and regulations of racist speech unlawfully interfere with the rights of free expression have felt obliged to stress their resulting heart-ache.¹⁸⁵

The conflict that gives rise to this deep ambivalence, however, is based on a misunderstanding of bias crimes. Bias crime laws, properly understood, do not attack racist beliefs. Rather they penalize intentionally or knowingly causing harm to a victim on the basis of his or her ethnicity, race, religion, or sexual orientation. Bias crime statutes are not only constitutional, they represent the highest expression of a societal commitment to racial, religious, and ethnic harmony.

that he participated in a battery. Why he did so is unclear. He may have done so because he is a racist, but he may have done so merely to impress his friends. For the purposes of the relevant Wisconsin bias crime statute, it is irrelevant. Significantly, no evidence was introduced at the trial in *Mitchell* as to why he selected Riddick for the battery.

185 See, e.g., *R.A.V.*, 112 S. Ct. at 2550 ("Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible."); *Wyant*, 597 N.E.2d at 452 ("Before undertaking an analysis of the statute, however, we express our abhorrence for racial and ethnic hatred, and especially for crimes motivated by such hatred."); *Mitchell*, 485 N.W.2d at 814 ("The statute commendably is designed to punish—and thereby deter—racism and other objectionable biases, but deplorably unconstitutionally infringes upon free speech."); Gellman, *supra* note 22, at 334; Post, *supra* note 25, at 271.

