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BOOK REVIEW

PUNISHING HATE, PUNISHING HARM

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Frederick M. Lawrence, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* (Cambridge, Mass., Harvard University Press, 1999) 269 pp.

In recent years, Americans have been shaken by numerous prominent acts of hate-based violence. In December 1993, Colin Ferguson, an African American, opened fire on Caucasian and Asian-American passengers of a Long Island Railroad train, killing six and injuring nineteen.¹ On June 7, 1998, several white supremacists in Jasper, Texas beat forty-nine-year-old African-American James Byrd Jr., tied him to the back of a pickup truck, and dragged him to his death.² In October 1998, Matthew Shepard—a gay University of Wyoming student—was savagely beaten, tied to a fence, and left to die.³ On August 10, 1999, former Aryan Nation member Buford Furrow, Jr. fired

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¹ See, e.g., Curt Simmons, *Sharpton: Ban All Handguns in State*, *NEWSDAY*, Dec. 13, 1993, at 18; Pat Milton, *Racial Bias Sparked Bloodbath: "I've Done Bad" Suspect's Notes Target Whites, Asians Detail Grudges Against Many*, *THE RECORD*, NORTHERN NEW JERSEY, Dec. 9, 1993, at A1.

² See, e.g., Terri Langford, *Jasper Tries to Heal Divide After 3 Dragging-Death Trials*, *BOSTON GLOBE*, Nov. 28, 1999, at A21; *The Year's Top Stories*, *HOUSTON CHRON.*, Dec. 26, 1999, at 20.

³ See, e.g., *Vigil Planned for Wyoming Student*, *ARIZ. REPUBLIC*, Oct. 15, 1998, at 5, available in 1998 WL 7803563; Sharon Shaw Johnson, *Hate; We Can Combat Hatred—But Not By Remaining Silent*, *DAYTON DAILY NEWS*, Mar. 18, 1999, at A20.

upon children in a Los Angeles Jewish Community Center, injuring five; he later asserted that he had conceived of his attack as "a wake-up call to America to kill Jews."⁴ The list goes on and on.

In *Punishing Hate: Bias Crimes Under American Law*,⁵ Frederick M. Lawrence argues that criminals motivated by bias⁶ can (as a constitutional matter) and should (as a prudential matter) be punished more severely than those who are not so motivated but who commit otherwise identical crimes. Part I of this Book Review sets out Lawrence's arguments in some detail. Part II probes and criticizes several of these arguments. I do not dispute that those who commit crimes in an attempt to strike fear into the hearts of the victim and the victim's community, and especially those who succeed in that regard, are ripe candidates for enhanced criminal punishment. I do, however, challenge the means whereby Lawrence proposes to differentiate those who deserve such penalty enhancement from those who do not, and I suggest that a different approach would better effectuate his ends. I contend that two of the central hurdles facing the case for penalty enhancement—specifically, the Eighth Amendment's bar on excessive criminal punishment and the First Amendment's prohibition against content-based government restriction on a citizen's thought or speech—might be more convincingly surmounted by a focus on the harms inflicted by hate crimes rather than on bias per se.

I. *PUNISHING HATE*: LAWRENCE'S ARGUMENT

Lawrence notes that the issues raised by bias crimes and the punishment of those crimes implicate "three fundamental values of the American polity: equality, free expression, and federalism" (p. 2). He thus centers his inquiry on three interrelated questions:

Must a society that is dedicated to equality treat bias crimes differently from other crimes, and must it enhance the punishment of these crimes? May a society that is also dedicated to freedom of expression

⁴ See, e.g., Robert Macy, *L.A. Suspect Surrenders: Supremacist Held in Vegas in Shootings*, CHI. SUN-TIMES, Aug. 12, 1999, at 3.

⁵ FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* (1999).

⁶ Lawrence uses the nouns "bias" and "hate" interchangeably; for the sake of clarity and consistency, I will as well.

and belief enhance the punishment of bias crimes? Is a prominent federal role in the prosecution and punishment of bias crimes consistent with the proper division of authority between state (and local) government and the federal government in our political system? (p. 2).

For Lawrence, the correct answer is, in each instance, "yes." Moreover, he contends that enhanced punishment is not simply *permitted*, but in fact "mandated by our societal commitment to the equality ideal" (p. 3).

Lawrence first distinguishes bias crimes from their "parallel" alternatives. Some criminals, he notes, act with utter disregard for the identities of their victims (p. 9). Others—those, for example, who commit crimes of passion or who exact premeditated revenge—choose their victims with specific reference to their identities and, in fact, would not commit the same crime against any other target (p. 9). Bias crimes fall into a third class; they "are crimes in which distinct identifying characteristics of the victim are critical to the perpetrator's choice of victim," but "in which the individual identity of the victim is irrelevant" (p. 9). Although the precise boundaries separating these three categories will always be difficult to discern, Lawrence proposes that an offense is only a bias crime if it would not have been committed but for the victim's membership in a particular group (p. 10).⁷ What matters most, though, is not the desire to inflict harm upon certain groups (or members thereof), but the underlying animus itself: "Hate-based violence is a bias crime only when the hatred is connected with antipathy for a racial or ethnic group or for an individual because of his membership in that group" (p. 9).

Lawrence next considers which groups qualify for the protection of hate crime laws. He argues that in order for the criminal law to enhance punishment for a bias crime, the "antipathy [animating the offense] must exist in a social context, that is, it must be an animus that is shared by others in the culture and that is a recognizable social pathology within the culture" (p. 11). Of apparently great significance are the questions whether the victim class has endured a "history of discrimination" and whether "any ideology or world view . . . connects those who do not trust them" (p. 12). Lawrence expresses his

⁷ Presumably, we can take Lawrence here to mean "group or groups." That is, if an assailant hates both African- and Latino-Americans and would have attacked a victim of either sort, his actions would still, in Lawrence's view, amount to a bias crime.

hesitance "to identify a definitive list of characteristics that yield groups that might properly be included in a bias crime statute," (p. 13) but elsewhere he is less coy: "As a normative matter, 'bias' should include bigotry on the basis of race, ethnicity, religion, national origin, sexual orientation, and, in certain instances, gender" (p. 3).

The inclusion of gender, Lawrence acknowledges, poses particularly difficult problems. In cases of acquaintance rape and domestic violence, the victim's gender plays a central role, but her particular identity is crucial as well. Nonetheless, Lawrence would label such attacks bias crimes, because they "attack women as a means of enforcing a particular social hierarchy. . . . The lack of a prior relationship may be a description of most bias crimes, but it is not a *sine qua non* for all bias crimes" (p. 16). What matters most, Lawrence maintains, is the "but for" test described above: if the victim had not been female, would the crime still have been committed?

Lawrence also supports extending the bias crime label to cover attacks motivated by the victim's sexual orientation. As he writes, "if one of the purposes of bias crime statutes is to protect frequently victimized groups, sexual orientation is particularly worthy of inclusion" (p. 18). Lawrence notes that some critics assert that homosexuality is a "mutable" characteristic—that is, that homosexuals are not born, but made, and can be *unmade*—and that sexual orientation is therefore a classification unfit for protection under hate crimes statutes. Lawrence gracefully dispenses with such claims: first, the mutability of homosexuality "is far from clear." There is much evidence that sexual orientation is indeed immutable, whether for genetic reasons alone, or for some combination of genetic and environmental reasons (p. 18). Second, there is no obvious reason to confer talismanic significance upon immutability. The mutability argument "could [also] be made with respect to religion, one of the classic bias crime characteristics" (p. 19). That argument, then, proves too much, as it would strip bias crime protection away from Jews, Muslims, Buddhists, or Baptists as well as from homosexuals.

Lawrence next presents data concerning the prevalence of hate-based violence. Although the evidence is mixed, Lawrence concludes that bias crimes in the United States have become increasingly frequent since the mid-1980s (pp. 21-25). In addition, Lawrence contends that those crimes have become more

violent; "property crimes such as spray painting, defacement, and graffiti" have given way "to personal crimes such as assault, threat, and harassment" (p. 21). Lawrence cites several potential culprits for the apparent rise in hate-based violence, including "the shrinking of the middle class," "the rise of a tenuous, service-oriented economy" (p. 25), and the Internet's role in facilitating communication among formerly isolated bigots (p. 24). He concludes that these factors, as well as the rise of white supremacist groups and the militia movement and an increase in hate crimes perpetrated *by*, rather than *against*, African-Americans, all suggest that America's bias crime problem will continue to fester for the foreseeable future (pp. 21-28).

Having defined the terms of the hate crime debate and stated his case for its growing relevance, Lawrence attempts to distinguish bias crimes from their "parallel" analogues. He first notes that "virtually every state now expressly criminalizes bias crimes" (p. 29), and describes the forms that these states' hate crime statutes typically assume. One, which Lawrence calls the "discriminatory selection model," requires that the defendant select the victim on the basis of the victim's membership in a particular group (p. 30). Such selection could be motivated by hatred for that group, but need not be (p. 30). For example, a thief who opts to rob a woman on the assumption that she will be wearing more jewelry or will be less capable of resistance than a man has selected his victim on the ground that she is female, but has not exhibited any hatred against women. The other variety of bias crime statute, which looks for "racial animus,"⁸ requires that the defendant acted out of hatred for the group to which a victim belongs or for the individual by virtue of being a member of that group (p. 30). "This model is consonant with the classical understanding of prejudice as involving more than differential treatment on the basis of the victim's race" (p. 34).⁹ Finally, Lawrence notes that many states have enacted "because of" bias crime statutes, which "require only that the defendant has committed the . . . crime . . . *because of*

⁸ Though Lawrence labels this model "racial animus," the category includes religion-, gender-, and sexuality-based violence as well.

⁹ It also falls closer to FBI's definition of hate crime, which singles out criminal conduct motivated by a "preformed negative opinion or attitude toward a group of persons based on their race, religion, ethnicity/national origin, or sexual orientation." LAWRENCE, *supra* note 5, at 35 (quoting FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, HATE CRIME DATA COLLECTION GUIDELINES 4 (1993)).

the victim's race" (p. 36). These statutes, Lawrence argues, might fall closer to either of his two primary categories, for it is unclear whether "because of" implies only discriminatory selection or in fact requires malice toward the target community.

It is worth noting that we can imagine criminals whose acts would be covered by a statute of the "discriminatory selection" variety but not by one of the "racial animus" sort—for example, the purse snatcher described above. The reverse, though, is not true: any crime meeting the "racial animus" requirement will by definition involve discriminatory selection (pp. 73-74).

Lawrence next notes that questions of punishment must always be considered in light of particular justifications for the criminal sanction. He thus briefly describes the two dominant schools of punishment theory. The first, retributivism, justifies punishment on the basis of the offender's desert. This approach holds that a criminal "deserves punishment because he has violated the norms of society imbedded in the criminal law" (p. 46). The second rationale, based on utilitarian moral philosophy, focuses on the consequences of punishment, and justifies punishment only to the extent that it will improve overall social welfare. Specifically, for the utilitarian, punishment is typically justified on the basis of its capacity (1) to deter the punished individual from offending again, (2) to deter other individuals from offending, (3) to rehabilitate the offender so as to reduce the chances that he will offend again, and (4) to incapacitate the offender and thus to prevent him from offending again while incarcerated (p. 46).

Both of these rationales, Lawrence points out, incorporate a proportionality requirement. Retributivism only requires punishment—and only permits it—to the extent it repays the debt the offender owes to society (pp. 46-47). The utilitarian approach sets punishment at the "level that is sufficient to deter the commission of [a particular] crime[]" (p. 48). More severe crimes will, on the whole, call for more stringent deterrence, rehabilitation, and incapacitation, and thus more severe punishment.

Lawrence believes that utilitarianism and retributivism both justify enhanced penalties for those who commit bias crimes. He argues that such crimes should be punished more severely than their "parallel crimes," because the harm caused by crimes in the former class will exceed that caused by crimes in the latter class. First, "[b]ias crimes are far more likely to be violent

than are other crimes" (p. 39). Crimes rooted in bias more frequently involve violence, and violent crimes stemming from bias are "far more likely . . . to involve serious physical injury to the victim" (p. 39). According to one study cited by Lawrence, "nearly 75 percent of the victims of bias-motivated assaults suffered physical injury, whereas the national average for assaults generally is closer to 30 percent" (p. 39). Second, Lawrence contends that a bias crime will also result in "particular emotional and psychological impact on the victim" (p. 40). Such a crime "attacks the victim not only physically but at the very core of his identity. It is an attack from which there is no escape," and thus results in a "heightened sense of vulnerability," which in turn has been shown to cause "depression or withdrawal, . . . anxiety, feelings of helplessness, and a profound sense of isolation" (p. 40). Third, bias crimes harm not only the victim, but also the "target community" (p. 41). The "additional harm of a personalized threat felt by persons other than the immediate victims of the bias crime," Lawrence asserts, "differentiates a bias crime from a parallel crime and makes the former more harmful to society" (p. 42). Finally, Lawrence contends that bias crimes impart a distinct set of societal harms that are not implicated by parallel crimes, because they "violate . . . the shared value of equality among . . . citizens and racial and religious harmony in a heterogeneous society" (p. 43).

Despite his harm-based justification for penalty enhancement, Lawrence specifies that determinations regarding who merits such enhancement should not take actual harm into account. Rather, the "critical factor in determining an individual's guilt for a bias crime" is *bias motivation itself* (p. 64). "A result-oriented focus is particularly inappropriate" because "[i]n many cases, the harms associated with a bias crime depend entirely on whether the victim, the target group, and the society perceive the perpetrator's bias motivation," and the offender "may often have little control" over that perception (pp. 64-65). Thus, a defendant who has successfully concealed the role hate played in his offense (Lawrence calls this offender a "Clever Bias Criminal") should be punished for a bias crime—even, presumably, if the result of his deception is that none of the excess harms typically associated with bias crime come to pass. Correspondingly, a defendant whose crime was only unconsciously motivated by the defendant's membership in a particular group (an "Unconscious Racist") should not be punished as a bias

criminal—even, presumably, if his crime gives rise to *all* of the excess harms associated with bias crimes. “[A]ctual harm,” Lawrence reasons, “has never been a *sine qua non* for guilt, and there is no reason that bias crimes should be an exception to this rule” (p. 67).

In light of the retributivist and utilitarian rationales for criminal punishment, Lawrence favors the racial animus model over the discriminatory selection model (p. 74). The case of the purse snatcher, who selects female victims but who bears no animus towards women, demonstrates to him that the discriminatory selection model overreaches. The purse snatcher “deserves” no more punishment as a result of his rationale for victimizing women, and requires “neither more nor less” deterrence than that “appropriate for any other common thief” (p. 75). Yet discriminatory selection statutes would nonetheless dub him a bias criminal and enhance his penalty. Racial animus statutes would not. Lawrence thus prefers the latter (p. 75).

Lawrence recognizes that prudence alone cannot justify hate crime legislation; the approach he advocates must, of course, be constitutional as well. Critics of bias crime statutes pose the following question: If all that differentiates a hate-based crime from a parallel crime devoid of bias is the perpetrator’s opinion regarding the victim or a group to which the victim belongs, then is not any punishment over and above that available for the parallel crime directed at the offender’s beliefs, and thus violative of his First Amendment rights? As Lawrence acknowledges, this question assumes heightened legal salience in the wake of the Supreme Court’s 1992 decision *R.A.V. v. City of St. Paul*.¹⁰ In *R.A.V.*, the Court unanimously struck down a municipal ordinance that read as follows:

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.¹¹

¹⁰ 505 U.S. 377 (1992).

¹¹ *Id.* at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

The Court assumed (as it had to, given the case's procedural posture, which I will describe below) that the St. Paul ordinance applied only to "fighting words"—a category of speech that was, under the Court's prior cases, proscribable.¹² Nonetheless, the Court found that the ordinance represented an unconstitutional regulation of speech on the basis of both content (that is, the subject a speaker addressed) and viewpoint (that is, the particular side of the debate the speaker advocated).¹³ Under the ordinance, "[d]isplays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. . . . The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."¹⁴ Nor could the city forbid the use of fighting words in the service of bias but license the use of such words in opposition to bias. "One could hold up a sign saying . . . that all 'anti-Catholic bigots' are misbegotten," the Court complained, "but not that all 'papists' are, for that would insult and provoke violence 'on the basis of' religion."¹⁵ This content- and viewpoint-based regulation was, in the Court's opinion, impermissible.

Lawrence acknowledges that *R.A.V.* appeared to prohibit restrictions on racist hate speech, but claims that there is "a critical distinction between racist speech and bias crimes" which allows us to enhance the penalties for the latter despite that case's holding (p. 82). He begins by considering, and rejecting, *flawed* bases for this distinction. The first failed approach is that employed by the Supreme Court in its post-*R.A.V.* decision *Wisconsin v. Mitchell*.¹⁶ Mitchell, an African-American man, was convicted of aggravated battery.¹⁷ His sentence was enhanced, pursuant to a Wisconsin statute, because he had intentionally selected his victim on account of that victim's race.¹⁸ The Wisconsin Supreme Court overturned the penalty enhancement, holding, *inter alia*, that the statute "violate[d] the First Amendment directly by punishing what the legislature ha[d] deemed

¹² *Id.* at 381.

¹³ *See id.* at 391-92.

¹⁴ *Id.* at 391.

¹⁵ *Id.* at 391-92.

¹⁶ 508 U.S. 476 (1993).

¹⁷ *Id.* at 479.

¹⁸ *See id.* at 479-80.

to be offensive thought,"¹⁹ and that under *R.A.V.*, "the Wisconsin legislature [could not] criminalize bigoted thought with which it disagree[d]."²⁰ The United States Supreme Court reversed, relying primarily on the distinction between "speech" and "conduct": "[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."²¹ Thus, whereas the St. Paul ordinance at issue in *R.A.V.* "was explicitly directed at expression," the Wisconsin penalty-enhancement statute was "aimed at conduct unprotected by the First Amendment."²²

Lawrence rejects the *Mitchell* Court's reliance on the distinction between speech and conduct. He argues that the two are "not merely intermingled" but in fact "inextricable" (p. 91). Lawrence invokes Professor John Hart Ely's discussion²³ of the Supreme Court's leading case on that distinction, *United States v. O'Brien*.²⁴ Ely wrote that: "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."²⁵ This analysis, Lawrence argues, holds for bias crimes and hate speech. Both involve behavior that is simultaneously all conduct and all expression. Any labeling will necessarily be result-oriented: "That which we wish to punish we will term 'conduct' with expressive value, and that which we wish to protect we will call 'expression' that requires conduct as its means of communication. . . . [I]f a meaningful distinction between bias crimes and racist speech exists, we must find it elsewhere" (p. 92).

After dismissing arguments based on the distinction between "pure bias crime statutes" and "penalty-enhancement statutes"—he contends that the two serve the same purpose and are similarly justified, and must therefore float or sink together (pp. 92-94)—Lawrence presents his own justification for distin-

¹⁹ *State v. Mitchell*, 485 N.W.2d 807, 811 (Wis. 1992).

²⁰ *Id.* at 815.

²¹ *Mitchell*, 508 U.S. at 484.

²² *Id.* at 487.

²³ John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1494-96 (1975).

²⁴ 391 U.S. 367, 376-77 (1968).

²⁵ Ely, *supra* note 23, at 1495.

guishing bias crime from hate speech. Ultimately, he urges, the difficulties raised by *R.A.V.* are to be solved by looking beyond bias to the defendant's underlying conduct. He contends that "[f]ree expression protects the right to express offensive views but not the right to behave criminally" (p. 7). Stripped of the bias element, hate speech is merely speech, and speech, generally speaking, may not be regulated for content. In contrast, he contends, "[t]he nonbias element of a bias crime . . . is an actual parallel crime that is punishable" (p. 7), and the bias element is therefore punishable as well. The *mens rea* of a racist speaker, Lawrence asserts, is "strictly one of expressing himself" (p. 95). In contrast, the hate criminal intends not only expression but also the commission of the parallel crime (pp. 95-96). Absent bias, hate crimes would still be regulable but hate speech would not be. For this reason, Lawrence contends, hate crimes may be regulated in a content- or viewpoint-conscious manner, even if hate speech may not be.

Lawrence next examines the federal role in policing and prosecuting bias crimes. After carefully tracing federal involvement in combating racial violence (pp. 118-49), he addresses the question of whether the federal government should play any such role, given the Constitution's limits on federal power and the states' traditional prerogative in criminal law enforcement. As Lawrence states, the "constitutional authority for most of the expansion of federal criminal jurisdiction has been congressional power over interstate commerce" (p. 151). That power has also grounded much of the federal government's effort to protect civil rights. He notes, though, that the Commerce Clause "is a poorer fit with federal civil rights crime laws" (p. 152), and urges greater reliance on the Thirteenth Amendment, which bars slavery or involuntary servitude, and the Fourteenth Amendment, which bars the official denial of due process of law. These Amendments, Lawrence contends, offer constitutional authority for the prohibition of private and public discrimination, respectively (p. 154).

Another basis for a federal role is the strong national interest in regulating hate-based bias. "[C]ases involving racially motivated violence are likely to be of great local notoriety and to be politically charged" (p. 155). Such cases might prove more problematic for a District Attorney concerned about reelection than for a United States Attorney who is likely appointed, who most probably will serve for only four years, and who will try

cases before an appointed judge with life tenure assuming good behavior. Finally, the federal government has an interest in punishing hate because "[r]acial motivation implicates the commitment to equality that is one of the highest values of our national social contract" (p. 156). Bias crimes, then, are crimes against the *national* community, and thus require a federal response.

Lawrence concludes with a plea regarding the necessity of punishing hate. Because criminal punishment "carries with it social disapproval, resentment, and indignation" (p. 163), bias crime statutes can be a powerful tool for denouncing the hateful personality. Such legislation, Lawrence contends, would "constitute[] a societal condemnation of racism, religious intolerance, and other forms of bigotry" (p.167). Complacency, in contrast, would send "a message that racial harmony and equality are not among the highest values held by the community" (p. 168).

II. PUNISHING HARM: A COUNTER-PROPOSAL

Lawrence presents a compelling case that we must marshal our legal resources to fight hate-based violence. Moreover, he brings an impressive array of sociological, philosophical, and legal argument to bear on this problem. *Punishing Hate*²⁶ is doubtless an important entry in the developing canon on hate crime regulation, and will be useful for laypersons, lawyers, and academics alike.

But like most thoughtful discussions, Lawrence's raises as many questions as it purports to answer. One such question is whether the legal device he champions—penalty enhancement for crimes motivated by bias—serves his ends better than its alternatives. Lawrence's analysis uses bias as a proxy for enhanced harm and the intent to inflict such harm—and thus as a trigger for enhanced punishment. I intend to concentrate my comments on this strategy, the implications of which reverberate throughout several of the central fields of Lawrence's inquiry. Specifically, I suggest that Lawrence's approach raises troubling concerns regarding his framework's compatibility both with traditional justifications for criminal punishment and

²⁶ LAWRENCE, *supra* note 5.

with the First Amendment's proscription on content- and view-point-based regulation of expression.

A. BIAS AS PROXY IN *PUNISHING HATE*

First, it is important to delineate the ways in which bias, in Lawrence's account, serves as a proxy for actual harm. Initially, one might assume that Lawrence's use of the bias proxy is the necessary consequence of a legal regime that must rely on actual, imperfect evidence in reaching final determinations with grave consequences. That is, one could envision a proponent of "bias as proxy" advocating the use of a proxy only because it was more efficient for courts to rely on bias as an indication that the crime likely involved the actual or desired infliction of certain physical and psychological harms to the victim and the victim's community than for those same courts to conduct case-by-case inquiries into those harms. But this is not Lawrence's point. Rather, he champions the primacy of bias even when we have reason to believe it to be, or *know* it to be, a failed proxy for secondary harm or the intention to inflict such harm. Consider an example from the book's opening pages. Lawrence asks his reader to:

[s]uppose that an argument between a landlord and a tenant of different races erupts because of the tenant's claim that the apartment is inadequately heated. As the argument becomes more intense, angry words are exchanged, including racial epithets. Ultimately, the argument boils over into an altercation in which one of the parties assaults the other. Should we consider this assault to be a bias crime? The answer will turn on the role that prejudice played. If we conclude that the argument itself was the primary reason for the eruption of the fight and that the assault would have occurred regardless of the racial difference between the two, then this is not a bias crime. If, by contrast, we conclude . . . that the assault would not have occurred had the victim not been of his race, then this is a bias crime (p. 10).

The key inquiry, then—the inquiry that will determine, for Lawrence, whether the offender receives only punishment x (for the parallel crime) or punishment x plus punishment y (for the bias element)—concentrates on factors that will not change the harm inflicted one bit. Whether the victim and his racial community will endure the special psychological harms associated with bias crimes will likely depend far more on their perceptions of the offender's motivation than on his actual motivation. The "heightened sense of vulnerability" and the

"psychological trauma of being singled out because of one's race" (p. 40) about which Lawrence rightly worries will not apply to at least some victims who are attacked by biased assailants—namely, those who do not perceive the assailant's racial motivation. But this perception—and the question whether it gives rise to the relevant secondary harms—is absent from Lawrence's analysis. Indeed, he contends that "the kind of harms that we wish to measure cannot be restricted to the individual reactions of particular victims" (p. 53).

The centrality of bias rather than secondary harm in Lawrence's designation of actual bias criminals is cemented in his discussion of the "Clever Bias Criminal" and the "Unconscious Racist." Lawrence believes the former should be punished as a bias criminal even though his deception has mitigated the secondary harms otherwise associated with hate crimes, while the latter should be absolved of any bias crime liability despite the secondary harms his crime is likely to inflict on the victim and his community.²⁷

There is a tension between Lawrence's reliance on secondary harms as a justification for enhancing the penalty of offenders motivated by bias and his simultaneous rejection of a link between those harms (or even intent to cause them) and a particular offender's classification as a bias criminal. We must at least consider the possibility that rather than keying penalty enhancements to bias on the ground that bias crimes *tend* to inflict greater harms than parallel crimes, we should simply single out those criminals who intend and/or actually cause the secondary harms Lawrence so eloquently describes.²⁸ This approach would be less likely to result in unjustified punishment and less likely to encroach upon crucial First Amendment pro-

²⁷ For more on the use of the bias proxy in hate crime laws, see Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015, 1051-62 (1997).

²⁸ The term "and/or" is not meant, and should not be understood, to imply that causation of harm alone justifies punishment. As I will explain in some detail, both utilitarian and retributive rationales for punishment demand some degree of intentionality (usually framed in terms of the offender's actual or constructive knowledge that certain consequences might ensue from his behavior) before imposition of the criminal sanction is authorized. Thus, causation of secondary harm is neither sufficient (in which case "or" alone would be appropriate) nor necessary (in which case "and" alone would be appropriate) for enhanced punishment, but is nonetheless relevant.

tections than the regime Lawrence proposes, but would serve the same ends, and serve them well.

B. QUESTIONING BIAS AS PROXY: RATIONALES FOR PUNISHMENT

On examination, Lawrence's singular focus on bias is troubling from the perspective of justifying criminal punishment. As described below, the use of bias as proxy groups biased offenders together without regard for the intended or actual causation of the secondary harms Lawrence relies on to justify penalty enhancement. American criminal jurisprudence, however, requires that relevant distinctions among offenders be reflected in the punishment they receive. Here, I argue that Lawrence's approach overlooks critical distinctions among biased offenders and thus risks delegitimizing punishment of certain individuals he would label "bias criminals." Moreover, once we develop the tools to distinguish those who deserve penalty enhancement from those who do not, we find that reference to "bias" is, in fact, superfluous.

The criminal sanction is the state's most potent weapon against the individual. Punishments "brand [the offender] with society's most powerful stigma and undermine his life projects, in career or family, disastrously."²⁹ We therefore must always situate our discourse regarding particular punishments within a broader understanding of the bases that justify the devastation that such punishments inevitably entail for the criminal defendant. As Justice Kennedy wrote in a concurrence to the 1991 case *Harmelin v. Michigan*:³⁰

Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order. . . . The efficacy of any sentencing system cannot be assessed³¹ absent agreement on the purposes and objectives of the penal system.

While the Supreme Court will not require that punishment be justified by any *particular* rationale,³² it must—as Justice Ken-

²⁹ 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 4 (1984).

³⁰ 501 U.S. 957 (1991).

³¹ *Id.* at 998-99 (Kennedy, J., concurring).

³² *See id.* (Kennedy, J., concurring).

nedy suggests—be justified by *some* rationale. Thus, for example, in *Coker v. Georgia*,³³ the Court stated that under the Eighth Amendment,³⁴ “a punishment is ‘excessive’ and unconstitutional if it . . . makes no measurable contribution to acceptable goals of punishment.”³⁵ Similarly, in his *Furman v. Georgia*³⁶ concurrence, Justice Brennan found the Eighth Amendment to embody a commitment to human dignity and to the notion that punishment is unacceptable “when it is nothing more than the pointless infliction of suffering”³⁷—that is, when “the punishment serves no penal purpose more effectively than a less severe punishment.”³⁸

A corollary to the requirement that punishment serve acceptable goals is the requirement that differently-situated offenders should not be treated alike unless different treatment is consistent with those goals. Put differently, if a given rationale prescribes unequal punishment for two offenders but they receive equivalent sentences, at least one of them will suffer punishment not in accord with that rationale. If the punishment allotted accords with that merited by the more culpable of the two, then the less culpable has been subjected to an “‘excessive’ and unconstitutional” sanction because the difference between the penalty merited and the penalty received “makes no measurable contribution to acceptable goals of punishment.”³⁹

By relying on bias as proxy, Lawrence obscures important distinctions within the class of those he would label bias criminals, and thus risks inflicting unjustified punishment on at least some of that class’s members. Consider the four following archetypal individuals, all of whom would, in Lawrence’s view, be guilty of bias crimes and subject to enhanced punishment. First is the “Classic Bias Criminal,” who acts out of bias (that is, who partakes in actual racial animus); who intends (that is, he knows or should know) that his crime will inflict secondary harms

³³ 433 U.S. 584 (1977).

³⁴ The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

³⁵ *Coker*, 433 U.S. at 592; see also *Stanford v. Kentucky*, 492 U.S. 361, 393 (1989) (quoting *Coker*); *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (quoting *Coker*).

³⁶ 408 U.S. 238 (1971).

³⁷ *Id.* at 279 (Brennan, J., concurring).

³⁸ *Id.* at 280 (Brennan, J., concurring).

³⁹ *Coker*, 433 U.S. at 592.

upon the victim and/or the victim's community; and whose intentions in that regard are fulfilled.

Second is the "Failed Bias Criminal," who also is motivated by bias and who also intends to cause secondary harms, but whose crime, for whatever reason, inflicts no harms beyond those associated with the relevant parallel crime. If, for example, the landlord in the example reproduced above instigated the altercation with his tenant for bias-related reasons, and hoped to send a message to other tenants or potential tenants of the same race that they were not welcome in the building, but both the tenant and the tenant's racial community viewed the incident as a simple race-neutral housing dispute, then the landlord might be classified as a Failed Bias Criminal.

Third is the "Localized Bias Criminal," who is motivated by bias, but who never intends to cause any harms beyond those associated with the parallel crime; who has little (but not necessary *no*) reason to believe such harms will ensue; and who does not, in fact, *cause* any secondary harms. This offender dislikes his victim and his dislike is motivated by some particular characteristic related to race, religion, ethnicity, gender, or sexual orientation, but his crime is not designed to inflict particular psychological harms upon either the victim or others like him, and does not, in fact, inflict any such secondary harm. The harm, that is, is localized.

Fourth is the "Accidental Bias Criminal," who, like the Localized Bias Criminal, intends no secondary harms, but whose actions inflict such harms anyway. This eventuality might result, for example, if the Localized Bias Criminal's victim and/or his community realize—or simply assume—that the attack was motivated by bias and begin to fear that similar future attacks could result from others' biases.

These archetypes represent the four categories that result when all biased criminals are differentiated along two separate axes: intent to cause secondary harms and the actual causation of such harms. The "Classic" and "Failed" Bias Criminals intend to cause secondary harms; the "Localized" and "Accidental" do not. The "Classic" and "Accidental" Bias Criminals actually cause such harms; the "Failed" and "Localized" do not. This taxonomy of bias criminals might be represented by the following simple chart:

FIGURE 1.

	Intended Secondary Harm	No Intended Secondary Harm
Causation of Secondary Harm	Classic Bias Criminal	Accidental Bias Criminal
No Causation of Secondary Harm	Failed Bias Criminal	Localized Bias Criminal

The distinctions among the four archetypes are central to our commonly-accepted rationales for punishment, and the legitimacy of Lawrence's proposal is weakened by his failure seriously to confront them. To understand why, we must revisit those rationales. I address retributivism and utilitarianism, the two schools of thought Lawrence describes, and then apply these schools of thought to the archtypes.

Retributivist theory "holds . . . that man is a responsible moral agent to whom rewards are due when he makes right moral choices and to whom punishment is due when he makes wrong ones."⁴⁰ This theory traces its lineage to Immanuel Kant, whose ethics hinge on a belief that man's capacity to reason endows him with autonomy and with a responsibility to deduce, and to abide by, *a priori* moral imperatives.⁴¹ These imperatives operate independent of the particular effects of any given action. Thus, in his volume regarding the criminal law, Kant declares: "The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it."⁴² Rather, "[w]hat makes punishment just, regardless of the social good that might follow, is that

⁴⁰ HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 9 (1968).

⁴¹ See, e.g., IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 70 (H.J. Paton trans., Harper & Row 1964) (1785); see generally BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 710-11 (1945); Pierre Hassner, *Immanuel Kant*, in *HISTORY OF POLITICAL PHILOSOPHY* 581, 585-95 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987).

⁴² IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (John Ladd trans. & ed., Bobbs-Merrill Co. 1965) (1797). For more on Kant's derivation of the duty to punish offenders, see, e.g., EDMUND L. PINCOFFS, *THE RATIONALE OF LEGAL PUNISHMENT* 9 (1966); John Cottingham, *Varieties of Retribution*, 29 *THE PHILOSOPHICAL QUARTERLY* 238, 238-40 (1979).

it is a fitting social response to the commission of the crime."⁴³ Georg Wilhelm Friedrich Hegel elaborated upon Kant's theory. Hegel saw in each criminal act a coercion that infringed upon the liberty of other autonomous beings. Punishment, for Hegel, represented a response to that coercion: "The sole positive existence which the [incursion into others' autonomy] possesses is that it is the particular will of the criminal. Hence to injure [or penalize] this particular will as a will . . . is to annul the crime, which otherwise would have been held valid," and thus to restore that autonomy.⁴⁴ Punishment, on this view, must be carefully calibrated to the offense, such that it properly counterbalances the transgressor's incursion against the rights he has violated.⁴⁵

For both Kant and Hegel, then, punishment must correspond to the offender's violation of moral law. The fitting response is measured by the harm caused and the offender's degree of blameworthiness—that is, the extent to which the offender has willed, or at least foreseen, the harms flowing from his actions. As philosopher Robert Nozick has framed the issue, "[t]he punishment deserved depends on the magnitude H of the wrongness of the act, and the person's degree of responsibility r for the act, and is equal to the magnitude of their product, r [times] H . The degree of responsibility r varies between one (full responsibility) and zero (no responsibility)."⁴⁶ While the inquiry into a wrongdoer's level of responsibility (r) once focused on his depravity or wickedness, it now emphasizes the degree to which the offender is aware—or should have been aware—of the consequences of his act.⁴⁷ Lower r values would

⁴³ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 6.3.2, at 415 (1978).

⁴⁴ HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* 69 (T.M. Knox trans., Oxford University Press 1953) (1821).

⁴⁵ Holmes succinctly summarized Hegel's position as follows: "[W]rong being the negation of right, punishment is the negation of that negation, or retribution. Thus the punishment must be equal, in the sense of proportionate to the crimes, because its only function is to destroy it." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 42 (Dover 1991) (1881).

⁴⁶ ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363 (1981). Nozick later extends this analysis, noting that when the harm intended differs from the actual harm done, H should be assigned a value between the actual and the intended harm. *See id.* at 389.

⁴⁷ *See, e.g.,* STANTON WHEELER ET AL., *SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* 86 (1988). *Compare* ARISTOTLE, *THE NICOMACHEAN ETHICS* Book V, ch. 8, at 191-94 (J.A.K. Thomson trans., Penguin 1976) (4th cent. B.C.E.);

thus apply to defendants who could not comprehend the consequences of their actions—such as the mentally ill or those with impaired cognitive function—as well as those who simply did not intend, and could not have foreseen, the consequences of their actions. When r equals zero, a retributivist would oppose punishment altogether.

Harm—the H value—also figures prominently in the retributive account. “[T]he wrongs imposed on society by the offender’s conduct should be equal to the costs imposed on the offender when she is punished.”⁴⁸ An important application of this principle is retributivism’s stance regarding criminal attempts. Although retributivism *would* sanction punishment of criminal attempts, it would reject punishment that was equivalent to that imposed upon those who succeed in committing analogous crimes. “[I]f the offense in question involves dangerous conduct that does not result in significant harm on a specific occasion,” only “slight” punishment is warranted.⁴⁹ This principle is embodied in the criminal laws of many states, which require diminished punishment for criminal attempts; it is especially prominent in the punishment for attempted murder, which is nowhere in the United States punished as severely as the completed crime.⁵⁰

We see, then, that contrary to Lawrence’s assertion that “[a]ctual harm has never been a *sine qua non* for guilt” (p. 67), both intention *and* harm are central to the retributive account. Attention to these elements will reveal differences in the punishment deserved by the various offenders who fall into Lawrence’s “bias criminal” category.

Utilitarian thinking also emphasizes the importance of intent and, to a lesser degree, harm actually caused. Associated primarily with the moral philosophy of Jeremy Bentham and

with MODEL PENAL CODE §2.02(2) (Official Draft & Revised Comment 1962) (distinguishing negligence, recklessness, knowing misbehavior, and purposeful misbehavior on basis of offender’s actual or presumed knowledge regarding the likely consequence of his actions).

⁴⁸ Paul Butler, *Retribution, For Liberals*, 46 UCLA L. REV. 1873, 1880 (1999).

⁴⁹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 6.04, at 42-43 (2d ed. 1995).

⁵⁰ The refusal to punish failed and successful criminal attempts equally extends far beyond our own borders. See, e.g., EUGENE MEEHAN, THE LAW OF CRIMINAL ATTEMPT—A TREATISE 23 (1984) (“Almost all countries allot a greater punishment to the completed crime than to the attempt.”); see also R.A. DUFF, CRIMINAL ATTEMPTS 117 (1996) (noting that the harm resulting from a criminal act often determines both the crime of which the offender is convicted and as the sentence received).

John Stuart Mill, utilitarianism is "that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of" society.⁵¹ On the utilitarian view, "[e]thics at large may be defined [as] the art of directing men's actions to the production of the greatest possible quantity of happiness."⁵² Punishment, like all other social institutions, must be judged by its influence on net happiness. It creates happiness by preventing crime. As Lawrence notes, punishment achieves this end (1) by deterring the punished offender from committing future crimes, (2) by deterring other potential offenders, (3) by allowing for rehabilitation of the punished offender, and (4) by incapacitating the offender such that he is unable to prey on society while imprisoned (or, in extreme cases, after being executed) (p. 46). However, utilitarians also recognize that "all punishment in itself is evil" because it engenders *unhappiness* for the punished that offsets the salutary effects of deterrence, rehabilitation, and incapacitation. Thus, "it ought only to be admitted in as far as it promises to exclude some greater evil."⁵³ Punishment must be imposed frugally: its benefits must exceed its costs, and it must be calibrated such that it effects the maximum total happiness.

The utilitarian model, like its retributive rival, is responsive to questions surrounding harm and intent. The more harm a crime inflicts, the more unhappiness it is likely to cause. The more unhappiness a crime causes, the more forcefully society should act to prevent that crime, and the more severely it may punish offenders while still remaining within the bounds of frugality. A lifetime in prison for a single pick-pocketing is inappropriate because the sentence inflicts not only more unhappiness than the crime itself but also, likely, more unhappiness than would have been caused by all the crimes such pun-

⁵¹ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2 (J.H. Burns & H.L.A. Harts eds., Clarendon Press 1948) (1823); *see also* JOHN STUART MILL, UTILITARIANISM 7 (George Sher ed., Hackett Publishing Co., 1979) (1861) ("The creed which accepts as the foundation of morals 'utility' or the 'greatest happiness principle' holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness.").

⁵² BENTHAM, *supra* note 51, at 310; *see generally* RUSSELL, *supra* note 41, at 773-82; Henry M. Magrid, *John Stuart Mill*, in HISTORY OF POLITICAL PHILOSOPHY, *supra* note 41, at 784, 788-90.

⁵³ Bentham, *supra* note 51, at 170.

ishment prevents; the same cannot be said for a similar sentence imposed upon a mass murderer.

But utilitarianism's attention to actual harm is more subtle, more ambivalent, and more closely tied to intent than the above may suggest. The principle that deterrence demands punishment keyed to harm alone is initially appealing—presumably, the worse a crime is for society, the more stridently we should wish to dissuade potential offenders. We must bear in mind, however, that we can only deter *harm-producing conduct*, not harm itself. Put differently, “[p]eople are deterred from actions when they *refrain* from them because they dislike what they believe to be the *possible consequences* of those actions.”⁵⁴ Thus, when an offender has no reason to believe that his conduct will produce harm, increased punishment for causing that harm will not result in any correlative deterrence.⁵⁵ Similarly, when an offender has every reason to believe his actions will result in some degree of harm, a utilitarian would not necessarily withhold punishment simply because, fortuitously, that harm failed to materialize.

This is not to say that utilitarianism prohibits any punishment for offenders who do not intend their harms. Often, unintended harms will result from unnecessarily risky behavior—behavior, that is, which is negligent or reckless because the actor could have or should have foreseen that he was irresponsibly increasing the chance that such harms would occur. Punishment can be employed to deter negligent and reckless conduct (or to rehabilitate or incapacitate negligent and reckless actors) just as it can be used to deter intentional harm-causation (or to rehabilitate or incapacitate intentional actors).⁵⁶ But this discussion does suggest that unlike retributivist rationales, which demand some harm, utilitarian justifications for punishment would sanction full punishment for those who attempt, but fail, to commit a crime. Whereas many states implicitly adopt the retributive argument, punishing attempts less severely than completed crimes, the United States Sentencing Guidelines, which govern the punishment of federal crimes, appear to favor the utilitarian approach. Guideline

⁵⁴ NIGEL WALKER, *WHY PUNISH?* 13 (1991).

⁵⁵ See, e.g., Ronald J. Allen, *Retribution in a Modern Penal Law: The Principle of Aggravated Harm*, 25 *BUFF. L. REV.* 1, 19 (1975).

⁵⁶ When an offender is truly and understandably ignorant of the risks his conduct engenders, however, a utilitarian would oppose punishment.

tarian approach. Guideline § 2x1.1(b)(1) provides that when an offender completes all the steps necessary to perpetrate a given crime but has failed nonetheless to succeed in its commission, his attempt will be punished as though he had succeeded.⁵⁷

This inquiry into the utilitarian and retributivist rationales reveals that we cannot lump the Classic, Failed, Localized, and Accidental Bias Criminal into one monolithic "bias criminal" category. Both justifications for punishment require attention to harm and intent to cause that harm; the focus on bias alone contemplates neither inquiry.

To begin with, both utilitarians and retributivists would demand a distinction between the punishment accorded to the Classic Bias Criminal and the Accidental Bias Criminal. Both of these offenders cause the secondary harms that justify our special treatment of hate crime, but only the Classic Bias Criminal intends or has reason to know that these harms will result from his actions. In the retributive calculus, then, the Accidental Bias Criminal's r value is far lower vis-à-vis those harms than his Classic counterpart's; indeed, that value would equal zero if the Accidental Bias Criminal had *no* reason to believe that he would cause such secondary harms. Assuming their H values are equal, the Classic Bias Criminal has committed a more serious infraction against the moral law than has his Accidental counterpart, and his punishment must be more serious, accordingly. For the utilitarian, though both offenders have committed a parallel crime worth preventing, and both have inflicted secondary harms beyond those ordinarily associated with that crime, the Classic Bias Criminal had far more reason to know that his actions would result in those harms. As demonstrated above, penalty enhancement for genuinely accidental infliction of secondary harms serves no utilitarian end, and as the actor's level of responsibility declines, the rationale for deterrence, rehabilitation, and incapacitation weakens. On both accounts, then, treating the Accidental Bias Criminal as though he were a Classic Bias Criminal would "make[] no measurable contribution to acceptable goals of punishment"⁵⁸ and would violate the constitutional proscription against cruel and unusual punishment.

Under retributivist theory, the Failed Bias Criminal also deserves less punishment than the Classic Bias Criminal. Though

⁵⁷ See U.S.S.G. § 2X.1.1(b)(1).

⁵⁸ *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

they share the same degree of responsibility for their crimes—the same r —the two have caused widely disparate harms. The product, then, of r and H will be far lower for the Failed Bias Criminal than for the Classic Bias Criminal. Note that this distinction tracks the retributivist's preference that those guilty of criminal attempts be treated more leniently than those who succeed, for the Failed Bias Criminal is simply an attempted Classic Bias Criminal who has been unable to effectuate his intentions.

But just as utilitarians are likely to disagree with retributivists over the punishment of criminal attempts, so too the utilitarian will be less willing to differentiate between the Classic Bias Criminal and the Failed Bias Criminal. Each has acted with intent to cause secondary harms; the latter has simply met with failure through no fault of his own. The two are equally appealing candidates for deterrence, rehabilitation, and incapacitation. For the utilitarian, then, the Failed Bias Criminal may merit punishment identical to that accorded to the Classic Bias Criminal.

Finally, however, utilitarians and retributivists will agree that irrespective of whether Failed Bias Criminals belong with Classic Bias Criminals in the class meriting the most punishment or with Accidental Bias Criminals in the class meriting less punishment, Localized Bias Criminals merit even less than otherwise similar Accidental Bias Criminals (unless, that is, each had no reason to know that any secondary harms might result, in which case neither should be accorded any enhanced punishment). Although the Localized Bias Criminal harbors what may be abhorrent opinions—he is, we have assumed, motivated by hate—he neither intends, expects, nor actually inflicts secondary harms. To the retributivist, the Localized Bias Criminal's H value vis-à-vis those harms is zero, and his r value is low (if he had any reason to know secondary harms would result) or zero (if he did not); he thus deserves no more punishment than one who commits the analogous parallel crime. Similarly, the utilitarian would likely find nothing to deter beyond the underlying parallel offense—no intentional, negligent, reckless, or even wholly accidental infliction of secondary harm, and no dangerous actions that only fortuitously failed to result in harm.⁵⁹

⁵⁹ As it becomes more and more likely that this offender should have known that secondary harms would result, his conduct will seem more and more negligent, or even reckless. Correspondingly, his r value will approach 1—signifying full responsi-

Moreover, a Localized Bias Criminal does not require any more rehabilitation or incapacitation than one who commits the relevant parallel crime, because the former's behavior was no different from the latter's.⁶⁰ Absent the intention to cause harms and the actual causation of such harm, Lawrence's case for enhanced punishment evaporates. To penalize the Localized Bias Criminal more than a parallel criminal motivated by greed or race-neutral personal animosity would be to punish mere thoughts, as the former neither intends nor expects any greater harm than the latter. Assuming the Classic, Failed, and Accidental Bias Criminals receive the appropriate degree of punishment, treating the Localized Bias Criminal like any of these would result in an excessive, unwarranted, and unconstitutional application of state power.

The use of bias as a proxy for harm is thus inferior, from the point of view of both the retributivist and the utilitarian rationales for punishment, to a focus on secondary harms. Both rationales would divide Lawrence's "bias criminal" category into at least three groups,⁶¹ at least one of which (the one including the Localized Bias Criminal and any Accidental Bias Criminal who truly bore no responsibility for secondary harms) would deserve no punishment in excess of that allotted to those who commit the appropriate parallel crime.

A supporter of the focus on bias could respond, of course, that the analysis presented here represents simply the next step to Lawrence's inquiry—that is, whereas Lawrence has established the case for punishing bias crimes more severely than parallel crimes, the argument presented here concerns the subsidiary issue of how we should differentiate among bias criminals. But this response is not quite right, for the above analysis

bility—and he will resemble more and more the Failed Bias Criminal, because, as noted above, foreknowledge of consequences is more salient in the modern American criminal law than is evil intent. *See supra* note 47 and accompanying text.

⁶⁰ Unless, of course, we hope to engage in the suspect project of "rehabilitating" the offender's biased opinions.

⁶¹ For the retributivist, the three sets are: Classic Bias Criminal, Accidental Bias Criminal/Failed Bias Criminal, and Localized Bias Criminal. For the utilitarian, they are: Classic Bias Criminal/Failed Bias Criminal, Accidental Bias Criminal, and Localized Bias Criminal.

Further, as suggested in the text, both the Accidental and the Localized bias criminals will likely escape enhanced punishment altogether if they truly should not have expected that secondary harms would result from their conduct—even if they harbored "bias" as Lawrence would define it.

in fact questions the very relevance of bias itself. If one is persuaded that we must reference an offender's intention to cause secondary harms and his actual causation of such harms, then one must doubt whether bias itself ought to play any role at all. Imagine, for example, that (1) an offender who bears no animus toward a particular minority group but stands somehow to gain from the infliction of secondary harms upon that community⁶² (2) commits a crime that he expects will inflict such harms, and (3) that the crime has the planned result. Is this individual any less subject to the arguments for an enhanced penalty than the Classic Bias Criminal? No. His level of responsibility is the same vis-à-vis those harms—he fully intended them—and the harms themselves are the same as well. A retributivist would find him as morally culpable as the Classic Bias Criminal. A utilitarian would find equal cause to deter, to rehabilitate, or to incapacitate him or others like him, because he is as likely as his biased counterparts to create harm. Though the presence or absence of bias may shed light on just how despicable the offender is, it does nothing to elucidate the deserved punishment.

A supporter of "bias as proxy" might also respond that the focus on secondary harm would be impracticable from an evidentiary standpoint. It is not at all clear, however, that Lawrence's approach does not face equally daunting hurdles. True, an assessment of secondary harms might well require testimony linking the crime to particularized psychological effects.⁶³ The evaluation of an offender's bias, however, would require evidence not only depicting the defendant's innermost beliefs and attitudes, but also linking that inner world view to a specific incident of wrongdoing. Such evidence might be just as difficult to secure and to evaluate.

⁶² Imagine, for example, an individual who sells firearms and whose business might be improved by the exacerbation of racial tensions in his area.

⁶³ In this respect, testimony regarding the secondary harms inflicted by bias criminals would resemble the so-called "victim impact evidence" currently heard in many criminal courts throughout the United States. Such evidence, offered by a crime's victims or, in the case of homicide, by its victim's survivors, typically addresses the psychological effects the crime has wrought upon the witness and is offered in an attempt to secure an enhanced penalty as would be the evidence at issue here. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808 (1991); *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987).

Thus, the argument of this section must be viewed not merely as a finesse on the use of bias as proxy, but as a challenge to the very reference to bias. The focus on bias, rather than on the intent to cause secondary harms and the causation of those harms, obscures crucial distinctions among offenders. Sometimes—perhaps even in most instances—bias will correspond to this intent and harm-causation. Where the two do not overlap, though, a more refined inquiry is required. The factors that guide that inquiry, I have suggested, will render the focus on bias irrelevant in all cases.

C. QUESTIONING BIAS AS PROXY: *R.A.V.* AND HATE CRIME REGULATION

Lawrence's choice to target "bias," rather than an offender's intent to cause secondary harms or the causation of such harms, also encumbers his arguments with perhaps unnecessary First Amendment baggage. His attempts to distinguish the hate crime statutes he champions from the hate speech ordinance invalidated in *R.A.V.*⁶⁴ are unpersuasive, but he could have avoided *R.A.V.*'s shadow by concentrating on secondary harm instead of bias.

While one can understand why Lawrence would like to station his proposal within, rather than in opposition to, current constitutional doctrine, there is far more tension between his arguments and the *R.A.V.* Court's than he acknowledges. Lawrence reasons that the non-bias analogue to hate speech is simply speech, and that the *R.A.V.* Court reached the appropriate result because speech absent bias is not regulable. In contrast, he argues, bias crimes may be regulated, because even absent bias, they are still crimes.

Lawrence's argument here is flawed in two important respects. First, the *R.A.V.* Court assumed that the ordinance at issue only governed "fighting words," a category of speech that is regulable. Second, it is clear that Lawrence is comfortable with just the sort of viewpoint-based content regulation that the *R.A.V.* court rejected, even though this aspect of his argument is muted in the section of *Punishing Hate* that addresses the First Amendment. This section elaborates these two difficulties and

⁶⁴ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

suggests that, as above, Lawrence's ends might have been better served by a focus on secondary harms rather than on bias.⁶⁵

First, Lawrence's distinction between hate speech and bias crime relies on a differentiation between speech and non-speech conduct that was not operative in *R.A.V.* He contends that "[w]ithout racial content, there is no suggestion that [hate] speech could be or should be prohibited" (p. 94), but that bias crimes, in contrast, could still be prohibited absent racial motivation. This argument would hold if we agreed that but for the racial element, the conduct prohibited by the ordinance at issue in *R.A.V.* would constitute ordinary speech. But this is not so. Before his case reached the United States Supreme Court, Robert Viktora, the *R.A.V.* defendant, asserted in Minnesota's Supreme Court that the St. Paul ordinance was unconstitutionally overbroad, because it reached constitutionally protected (albeit offensive) speech.⁶⁶ In a previous case, however, that court had interpreted the phrase "arouse alarm, anger, or resentment in others" to refer only to conduct that constituted "fighting words;"⁶⁷ in *R.A.V.*, it followed suit, and thus deemed the ordinance at issue constitutional.⁶⁸ The United States Supreme Court was bound by the Minnesota court's interpretation of St. Paul's ordinance.⁶⁹ Whereas governmental regulation of most public speech on the basis of content is permitted only if such regulation is the most narrowly tailored means of achieving a

⁶⁵ Despite the tensions between Lawrence's approach and *R.A.V.*'s, I do not suggest that his proposal would be unconstitutional. Indeed, the *Mitchell* decision strongly suggests otherwise. Given Lawrence's appropriate discomfort with the *Mitchell* Court's reliance on a speech/conduct distinction, his rationale for a bias-based regime's constitutionality seems suspect, and weaker than the defense that could be mounted on behalf of harm-based bias crime regulation. Thus, his approach raises difficult constitutional questions given his stand toward *Mitchell*, even if it is not directly contrary to prevailing constitutional law.

⁶⁶ See *in re Welfare of R.A.V.*, 464 N.W.2d 507, 509 (Minn. 1991)

⁶⁷ See *id.* at 510 (quoting *In re Welfare of S.L.J.*, 263 N.W.2d 412, 419 (Minn. 1978)).

⁶⁸ In any event, the Minnesota Supreme Court reasoned that the ordinance represented "a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order," *id.* at 511, and thus would survive even if not for the "fighting words" gloss.

⁶⁹ See *R.A.V.*, 505 U.S. at 381; see also *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 (1986); *New York v. Ferber*, 458 U.S. 747, 769-70 n.24 (1982).

compelling governmental interest,⁷⁰ analogous regulation of fighting words—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"—is allowed because such speech is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."⁷¹ Thus, the *R.A.V.* Court self-consciously limited its holding to (1) fighting words that (2) were likely to inspire "anger, alarm or resentment on the basis of race, color, creed, religion, or gender."⁷² These are overlapping but distinct categories. As Viktora's overbreadth claim made clear, not all racist speech would constitute fighting words; likewise, not all fighting words would constitute racist speech.⁷³ Thus, when we remove the second defining characteristic—effects related to biased content—we are left not, as Lawrence suggests, with ordinary speech that can only be regulated in the service of a compelling government interest, but with speech that still constitutes *fighting words*, and which consequently is *still subject to regulation*. In Lawrence's analogy, hate crime is to parallel crime as hate-based fighting words are to ordinary speech, but in fact, hate crime is to parallel crime as hate-based fighting words are to *race-neutral fighting words*. It may be true that *some* racist speakers "lack[] the . . . *mens rea* for any parallel crime," (p. 95) but those are not the speakers with whom Lawrence must concern himself. To distinguish bias crime legislation from the *R.A.V.* ordinance, Lawrence must address those racist speakers who utter *fighting words*, and those speakers *do not* lack the requisite *mens rea*.⁷⁴ Even

⁷⁰ See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); see also *Rosenberger v. Rector*, 515 U.S. 819, 828-29 (1995) ("It is axiomatic that government may not regulate speech based on its substantive content or the message it conveys Discrimination against speech because of its message is presumed to be unconstitutional.").

⁷¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

⁷² *R.A.V.*, 505 U.S. at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

⁷³ Indeed, the "fighting words" at issue in *Chaplinsky* itself involved not race but political belief: *Chaplinsky* had accused a City Marshall of being a "damned Fascist." See *Chaplinsky*, 315 U.S. at 569-70.

⁷⁴ For this reason, Lawrence's effort to re-envision the "fighting words" doctrine (pp. 99-102) seems misplaced. Lawrence distinguishes "[r]acially targeted actions that are intended to create fear in the addressee"—which are regulable in any event—from "racially targeted behavior that vents the actor's racism"—which is not regulable (p. 102). However, *R.A.V.* addressed the first category, and to distinguish his proposals from the St. Paul Ordinance, Lawrence must as well.

stripped of its racial garb, those speakers' words, like the actions of race-neutral "parallel" criminals, are constitutionally subject to regulation.⁷⁵ Lawrence's distinction, which depends upon the non-regulable character of race-neutral speech (as opposed to race-neutral crime), therefore fails to shield his proposals from *R.A.V.*'s reach, which extends to communicative activities which remain, for the most part, beyond the purview of the First Amendment. It appears, then, that Lawrence must either declare his opposition to *R.A.V.* or find a new rationale for his program's constitutionality.

The second flaw in Lawrence's attempt to situate his proposals within prevailing First Amendment jurisprudence is related to the first. Though his chapter on *R.A.V.* purports to align his position with the Court's, the rhetoric that animates his text amounts to a sharp critique of *R.A.V.*'s commitment to viewpoint neutrality. Albeit implicit, this critique raises the question whether his proposal is truly in keeping with that decision's dictates.

What troubled the *R.A.V.* Court was that St. Paul had singled out "fighting words . . . that communicate messages of racial, gender, or religious intolerance."⁷⁶ The First Amendment, the Court held, "does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."⁷⁷ Even more disturbing was that St. Paul's ordinance, in the Court's view, impaired only the expression of *certain* viewpoints regarding those topics, and thus facilitated a government-prescribed orthodoxy.⁷⁸ In what is likely the case's most frequently quoted passage, the Court declared that "St. Paul ha[d] no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules."⁷⁹ The opinion explicitly rejected the Minnesota Supreme Court's holding that such regulation was neces-

⁷⁵ Whether the speech in which such speakers partake in fact violates the law will of course depend on the relevant sovereign's decision whether to regulate fighting words, but what matters for our purposes is that the sovereign is permitted to regulate it.

⁷⁶ *R.A.V.*, 505 U.S. at 393-94.

⁷⁷ *Id.* at 391.

⁷⁸ But see Akhil R. Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 148-49 (1993) (questioning whether or not the ordinance did not in fact impose limitations on *both* sides of any particular debate).

⁷⁹ *R.A.V.*, 505 U.S. at 392.

sary to serve a compelling governmental interest; indeed, to the Court, "it plainly [wa]s not."⁸⁰ Rather, by focusing on bias instead of harm, St. Paul had fashioned an ordinance that distinctively served only one interest: "displaying the city council's special hostility towards the particular biases . . . singled out."⁸¹

Mindful of the Court's concerns, Lawrence concedes that "[w]e must ask whether bias crime statutes further an important interest unrelated to the suppression of racist speech" (p. 106). But suppression of such ideas—and the fostering of a government-sponsored orthodoxy on racial equality—lie at the heart of his program. Lawrence champions the "social disapproval" and "condemnation" immanent in hate crime legislation (pp. 167, 163). Moreover, he makes plain his belief that bias crimes are worse than parallel crimes in large part because they "violate . . . the shared value of equality among [society's] citizens and racial and religious harmony in a heterogeneous society" (p. 43). Surely this objection applies with equal force to hate *speech*, for such speech threatens to undermine those same ideals. Given the threat hate speech poses to "racial and religious harmony in a heterogeneous society," we might wonder why Lawrence should not applaud the St. Paul city council for "displaying . . . [their] special hostility" toward bigotry grounded in race, color, religion, creed, or gender. Why, if he favors content- and viewpoint-based hate crime laws (that is, statutes focusing on bias motivation) over their content- and viewpoint-neutral alternatives (that is, statutes focusing on secondary harms), would he not similarly prefer content- and viewpoint-based hate *speech* laws over *their* neutral alternatives? If the answer is simply that the latter are unconstitutional per *R.A.V.*, then on what principled basis can we distinguish his bias crime proposals? It seems that the most likely conclusion is that Lawrence is engaging here in precisely the sort of result-oriented analysis for which he properly chided the *Mitchell* court: "[t]hat which [he] wish[es] to punish [he] . . . term[s] 'conduct' with expressive value, and that which [he] wish[es] to protect [he] . . . call[s] 'expression' that requires conduct as its means of communication" (p. 92).

The disjuncture between Lawrence's framework and *R.A.V.* is further evidenced by his choice to focus on bias as proxy even

⁸⁰ *Id.* at 395-96.

⁸¹ *Id.* at 396.

in cases—such as the Localized Bias Criminal’s—when we know it to be a *failed* proxy. If we were truly intent on punishing bias crime because it inflicted more harm, and not because we wished to communicate something about bias itself, why would we insist on punishing this offender, who neither intends nor inflicts the harms about which Lawrence is concerned? Indeed, any doubt that Lawrence is perfectly comfortable with punishing an offender’s thoughts is eradicated toward the close of his book, when he complains that “[i]f a racially motivated assault is punished identically to a parallel assault, the racial motivation of the bias crime is . . . not part of that which is condemned” (p. 169). Here, Lawrence appears to counsel just the sort of state-sponsored orthodoxy the *R.A.V.* court eschewed.

The point here is not simply to ferret out and to criticize Lawrence’s opposition to *R.A.V.*; he would hardly be the first prominent legal thinker to oppose that decision.⁸² The point, rather, is that his position is in greater tension with prevailing constitutional doctrine than he acknowledges; this tension could prove problematic for hate crime statutes justified by Lawrence’s rationales.

As may have already become clear, the discord between Lawrence’s position and *R.A.V.* could have been sharply mitigated had Lawrence grounded his approach on secondary harms rather than on a resort to bias as proxy. The *R.A.V.* Court emphasized that it was not prohibiting *all* line-drawing within the category of fighting words, but only *content- and viewpoint-based* line-drawing:

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.⁸³

⁸² See, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 193 (1993); Amar, *supra* note 78, at 151-61. See also Owen M. Fiss, *The Right Kind of Neutrality*, in *LIBERALISM DIVIDED* 109, 116 (1996) (distinguishing *R.A.V.*’s “classic liberalism,” which embodies an “exclusive devotion to individual liberty,” from “contemporary liberalism,” which is “defined by a dual commitment—to liberty and equality”).

⁸³ *R.A.V.*, 505 U.S. at 388.

Fighting words can be regulated because they cause harm in and of themselves; they fall within a class of words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."⁸⁴ Under *R.A.V.*, therefore, hate speech might properly be regulated by a statute or ordinance that keys punishment to harm rather than to the expression of certain ideas. Indeed, the *R.A.V.* Court explicitly noted that "[a]n ordinance not limited to the favored topics" could serve the same purposes as the actual St. Paul ordinance, and strongly implied that such an ordinance would pass constitutional muster.⁸⁵ Thus, whereas the ordinance at issue in *R.A.V.* singled out "[w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti . . . 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,"⁸⁶ one can imagine a constitutionally acceptable alternative proscribing communications that constituted regulable "fighting words" and tended to arouse a *particularly extreme* degree of "anger, alarm or resentment in others" on *any* basis.⁸⁷ Such an ordinance would link penalty enhancement not to the offender's "motivation" (which, as Lawrence himself appears to acknowledge in his discussion of *Mitchell*, is inextricably bound up with his thoughts and expression), but rather to the offender's intent to cause, and actual causation of, secondary harms.

From this hypothetical content-neutral hate speech code, the jump to an analogous content-neutral bias crime statute is quite short. Such a statute would consider an offender's intent to inflict secondary harms upon the victim and his community and the offender's actual infliction of such harms. In addition to better serving the Eighth Amendment's demands regarding

⁸⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Though the *Chaplinsky* Court referred to utterances that inflict injury, subsequent decisions have concentrated upon the second prong, which concerns the likely evocation of an imminent response. See, e.g., *Gooding, Warden v. Wilson*, 405 U.S. 518, 522 (1972); *Cohen v. California*, 403 U.S. 15, 20 (1971).

⁸⁵ *R.A.V.*, 505 U.S. at 395-96.

⁸⁶ *Id.* at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS.CODE § 292.02 (1990)).

⁸⁷ The phrase "particularly extreme" here denotes that the ordinance allows compartmentalization of the "fighting words" category, but only when that compartmentalization is grounded on what the *R.A.V.* Court referred to as the category's "distinctively proscribable content." *R.A.V.*, 505 U.S. at 383-84.

the justification for punishment, such a statute would more deftly evade the First Amendment quagmire signaled by *R.A.V.* than would its bias-based alternatives. Because fighting words can be regulated precisely as a consequence of the harm they can cause, harm-based regulation within the "fighting words" category is *allowed* by *R.A.V.*; there is no reason that harm-based differentiation among *crimes* should be treated any differently.

Indeed, such an approach would be consistent with another strand of the *Mitchell* decision not mentioned by Lawrence. Immediately after drawing the speech/conduct distinction, the *Mitchell* Court emphasized that, in keeping with the demands of *R.A.V.*, the statute "single[d] out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm."⁸⁸ This rationale is entirely independent of the speech/conduct distinction, and holds even if that argument does not. It also aligns *Mitchell* with the analysis above: Harm-based responses to bias crime are constitutional even if content-based responses are not.

The focus on harm enjoys another related advantage over the use of bias as proxy: it minimizes the state's role in determining which groups merit special protection against hate crimes and which do not. Lawrence contends that in order to merit special treatment, a prejudice must be "shared by others in the culture and [be] a recognizable social pathology within the culture" (p. 11); he then cites specific pathologies calling for such protection today. In contrast, he describes the narrator of Edgar Allen Poe's story *The Tell-Tale Heart*, "who obsesse[d] over his victim's 'pale blue eye, with a film over it,'" and he states, conclusively, that "we would be hard pressed to call [the narrator's] behavior prejudiced in a deep sense" (p. 11). But Lawrence's approach here is likely too categorical and too inflexible to ensure a legal regime sufficiently responsive to shifting societal power hierarchies. In a diverse and evolving society, there will be no fixed and permanent demarcation between those groups that require protection and those that do not. Anti-blue-eyed sentiment may not constitute a "prejudice" in contemporary America, but as modern history has repeatedly demonstrated, the transition from peaceful coexistence to vicious persecution can be quick and unexpected. An ideal hate crime statute would be responsive to such rapid transitions.

⁸⁸ *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993).

Of course, bias crime statutes could be amended to reflect shifts in social hierarchies, but there is reason to doubt whether the political majorities who exercise legislative power will recognize and respond to evolving prejudices. Although hate crimes can be perpetrated against those in the majority,⁸⁹ it seems likely that minorities defined in terms of race, religion, ethnicity, gender, sexuality, or otherwise, are more likely to benefit from the protections offered from bias crime statutes—even when those statutes are drafted in a viewpoint-neutral manner. Though enlightened members of the majority may well favor penalty enhancement for those who victimize the disempowered, they are likely to care far more about pressing issues more closely relevant to their daily lives, and thus may not be quick enough to codify protections for the victims of emergent hatreds. Even worse, bias-focused statutes could become the tool of an oppressive majority against the persecuted minority.⁹⁰ Bias crime statutes organized not around particular prejudices but around secondary harm *per se* would circumvent this problem by allowing prosecutors to seek, and juries and judges to impose, penalty enhancements for offenders who attack members of groups that are prone to secondary harms but not those groups that have not yet become beneficiaries of bias-focused legislation. In the event, for example, that blue-eyed fell victim to invidious persecution and that members of the blue-eyed community came to view bias-motivated crime against one blue-eyed “as an attack on themselves directly and individually” (p. 42), Lawrence’s approach to bias crime might be incapable of an adequate response. Resort to a codified list of victim classes is a strategy ill-suited to dealing with emergent

⁸⁹ In *Mitchell*, for example, African-American assailants attacked a white youth. *Id.* at 479-80. Long Island Railroad gunman Colin Ferguson attacked Caucasian passengers, as well as Asian-Americans. See, e.g., Milton, *supra* note 1 at A1.

⁹⁰ As American Civil Liberties Union Executive Director Ira Glasser has written in relation to hate speech regulation, “[t]he key questions when evaluating the likely impact of any proposed speech restrictions are: Who enforces it? Who interprets what it means? Who selects its targets? Minorities have special reason to fear that those in power—who cannot be relied upon to be responsive to minorities—will most often use their discretion to limit the speech of minorities.” Ira Glasser, *Hate Crimes/Hate Speech*, in *SPEECH & EQUALITY: DO WE REALLY HAVE TO CHOOSE?* 55, 59 (Gara LaMarche ed., 1996). Thus, content-based restriction of hate speech—or, presumably, bias crime—represents “a political and strategic trap of the worst kind for the very people it is meant to benefit.” *Id.*; see also *id.* at 59-61 (cataloguing examples).

prejudices as they arise, which would—given Lawrence’s demand for a “history of discrimination” and/or an “ideology or world view that connects” those who hate a particular minority (p. 12)—almost guarantee that the blue-eyed community would suffer various secondary harms before its members’ assailants were considered bias criminals. In contrast, a prosecutor operating in a harm-based regime could seek an enhanced penalty for the perpetrator of an anti-blue-eyed attack the very first time such an attack implicated Lawrence’s secondary harms.

III. CONCLUSION

Frederick M. Lawrence’s *Punishing Hate: Bias Crimes Under American Law*⁹¹ offers an engaging and important analysis of the growing American debate over the propriety and permissibility of bias crime regulation. Lawrence’s case that we must take special measures to address hate-based violence is compelling, and the book serves as a forceful rejoinder to those who doubt the necessity of such action. However, Lawrence’s choice to concentrate upon an offender’s bias motivation locates his proposals on uncertain constitutional ground. His ends, I have argued, might have been better served by an approach that linked penalty enhancement to the offender’s intent to inflict secondary harms and the actual causation of such harms. Such a strategy, one suspects, might in fact result in the realization of Lawrence’s “fondest hope”: that his children’s children, upon reading *Punishing Hate*, “will be puzzled as to why their grandfather should have spent so much time on something as inconceivable as racial violence” (p. xi).

⁹¹ LAWRENCE, *supra* note 5.