

## Bias Crimes and the First Amendment

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Bias Crimes are both different from and more severe than their “parallel crimes”<sup>1</sup> or the ‘same’ crime without the bias motivation (e.g., defacing a wall with anti-semitic graffiti vs. defacing it without the antisemitism). For these reasons, I argue that Bias Crimes are a unique crime category requiring a unique assessment of punishment. Ultimately, I think this assessment will mean punishing Bias Crimes more severely.

The difference between Bias Crimes and their respective parallel crimes is based on the criteria for selecting victims. In Bias Crimes:

- a) victims are interchangeable so long as they share one characteristic in common;
- b) the victim and the perpetrator have little or no previous relationship.

That victims share one common characteristic distinguishes Bias Crimes from all crimes motivated by necessity or the requirements of the crime. Bias Crimes differ from random muggings, most robberies, and most burglaries. In these crimes, the victim could be absolutely anyone - motivation for the crime is not contingent upon the personal identity of the victim. In a

Bias Crime, however, victim selection depends on the victim's possession of specific identifying characteristics. These characteristics categorize a person as a member of a group; therefore, the Bias Crime threatens that entire group.

Bias Crimes also differ from crimes where a relationship exists between perpetrator and victim. In these, the crime is committed because of the personal identity of the victim. In a Bias Crime the victim need not have a relationship with the perpetrator. What counts is the victim's membership in a hated group.

Bias Crimes also differ from other crimes because of the threatening message sent to victims in the commission of the crime. The threatening message sent in Bias Crimes causes relatively greater harm to the immediate victim than the 'parallel crime' alone, and it also threatens other members of the group to which the victim belongs because of which the victim is selected in the first place. Because of the way biased motivation affects a crime, a victim experiences substantially more harm than otherwise.

Although the difference and increased severity of Bias Crimes suggest that they do indeed warrant increased punishment, the biggest obstacle in punishing

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<sup>1</sup> Lawrence's term for the identical crime lacking biased motivation-e.g. assault and biased motivated assault.

Bias Crimes lies in the constitutional permissibility of punishing Bias Crimes differently. The notion of punishing Bias Crimes differently, on the surface, appears to conflict with constraints in the First Amendment on punishing thoughts or ideas. Frederick Lawrence, author of the recently published book Punishing Hate: Bias Crimes Under American Law, provides an resolving this 'paradox' but I do not agree that his theory effectively resolves it. Instead, I believe that we can employ the notion of *illocutionary force* derived from speech-act theory to locate what is punishable in the bias of Bias Crimes and ultimately, to construct a more convincing theory that remains constitutionally sound and consistent with claims about increased severity.

To show this, I will first explain the paradoxical First Amendment objection. Then I will show both how Lawrence's theory attempts to avoid the paradox while still providing a justification for punishing Bias Crimes more severely; here I examine the deficiencies of his theory. I will conclude with an examination of the illocutionary force of the message sent in a Bias Crime to show how it provides a basis for enhanced penalties for Bias Crimes.

As I stated earlier, the main obstacle to punishing Bias Crimes with increased severity is the First Amendment protection of speech and expression.

Lawrence calls this problem the Bias Crime-Hate Speech paradox.<sup>2</sup> Essentially, the paradox is this: how is it possible to punish a bias criminal while protecting his right to free expression? The right to free expression ensures that all beliefs, regardless of their unpopularity or offensiveness, are guaranteed protection.

The First Amendment intended to protect the expression of all ideas even those found unappealing by the majority of citizens.<sup>3</sup> The importance of Freedom of Expression is twofold: on one hand, by providing a forum for all ideas, we ensure that the minority's voice will never be completely overpowered by the majority's. Thus society can profit even from unpopular ideas when their time has come, as we saw in the case of the Civil Rights movement where the majority gained from the minority who were free to express their discontent. The First Amendment also ensures individuals the freedom to express radical ideas, religious or political opinions, within the scope of the law.

Punishing Bias Crimes appears to violate the First Amendment for a number of reasons. First, while it

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<sup>2</sup> Lawrence, Frederick, M. Punishing Hate: Bias Crimes Under American Law, Pg. 84-85, (1999).

<sup>3</sup> By expression, the First Amendment provides not just the right to hold certain ideas or opinions but to communicate them as well. Thus, when referring to expression, I will be referring to an action—the act of expressing or communicating. Free Speech on the other hand, simply refers to the right to hold any opinion or idea. The problem with punishing Bias Crimes conflicts with Freedom of Expression, not the Freedom of Speech.



seems permissible to punish the harm caused by a crime, it is not permissible to punish the criminal's expression of ideas or opinions about the crime or about the victim. An anti-gay bigot, for instance, has a constitutionally protected right to utter venom about gay people; the exercise of this expression is not punishable by law. Enhancing punishment for bias seems precisely to do this!

Furthermore, the motivation of a crime sends a message so that, for example, illegally parking in a handicapped space suggests that one values one's own convenience over the rights and needs of handicapped people. However, the law cannot make judgments about whether one type of motivation is better or worse than another, e.g. judging that impatience is better or worse than prejudice. Crimes are punished for the harm they cause - parking violators and Bias Criminals are constitutionally permitted to express any idea about their crime. To base severity of punishment on the thoughts or motivation of the criminal violates the norm of content-neutrality.

Content neutrality forbids legislative preference for the content of one belief over the content of another. Thus, Bias Crimes cannot be punished simply because lawmakers do not care for the content of prejudiced ideas. This ensures that lawmakers cannot create laws that favor one group over another. In the eyes of the law

biased, racist, or prejudiced beliefs are not worse or better than any other beliefs. According to the Bias Crime-Hate speech paradox, there is in the eyes of the law essentially no difference between Bias Crimes and similar crimes not motivated by bias.

The Bias Crime-Hate speech paradox has stirred up a good deal of controversy and there are attempts to avoid the First Amendment conflict. The common thread through all of them is to leave motivation aside and punish only the increase in harmful effects. Susan Gellman is one of the pioneers of this theory and explains it in her essay: *Brother, You Can't Go to Jail For What You're Thinking: Motives, Effects, and 'Hate-Crime' Laws.*<sup>4</sup> In this essay, Gellman argues against the ADL model legislation for punishment of hate-crimes because it attempts to punish motivation and mentions nothing of the effects - essentially, it falls into the trap of the paradox. To avoid the paradox, Gellman suggests punishing the additional harm caused by Bias Crimes rather than any biased motivation. If after harm assessment occurs, a crime appears to have a profound effect on its victim or victims, the crime can be considered worse.

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<sup>4</sup> Gellman, Susan, «Brother, You Can't Go to Jail for What You're Thinking: Motives, Effects, and Hate Crime Laws,» *Criminal Justice Ethics*, v11 n 2, Summer 1992.

Gellman's idea about punishing the increased harm is not enough to avoid the paradox although it does take steps in the right direction. To avoid the paradox, some relationship between the biased motivation and the increased severity of the crime has to be drawn which, however, does not punish the content of the thought or the expression of ideas.

Lawrence takes Gellman's suggestion into consideration and proposes a "two-tiered" theory. According to this theory, one must distinguish between Bias Crimes and parallel crimes. All Bias Crimes, according to Lawrence, contain a parallel crime that is already punishable regardless of motivation. Bias Crimes contain this 'tier' (or 'parallel crime') and in addition, they involve a criminal act of bias (the 2<sup>nd</sup> 'tier').

According to Lawrence's theory, a bias criminal does not have to be a racist, anti-Semite, or bigot in any way to commit a bias crime (as defined in section 1)<sup>5</sup> - the content of their prejudice is not criminal. What is punishable, rather, is the harmful consequences of the unnecessary singling-out of victims.

To be guilty of a Bias Crime under Lawrence's two-tiered theory first, an offender must be blameworthy for any parallel crime. Second, when it has been established that bias motivated the crime, the crime

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<sup>5</sup> *Ibid.*, Lawrence, pg. 95.

becomes a Bias Crime and can be shown to cause significantly more harm. The mere expression of Bias Speech is not illegal, it only meets the second tier of criteria - without the first tier, a criminal act has not occurred. By connecting the singling out of victims and groups with the increase in degree of harm, Lawrence derives the conclusion that Bias Crimes involve increased harm.

Lawrence cites examples where law already takes motive into consideration to increase the degree of punishment.<sup>6</sup> In those states that have capital punishment, motivation influences the imposition of the death sentence. For example, murdering for profit may warrant the death penalty; in these cases, maintain content neutrality is maintained because the punishment is justified as deterrence, not as restriction of expression: the profit motive could compel rational people to take their chances and commit murder, and therefore deserves more severe punishment. In Lawrence's model, the motivation of bias is not punished out of legislative distaste for the content of the belief but rather because of magnitude of the harm: it affects not only the immediate victim but also his or her associates.

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<sup>6</sup> *Ibid.*, Lawrence, pg. 106-109. Furthermore, Lawrence believes that the difference between motive and intent (intent is already punishable) is tenuous with regard to punishing Bias Crimes and protecting free speech and expression.



In Lawrence's model only harmful effects influence the degree of punishment. Expression and speech are not punished. However, the increase in harm stems from «singling-out» and "singling-out" is a direct consequence of bias motivation. If this is the case, I do not believe that the paradox is effectively avoided. "Singling-out" is not a crime in and of itself; any additional harm that Lawrence claims results from this process cannot be separated from the thought of the offender. One could easily claim that although "singling-out" occurs, it is accidental; and, although it may augment the degree of harm experienced by a victim in a crime, it is not intended by the offender, is not a criminal offense, and therefore is not punishable.

Lawrence's ideas about singling-out are incomplete and do not explain clearly how the biased motivation affects the harm in a Bias Crime. The idea of singling-out lacks context and therefore cannot be interpreted to warrant increased punishment. What is the missing context? Rather than refer to a two-tiered theory for punishing Bias Crimes, I think it is easier and constitutionally more effective to simply emphasize the uniqueness of these crimes. Bias Crimes cause more harm to victims and therefore, according to the premise that punishment should fit the crime, warrant more severe punishment. This harm is connected with their

motive and even the criminal's 'message' but in a way that avoids the paradox.

I propose examining the *illocutionary force* of the message sent through the biased motivation to commit a crime. Examining illocutionary force allows us to see the message as a threat which is punishable as such and not as content. My theory is a kind of 'two-in-one' approach because it treats Bias Crimes as essentially two crimes in one.

We all recognize that it is illegal to scream «fire» in a crowded area. It is possible to punish this expression of speech however because speech - screaming in this case - is an action, and actions can be punishable. All speech is action to a degree but as long as a speech act does not violate any law, it can be used to send any message regardless of content.

J. L. Austin, a pioneer in the field of philosophy of language, coined the expression, *illocutionary force*, to signify what one does *in* saying something. An example will help illuminate this:<sup>7</sup> Imagine a bartender saying "The bar will be closed in five minutes." The speech-act can be broken down into the following components:

- 1) Act of locution: the bartender utters the sentence that the bar will be closed in five minutes.

- 2) Act of illocution: the bartender is informing the patrons that the bar soon will be closing and perhaps is also urging them to order a last drink. The *uptake* of the illocutionary act refers to how the patrons understand the bartender's utterance.
- 3) Act of perlocution: the bartender intends to cause the patrons to believe that the bar will shortly close and maybe to prompt them to order a final drink. The *uptake* of the perlocutionary act is the reaction of the patrons.

Let's apply this apparatus to a Bias Crime such as an act of case of Gay-bashing. The content of the locutionary act is "I hate gay people!" The illocutionary force of this message is to threaten gay people with random violence, roughly: "In doing this I urge others to follow my example and incite them to assault Gay people out of hatred." We can only hope there will be no perlocutionary force so that the promptings will fall on deaf ears. So, a threat can be construed from the illocutionary force of the message alone. Bias criminals intend to threaten individual victims as well as the group with which the individual is associated and Bias

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<sup>7</sup> The example comes from Edward, Craig. Routledge Encyclopedia of Philosophy. Vol. 9, Pg. 82, (1998).

Crimes often serve to incite similar crimes. They have the illocutionary force of threats. The force of threat is an intrinsic part of the crime itself: the motivation to threaten and the motivation to commit crime presuppose one another.

Punishing Bias Crimes, then, is not punishing thought, consequently, there are no implications for the First Amendment. One is punishing the threat which is an unacceptable form of expression of thought. Just as public displays of nudity and drunkenness are not legal, not because of the content of the beliefs expressed but rather because of the form of expression. My approach preserves the important right to express radical, nonsensical, or even objectionable ideas.

I think the argument from illocutionary force which foresees punishment for the threat in Bias Crimes is less problematical than Lawrence's two-tiered system which, with its incomplete notions of "singling-out" as grounds for enhanced punishment, doesn't necessarily avoid the paradox. My two-in-one theory for punishing Bias Crimes avoids conflict with the First Amendment while correctly construing the especial severity of these crimes and the proportionality of enhanced punishment.

In conclusion, differential punishment for Bias Crimes as a unique category of crime justifying a specific



proportion between crime and punishment is both advisable and constitutionally permissible.