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The Problem of Motive in Hate Crimes: The Argument against Presumptions of Racial Motivation

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COMMENT

THE PROBLEM OF MOTIVE IN HATE CRIMES: THE ARGUMENT AGAINST PRESUMPTIONS OF RACIAL MOTIVATION

I. INTRODUCTION

Fourty-eight incidents of violence, harrassment, or intimidation of Arab-Americans occurred in the first month of Operation Desert Storm.[1] These incidents are part of a pattern of hate crime[2] activity which began in the 1980's and continues to date.[3] While the exact scope of hate crime activity nationwide is unclear[4], state and federal authorities, along with minority rights groups, have begun to collect information on the patterns and frequency of hate crimes.[5] This information suggests that state and federal efforts have largely failed to deter hate-motivated violence.[6]

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[1] Jennifer Toth, *Hate Crimes Increase Since the Start of the War*, L.A. TIMES, Feb. 7 1991, at A11.

[2] "Hate crime" will be used in this Comment to connote crimes of violence committed by individuals who are motivated by hate of another's background.

[3] *See generally*, U.S. COMMISSION ON CIVIL RIGHTS, *Recent Activities Against Citizens and Residents of Asian Descent* (1987).

[4] Until very recently, there was no system for collecting data on the prevalence of hate crimes nationwide. Minority rights groups, like the Anti-Defamation League (hereinafter the "ADL"), and at least one government agency, the Community Relations Service of the Department of Justice, have collected information on racially-motivated violence during the last decade. The U.S. Commission on Civil Rights, however, reports that it is impossible to measure whether such violence is on the rise, as many observers believe. *See* U.S. COMMISSION ON CIVIL RIGHTS, *Intimidation and Violence: Racial and Religious Bigotry in America* 4-8 (Sept. 1990).

[5] Congress recently passed The Hate Crimes Statistics Act, Pub. L. No. 101-275, 1990 U.S.C.C.A.N. (104 Stat.) 158 *reprinted in* U.S. CODE AND ADMINISTRATIVE NEWS, No.3 (June 1990) (Act requires the Attorney General to collect data on crimes which "manifest evidence of prejudice based on race, religion, sexual orientation or ethnicity.").

[6] Personal attacks on persons of Jewish descent in 1988 numbered 458, up from 112 in 1980. U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 4, at 4. The ADL reports 432 incidents of anti-Semitic violence in 1989 while the Gay and Lesbian Task Force reports 885 cases of physical violence against homosexuals in 1989. Amy Bayer, *Senators Pass Bill*

Prosecutors have utilized a multitude of federal and state statutes to deter violent, racist[7] activities.[8] Special hate crimes statutes adopted by states during the past decade, however, are at the center of a continuing debate about the efficacy of official attempts to deter interracial violence.[9] These statutes increase the criminal penalties for individuals who commit racial violence, and allow the victims of such violence to collect civil damages from their persecutors. The statutes require the prosecution to prove that the accused assaulted, harassed, or intimidated another person "by reason of"[10] the person's race, religion or national origin.[11] In other words, the statutes require prosecutors to demonstrate that the accused's criminal conduct was motivated by racism.

These state hate crimes statutes have largely failed to address the problem of racially-motivated violence. Commentators attribute this failure to the onerous burden of proof of the perpetrator's racial motivation which the statutes require.[12] The burden of proof severely limits the number of charges brought and convictions obtained under the statutes.[13]

A number of commentators have proposed that states amend existing hate crimes statutes to relieve the prosecution of the bur-

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Requiring Data Gathering on Hate Crimes, S.F. CHRON., Feb. 9, 1990, at A19. The ADL also reports that membership in racist organizations, such as the Skinheads, also appears to be increasing. Paul M. Barrett, *Hate Crimes Increase and Become More Violent: U.S. Prosecutors Focus on 'Skinhead" Movement*, WALL ST. J., July 14, 1989, at A12.

7 "Racist" will be used in this Comment to connote disregard of another because of that person's racial, religious, or ethnic background.

8 Federal prosecutors have utilized criminal civil rights statutes, 18 U.S.C. § 242, § 245 to bring charges against organized, racist acitivity. State prosecutors have utilized state laws forbidding mask-wearing, paramilitary training, carrying weapons under certain circumstances, and meetings to plan the commission of crimes. *See generally* Gregory L. Padgett, Comment, *Racially Motivated Violence and Intimidation: Inadequate State Enforcement of Federal Civil Rights Remedies*, 75 J. CRIM. L. & CRIMINOLOGY 103 (1982).

9 *See* Note, *Combatting Racial Violence: A Legislative Proposal*, 101 HARV. L. REV. 1270, 1271 (1988) [hereinafter *Combatting Racial Violence*]; Tanya Kateri Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of Racially Motivated Violence*, 99 YALE L.J. 845, 850 (1990).

10 Helen L. Mazur-Hart, Comment, *Racial And Religious Intimidation: An Analysis of Oregon's 1981 Law*, 18 WILLAMETTE L. REV. 197 (1982).

11 The three elements of race, religion and national origin are most commonly used in existing hate crimes legislation and therefore will be utilized throughout this Comment. Some states have expanded these categories to include disabled, elderly, or homosexual persons. *See, e.g.*, ILL. REV. STAT. ch. 38, para. 12-7.1 (1990).

12 *But see* Hernandez, *supra* note 9, at 854 (commentators who emphasize the burden of proof as the problem with existing statutes are mistaken. The real problem is overbroad prosecutorial discretion).

13 *See* Padgett, *supra* note 8, at 104-05 ("racial and religious violence persists in part because existing state legislation and state court systems fail to adequately deter and punish perpetrators of those crimes.").

den of proving the accused's motive.[14] Specifically, they propose shifting the burden of proof on the issue of motive to the accused through the use of an affirmative defense of no racial motivation where the accused is white and the victim is a minority.[15] While this proposal may facilitate successful hate crimes prosecutions, it fails to pass constitutional muster on due process and equal protection grounds, would neglect to protect many victims of hate crimes, and may result in the conviction of persons whose actions are not motivated by racism.

Part II of this Comment surveys current hate crimes legislation at the state level. Part III discusses the problem of proving motive and the effects of this requirement on criminal prosecutions and, to a lesser extent, civil damage actions under hate crimes statutes. Part IV critiques, under due process and equal protection analysis, current proposals to shift the burden of proof on the issue of motive. The Comment concludes with suggestions for improving the efficacy of existing statutes in light of the need to distinguish between racial motivation and unconscious racism.

II. STATE HATE CRIMES LEGISLATION

State and local prosecutors traditionally enjoyed a poor record of prosecuting members of racist organizations for crimes against minorities. As a result, victims of hate crimes relied on federal prosecutors to enforce civil rights statutes against perpetrators of hate crimes.[16] Federal prosecutions of these crimes lessened the impact of local prejudices on the initiation of such actions and brought the full power of the national government to bear on the problem of hate-motivated violence.[17]

The Department of Justice made repeated attempts during the 1960's and 70's to prosecute hate crime perpetrators under federal civil rights statutes.[18] Federal prosecutors, however, found these statutes to be an extremely unwieldy means of dealing with racial violence. The statutes require proof that the accused specifically in-

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[14] *See generally* Marc L. Fleischauer, Comment, *Teeth For A Paper Tiger: A Proposal To Add Enforceability To Florida's Hate Crimes Act*, 17 FLA. ST. U.L. REV. 697 (1990); *Combatting Racial Violence*, *supra* note 9.

[15] Affirmative defenses shift the burden of production and persuasion to the defendant. They can be distinguished from the nearly functionally equivalent device, the statutory presumption, which only shifts the burden of production. *See* Ronald J. Allen, *The Restoration of In re. Winship*, 76 MICH. L. REV. 30, 60 (1977).

[16] Padgett, *supra* note 8, at 114-115.

[17] *Id.* at 118-119.

[18] The government utilized the Reconstruction Era statutes embodied in U.S.C. § 1983 et. al.

tended to deprive his or her victim of a constitutionally-protected right.[19]

For example, federal prosecutors attempted but failed to convict a white supremacist for the 1980 shooting of Vernon Jordan, then President of the National Urban League.[20] The accused, a former member of the Klu Klux Klan and the American Nazi Party, admitted firing the shot which wounded Jordan. The prosecutor, however, was unable to convince the jury that the accused thereby intended to deprive Jordan of his constitutional right of access to public accommodations.[21] The Jordan trial illustrated for many the difficulties of addressing individual acts of racially-motivated violence through federal civil rights laws.[22]

The failure of federal civil rights statutes to address the problem of racially-motivated violence signalled to states the need to address the problem at the local level.[23] Alarming statistics of a resurgence of hate crimes in the 1980's, along with a number of highly publicized violent attacks on minority leaders,[24] also helped to spur state legislatures to action.

As states recognized the unique dangers of hate crimes, a consensus developed to enact special hate crimes statutes to deal with the problem of interracial violence.[25] States came to understand that such violence has insidious effects on entire communities that go well beyond the suffering of particular victims and their families.[26]

States with painful histories of violence between racial and religious groups viewed the statutes as a possible means of mandating local prosecutors and juries to impose stiffer penalties on the perpe-

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19 *But see* Padgett, *supra* note 8, at 127, n.3 (listing successful federal prosecutions under 18 U.S.C. § 245).

20 Tom Watson, *Hate Crimes Bill No Boon for Federal Prosecutors: Skinhead Case in Dallas was a Justice Department Victory*, TEX. LAW., April 30, 1990, at 10.

21 *Id.*

22 "In federal criminal civil rights cases. . .[y]ou have to show interference with some federally protected interest or right. There is no federal murder statute. . . ." *Id.* (statement of Barry Kowolski, Deputy Chief, Criminal Section, Civil Rights Division of the Department of Justice).

23 *See generally* Mazur-Hart, *supra* note 10, at 199, n. 16.

24 The trials of white supremacists for the near-fatal shooting of black civil-rights leader Vernon Jordan and the killing of prominent Jewish talk-show host Alan Berg were cited by state legislators as reflective of the difficulties inherent in prosecuting under federal criminal civil rights laws. Watson, *supra* note 20, at 10.

25 This is in stark contrast to states' collective refusal to curtail the violent activities of organized racist groups in the 1960's. Padgett, *supra* note 8, at 115.

26 Crimes between the races can lead to riots and retaliation against innocent victims as in the case of the Yusef Hawkins attack in New York. They serve as a catalyst for interracial violence. *Combatting Racial Violence*, *supra* note 9, at 1280.

trators of hate crimes.[27] Even states which had not traditionally experienced many incidents of racially-motivated violence considered passage of hate crimes statutes in order to deter hate groups from relocating in their states and creating racial discord.[28]

Oregon became the first state to enact hate crimes legislation when it passed the Hate Crimes Act in 1981.[29] Thirty-two states have enacted similar legislation to date.[30] State legislatures passed these statutes without much controversy[31] and apparently without much discussion of the difficult burden of proof which the statutes place upon prosecutors to prove the accused's motive.[32]

The Oregon Act, which is representative of these statutes, prohibits the commission of third degree mischief or harassment and fourth degree assault or menacing "by reason of the race, color, religion, or national origin of another person."[33] Persons whose acts are motivated by racism face higher penalties under the Act than they would under traditional criminal statutes.[34] In addition, the Act allows victims of racially-motivated violence to bring civil actions to recover damages under the Act, irrespective of successful criminal prosecutions of their victimizers by the state.[35] This civil provision is intended to encourage victims of racial violence to bring

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27 Padgett, *supra* note 8, at 117.

28 For example, a PEOPLE magazine article about the settlement of Neo-Nazis in Northern Idaho was cited by the Idaho legislature as evidence of the threat from out-of-state racists. Jerry D. Mason & Jeffrey A. Thompson, Comment, *Racial and Religious Harrassement: Idaho's Response to a Growing Problem*, 21 IDAHO L. REV. 85, 86 (1985).

29 *See generally* Mazur-Hart, *supra* note 10.

30 A partial list of these statutes follows: CAL. PENAL CODE § 422.6 (West 1991); COLO. REV. STAT. § 18-9-121 (1990); CONN. GEN. STAT. § 460-58 (1990); 1990 FLA. LAWS, ch. 89-133 (1990); IDAHO CODE § 18-7901-7908 (1991); ILL. REV STAT. ch. 38, para. 12-7.1 (1990); MD. ANN. CODE, art. 88B, § 9-10 (1990); MASS GEN. LAWS ANN. ch. 22, § 16 (West 1991); MICH. COMP. LAWS, § 750.147b (1991); MO. REV. STAT. § 574.090 (1990); N.D. CENT. CODE § 12.1-14-04 (1991); N.Y. PENAL LAW § 240.30 (Consol. 1990); OHIO REV. CODE ANN. § 2927.12 (Baldwin 1987); OKLA. STAT. tit. 21, § 850 (1990); OR. REV. STAT. § 166.155 (1987); 27 PA. CONS. STAT. § 2710 (1989); R.I. GEN. LAWS § 11-42-3 (1990); WASH. REV. CODE ANN. § 9A.36.080 (West 1990); W. VA. CODE § 61-6-21 (1990).

31 The only real controversy engendered during passage of state hate crimes statutes involved which categories of minorities would be included under these statutes. *See e.g.*, Mazur-Hart, *supra* note 10, at 198-99 (The Oregon legislature debated but ultimately rejected the argument to include persons intimidated by reason of sexual orientation, age, handicap, or political affiliation under the Act.).

32 *Combatting Racial Violence*, *supra* note 9, at 1274.

33 1981 Or. Laws 785.

34 Harassment and third degree criminal mischief which are usually Class B misdemeanors are elevated to Class A misdemeanors under the Act. This means that those found guilty of hate crime face at least five year penalties. Mazur-Hart, *supra* note 10, at 200.

35 1981 Or. Laws 785-3(1).

suits in circumstances where community or prosecutorial prejudices might preclude criminal charges.[36] The Act also provides that local district attorneys may seek injunctions against persons or groups that they believe to be engaged in hate crimes activities.[37]

Passage of the Oregon Act and hate crimes acts in other states produced optimistic predictions from many commentators.[38] These predictions have proven to be at odds with the reality of the statutes' success. Since the passage of Oregon's statute in 1981, prosecutors have successfully prosecuted only a handful of persons under the existing thirty-three hate crimes statutes. In Oregon, prosecutors have obtained only two criminal convictions under the statute.[39] Similarly, in Illinois, only two victims have collected civil damages stemming from racially-motivated attacks. The remaining thirty states which have enacted hate crimes legislation report no criminal convictions or civil actions under these statutes.

III. THE PROBLEM OF MOTIVE

Prosecutors must prove a complex set of factors in order to secure a criminal conviction under existing hate crimes statutes. Like any criminal statute, a typical hate crimes act requires proof by the government of the accused's *mens rea* or "guilty mind."[40] Traditional *mens rea* elements consist of purpose, knowledge, recklessness, or criminal negligence.[41] Hate crimes statutes also require proof that the accused attacked his or her victim "because of" or "by reason of" that person's race, religion, or national origin.[42] This requirement of proof severely undermines the efficacy of existing statutes and has discouraged prosecutors from charging individuals under the statutes. Prosecutors often find it impossible to demon-

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36 Mazur-Hart, *supra* note 10, at 202. *But see* Mason & Thompson, *supra* note 28, at 87 (Idaho's statute does not contain a provision for a private cause of action. The provision was removed during the legislative debate on passage because some legislators feared that the provision might spawn nuisance suits).

37 1981 Or. Laws 785-4.

38 It should be noted that at least two early commentators noted the difficulty which the requirement of proving the accused's racial motivation might have on the prosecution of hate crimes defendants. *See* Mason & Thomson, *supra* note 28, at 91-94; Mazur-Hart, *supra* note 10.

39 *See* State v. Beebe, 680 P.2d 11, *appeal denied*, 683 P.2d 1372 (Or. 1984) (defendant who threw his victim to the ground while shouting racial obscenities is convicted under Oregon's hate crimes statute).

40 WILLIAM L. BURDICK, THE LAW OF CRIME 150-73 (1946); SANFORD KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 217-327 (1989).

41 *See* MODEL PENAL CODE § 2.02(2).

42 *See* Mazur-Hart, *supra* note 10, at 204 (classifying motive as a new, fifth mental state of culpablity).

strate by proof beyond a reasonable doubt that the accused acted out of racist motives. To a lesser extent, civil plaintiffs also encounter difficulty in proving the accused's motives by a preponderence of the evidence in actions to recover civil damages from their victimizers.[43]

A. UNDERSTANDING MOTIVE

The problems faced by prosecutors and plaintiffs in proving racist motive in hate crimes stem principally from the ambiguous nature of motive itself. Courts and commentators often confuse motive with the distinct concepts of intent, specific intent, purpose and reason. Motive, however, can be distinguished from these concepts in a number of ways.

Intent probably offers the easiest means for distinguishing motive from other *mens rea* elements. Intent is defined as the purpose to use a particular means to achieve some definite result. Motive, in contrast, is the cause or moving power which impels action to achieve that result.[44] One's intent is the desire that a particular consequence follow from one's actions. One's motive, however, explains why that consequence was desired. For example, consider the case of an individual apprehended in the process of breaking into a bank.[45] The individual likely intends to steal money from the bank's safe. The individual's motive may be any number of possible things, from the accumulation of wealth for wealth's sake to beneficience towards a needy friend. While the law traditionally imposes criminal liability on the individual's intent to rob the bank, it does not make judgements about the "good" or "bad" motives behind that intent.[46] The individual in the example will be found guilty of burglary as long as the prosecution can prove his or her intent to rob the bank beyond a reasonable doubt, regardless of the individual's motivation.

Motive also can be distinguished from the concept of specific intent. Specific intent is defined as "a desire that a chosen consequence follow from the use of a particular means to affect some re-

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[43] The effect of the requirement of proof of the defendant's racist motive is lessened in the context of civil action by the lower evidentiary standard of preponderance of the evidence. However, civil actions remain difficult in states which require civil litigants to base an action for damages on a successful criminal prosecution by the government. *See, e.g.*, WASH. REV. CODE ANN. § 9A-36.080 (Supp. 1985); Mason & Thomson, *supra* note 28, at 87 (Washington legislature refuses to provide a civil action under its hate crimes act for fear of nuisance suits).

[44] GLANVILLE L. WILLIAMS, THE MENTAL ELEMENT IN CRIME 10 (1965).

[45] This example is adapted from *id.* at 14.

[46] *See* WARREN R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 227-28 (2nd ed. 1986).

sult."[47] One may specifically intend that one's actions result in particular consequences. For example, reconsider the individual apprehended in the process of breaking into the bank. The individual's specific intent might be to deprive the bank of its assets. His or her motive in hoping to deprive the bank of the assets, however, may be to undermine all capitalist institutions. Many criminal offenses impose liability upon proof of a particular specific intent but, again, do not traditionally do so upon proof of the individual's motive.[48]

While motive is closer to purpose, this concept similarly can be distinguished. A purpose is defined as "an explicitly aimed-at, rational goal."[49] An individual consciously adopts a means to achieve a particular purpose. The individual's motive for adopting those means to achieve that purpose, however, is something different.[50] In our example, the individual's purpose in breaking into the bank may be to steal to provide for a needy friend. His or her motive, however, might be friendship or beneficence.

Finally, motive can be distinguished from the concept of reason. Reason, like motive, is defined as "the cause which impels action for a definite result."[51] Motive, however, is a particular type of reason, often the cause of untoward or criminal conduct.[52] For example, the individual's reason for awakening early on the day of the bank robbery may be to effectuate a plan to rob the bank. His or her motive for doing so, however, may be to go to the bank before security guards arrive in order to avoid detection.

Motive, thus, can be distinguished from the concepts of intent and specific intent for which the criminal law imposes liability and from the closely-related concepts of purpose and reason. Motive is the cause of one's actions, whether one adopts a means to achieve desired ends or consciously selects those ends. An individual's per-

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47 KADISH & SCHULHOFER, *supra* note 40, at 277.

48 For example, common law larceny requires proof that the defendant not only intended to take another's property, but intended to "steal." LAFAVE & SCOTT, *supra* note 46, at 202.

49 Marjorie J. Weinzweig, *Discriminatory Impact and Intent Under the Equal Protection Clause: The Supreme Court and the Mind-Body Problem*, 1 LAW & INEQ. J. 277, 308 (1983).

50 Courts and commentators often mistake motive and purpose. For example, legal precedent and scholarship devoted to the question of discriminatory legislative intent is replete with confusion about the respective meanings of purpose and motive, as well competing definitions of both concepts. *See generally* J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978).

51 Weinzweig, *supra* note 49, at 306.

52 *Id.* This distinction between reason and motive admittedly may be one without a difference generally, but it does seem important to keep in mind given the subject of this Comment, the untoward motive of racism.

sonality and psyche, therefore, largely determine his or her motives. The exact contours of motive, accordingly, will be within each individual's knowledge alone as personality and psyche are inherently subjective.[53]

B. MOTIVE AND ITS COMPLICATIONS FOR THE PROOF PROCESS

The fact that an individual's motive lies peculiarly within his or her knowledge undermines the ability of prosecutors and plaintiffs to prove racist motive in hate crimes cases. In a criminal case where the accused invokes the Fifth Amendment privilege against self-incrimination,[54] the prosecutor will attempt to convince the jury to draw inferences of racist motive from the available circumstantial evidence.[55] Given the very nature of motive, however, members of the jury are likely to make widely disparate inferences about whether racist motives animated the accused's behavior. Even if the jury unanimously establishes racist motive, this conclusion may be inaccurate or tainted by the jury's own predispositions. In addition, the rules of evidence and the accused's constitutional rights to a fair trial will limit the admissibility of some kinds of circumstantial evidence of the accused's motives and the proper inferences to be drawn by the jury from such evidence. The net result of these problems is that the requirement of proof of the accused's racist motive seriously undermines the ability of prosecutors to obtain convictions under hate crimes statutes in all but the most egregious cases.

1. The Accuracy and Consistency of Inferences About Motive

Absent an explicit admission of racial motivation by the accused, prosecutors need to rely on circumstantial evidence of the accused's reasons for perpetrating the alleged crime. Inferences about motive which are drawn from circumstantial evidence, however, may be highly inaccurate given the inherent ambiguity of motive itself.[56] For example, consider the case of a white defendant who assaults a black stranger.[57] Circumstantial evidence that the as-

53 Mazur-Hart, *supra* note 10, at 205 (citing R. ROBERT M. MACIVER, SOCIAL CAUSATION 17-18 [1942]).

54 U.S. CONST. amend. V ("No person shall be. . .made to serve as a witness against himself. . . .").

55 Mason & Thompson, *supra* note 28, at 93; *Combatting Racial Violence*, *supra* note 9, at 1274 n.17.

56 *Combatting Racial Violence*, *supra* note 9, at 1274.

57 This example was developed from the attack on Yusef Hawkins, a black teenager, in Bensonhurst, New York in 1988. *See* Eric Pace, *Bensonhurst Witness Challenged on Use of Drugs*, N.Y. TIMES, Nov. 22, 1990, at B8.

sault occurred in a neighborhood predominated by whites may lead the trier of fact to conclude, quite accurately, that racism motivated the attack. In many cases, however, this conclusion may be incorrect. The defendant, in the example, may have attacked his or her victim because of a paranoid fear of strangers. Proving that racism rather than paranoia motivated the attacker's actions may be an impossible task for prosecutors given the reasonable doubt standard which requires a far greater quantum of proof than circumstantial evidence can usually provide.

Prosecutors also have a difficult time proving racist motive because multiple motives may impel an individual to action, and more particularly to criminal conduct, at any given time.[58] Discerning which motive caused an individual to commit a criminal act may be genuinely problematic.[59] In our example, the white defendant who assaulted the black stranger may have been motivated by cruelty as well as racism. Existing hate crimes statutes incorrectly assume that prosecutors can distinguish the accused's racist motive from his or her other possible motives.[60] Even where the prosecutor can prove that racism motivated the individual's actions, the accused will likely counter with evidence that he or she acted out of some other motivation. The prosecutor then will be required to prove definitively the existence of racial motivation.[61] To a lesser extent, plaintiffs in civil damage actions face the same problem under the preponderance of the evidence standard.

A related problem for prosecutors and civil litigants alike is how to convince a jury that the defendant acted "because of" racial motivation. The exact degree to which racism needs to have motivated the defendant's conduct is unclear under existing hate crimes statutes.[62] The statutes require proof that the accused attacked his or her victim "because of" that person's race, religion, or national origin. As one commentator has pointed out, this standard begs for

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58 Fleischauer, *supra* note 14, at 701.

59 Cognizant of this fact, the law normally refrains from requiring the prosecution to prove that the individual acted "because of" one motive rather than another. Under traditional criminal offenses, a prosecutor needs to prove the requisite intent to commit the act but is not required to prove a particular motive behind the individual's actions. Of course, this is not to say that motive plays no role in a criminal prosecution. Quite to the contrary, proof of the individual's motive assists in persuading the trier of fact that he or she in fact committed the alleged crime.

60 Mazur-Hart, *supra* note 10, at 217-218.

61 Fleischauer, *supra* note 14, at 702-703.

62 *See* William E. Schmidt, *Local Setback on Michigan Law on Hate Crimes*, N.Y. TIMES, Nov. 30, 1990 at A18 (municipal court judge invalidates Michigan's hate crimes statute on the grounds that the act's evidentiary requirement is void-for-vagueness).

clarification.[63] The statutes theoretically could require the prosecutor or civil litigant to prove that racial motivation was the sole or principal cause of the accused's actions.[64] Proving that only racism, and not some other reason, motivated a defendant's actions imposes an onerous burden on prosecutors. The proof beyond a reasonable doubt standard serves as a deliberate preference for the defendant which, in this context, is difficult if not impossible to overcome.[65]

Finally, in order to prove that racism motivated the accused's particular conduct, the prosecutor will often need to pinpoint when the racist motive was formed. In any number of cases, racism could have played little if any role in the beginnings of an altercation but have been injected into an argument later when tempers flared.[66] Testimony by the accused that he or she used a racial epithet in anger or that motivation other than racism caused the altercation would require the prosecution to pinpoint when the accused's racist motive was formed. Proving the exact point at which an individual's motive became racist, however, is an impossible task given the nature of motive. The question arises at which point does the presence of racial motivation trigger the conclusion that the accused acted "because of" those motives rather than others.

2. *Limits on the Admissability of Evidence of Motive*

Where there is no circumstantial evidence of the accused's racial motivation, such as insults hurled during an altercation, the prosecution will undoubtedly attempt to introduce evidence of the accused's prior racist conduct. The Federal Rules of Evidence and the constitutional rights of the accused, however, severely limit the admissibility of such evidence in hate crimes prosecutions.

First, the Federal Rules of Evidence explicitly prohibit the admission of character evidence to prove that the accused acted in conformity therewith during an alleged incident.[67] The rationale behind this prohibition lies in the concern that the jury will convict a

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63 Fleischauer, *supra* note 14, at 703.

64 Theoretically, the statutes also could require prosecutors to prove merely that racism played some role in motivating the defendant. The debate about the evidentiary standard intended by the statutory requirement of "because of" or "by reason of" is long-standing in this context. It is unclear at this point which, if any, standard the courts have adopted given the small number of reported cases under hate crimes statutes. *See generally*, U.S.C.C.A.N. (104 Stat.) at 165-169 (comments of Senators Thurmond and Grassley during debate of the Hate Crimes Statistics Act).

65 Allen, *supra* note 15, at 47.

66 This example is taken from Mason & Thompson, *supra* note 28, at 93.

67 FED. R. EVID. 404(a) "CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

defendant for a crime because he or she deserves punishment for prior bad acts.[68] Where character evidence relates to the accused's motive, however, the Federal Rules allow its admission under certain narrow constraints.[69] The difference between these two forms of character evidence can be subtle. In deciding whether evidence is covered by Fed. R. Evid. § 404 (a) or (b), courts weigh whether the prejudicial effect of such evidence outweighs its likely probative effect[70] and the relative explanatory power of such evidence with regard to the accused's conduct.[71]

Courts are especially careful in admitting evidence of the accused's racist character because of the inherently prejudicial nature of such evidence. For example, the Sixth Circuit has held that it is reversible error for a trial court to allow evidence of racial slurs made by a defendant towards blacks where his victim was Asian.[72] Those courts that have admitted evidence of the defendant's racist character have done so only where the evidence involves statements made at the time of alleged criminal activity which reasonably explain the defendant's behavior.[73] In this way, the Rules of Evidence

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(1) CHARACTER OF ACCUSED. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
(2) CHARACTER OF A VICTIM. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.
(3) CHARACTER OF A WITNESS. Evidence of the character of a witness, as provided in rules 607, 608, and 609."

68 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL, 7-8 (1991) (arguing that Rule 404(a) prevents the improper inference, "he's done it before, so he's done or will do it again.").

69 FED. R. EVID. 404(b). "OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissable to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

70 FED. R. EVID. 403. "EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

71 FED. R. EVID. 401. "DEFINITION OF RELEVANT EVIDENCE. Relevant evidence means evidence having any tendancy to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

72 United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986) (defendant appealed his conviction under 18 U.S.C. § 245(b)(2)(F) for depriving a Chinese-American of his constitutional rights by beating him to death with a baseball bat).

73 United States v. Franklin, 704 F.2d 1183 (lOth Cir. 1983) (court holds that evidence that the defendant told police that he thought interracial integration was wrong shortly after being charged with spraying mace on a black man and white woman is admissible under § 404[b]).

limit the ability of prosecutors to introduce evidence of the accused's racist character even though such evidence directly corroborates the accused's racist motive.

Second, the First Amendment guarantees of freedom of association and expression also limit the admissibility of evidence which prosecutors might seek to use to prove racist motive in hate crimes prosecutions. Courts generally disfavor the admission of evidence relating to the beliefs of the accused because liberal admission of such evidence may chill the exercise of the constitutional rights of freedom of association and expression.[74] For example, prosecutors may wish to introduce evidence of the accused's membership in a racist organization or possession of racist literature.[75] While such evidence is certainly probative of racist motive, its admission can impinge on the accused's First Amendment rights by punishing him or her for holding unpopular beliefs about racial, religious, or ethnic groups.[76] Hence, courts generally limit the use of such evidence, thereby making the prosecutor's burden of proof even more onerous.

3. The Effects Of The Motive Requirement

The requirement of proof of the accused's racial motivation raises problems for prosecutors because of the inherent difficulty of proving motive and the limits on the admissibility of evidence of the accused's racist character and beliefs. These problems seriously undermine the efficacy of existing hate crimes statutes in a number of ways.

The clearest effect of the requirement of proof of the accused's motive is to limit the ability of prosecutors to obtain convictions under current hate crimes acts, even in the most egregious cases.[77] Where the accused's actions clearly suggest only one explanation, racial motivation, prosecutors will have a decent chance of securing a conviction.[78] Conversely, when circumstantial evidence indicates the existence of mixed motives, the prosecutor's burden of proof

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74 Mazur-Hart, *supra* note 10, at 213 (citing THOMAS I. EMERSON, THE SYSTEM OF FREE EXPRESSION 22, 35 (1970)).

75 Mazur-Hart, *supra* note 10, at 212-213.

76 *But see* Fleischauer, *supra* note 14, at 710-11 (arguing that the real chilling effect of the use of such evidence will be on "lawless action," not the defendant's constitutional rights).

77 Mason & Thompson, *supra* note 28, at 93-94.

78 United States v. Ebens, 800 F.2d 1422, 1429 (6th Cir. 1986) (court holds that racial comments by the defendant toward his victim were sufficient evidence to establish a violation under 18 U.S.C. § 245's language "on account of the victim's race or national origin").

can be nearly impossible.[79] Even where prosecutors obtain convictions under hate crimes statutes, convicted offenders may appeal their convictions successfully on the grounds that the trial court erred in admitting evidence of the individual's racist character or beliefs.

Second, the requirement of proof of the accused's motive deters prosecutors from charging individuals with hate crimes in the first place.[80] Prosecutors often charge individuals who commit crimes evidencing racial motivation under traditional criminal statutes rather than risk the possibility of failing to prove motive under hate crimes statutes and face acquital.[81] For example, the District Attorney of Davis, California reported that he chose not to prosecute the fatal stabbing of a Vietnamese student by a white schoolmate under California's Hate Crimes Act because there was no evidence that the defendant had uttered racial slurs during the attack.[82]

Finally, the requirement of proof of the accused's motive complicates hate crimes prosecutions because it introduces subjective factors into the proof process.[83] Due to the difficulty of accurately inferring motive from circumstantial evidence, a jury must rely on its own subjective intuitions about the motivations behind an individual's conduct.[84] This reliance invites inconsistent verdicts in hate crimes prosecutions. More troubling, it may encourage arbitrary application of the statutes against disfavored groups for whom the statutes were intended in the first place.[85] Even where judges give careful instructions to the jury about not bringing their own views to bear on the case, jurors are likely to rely on their own prejudgements about interracial violence in deciding whether the accused's actions were motivated by racism.[86]

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79 Fleischauer, *supra* note 14, at 702-703.

80 Padgett, *supra* note 14, at 127, n.163; *Combatting Racial Violence*, *supra* note 9, at 1274.

81 Mason & Thompson, *supra* note 28, at 91-92 (predicting that prosecutors will assess the burden of proof before committing limited public resources to what might prove to be a difficult prosecution).

82 *See* U.S. COMMISION ON CIVIL RIGHTS, *supra* note 3, at 30.

83 Mazur-Hart, *supra* note 10, at 204.

84 *See* Trumble v. Gordon, 430 U.S. 762, 782 (1977) (Rehnquist, J., dissenting) (Court troubled by having to intuit the motives of legislators in the context of a discriminatory legislative intent case).

85 One commentator suggests, ". . .the elements peculiar to the Act[s] could lead to arbitrary enforcement against persons who, due to their particular lifesyles or race, religion or beliefs, incur the ire of those empowered to determine who shall be prosecuted." Mason & Thompson, *supra* note 28, at 112.

86 *But see* Allen, *infra* note 119, at 352.

IV. Reforming Current Hate Crimes Statutes

The requirement of proof of the accused's motive ultimately may defeat the purpose behind the hate crimes statutes and pose dangers to the victims of racially-motivated violence. State legislatures intended the statutes to serve dual purposes: to send a strong message of support to minority groups traditionally victimized by racially-motivated violence and to deter the occurrence of such violence.[87] The small numbers of convictions and succesful civil damage actions under the statutes have left minority rights groups understandably disheartened. While the attitudes of racist groups towards the statutes are difficult to gauge, these small numbers surely indicate a failure to deliver the intended message of condemnation to these groups.[88] More troubling, the statutes' inefficacy may encourage racist groups to commit more extremist actions.

In response to these problems, a number of commentators have suggested that state legislatures reform current hate crimes statutes to ease the prosecutor's burden of proving the accused's motive.[89] Specifically, these commentators propose that states remove racist motive as an element of the offense of hate crime and shift the burden of proof on the issue of motive to the accused, thereby creating a presumption of racial motivation in cases of interracial violence.[90]

This proposed reform suffers from fatal constitutional flaws. The constitutional rights of the accused to proof beyond a reasonable doubt and equal protection of the law prohibit state legislatures from adopting this proposal.[91] More modest, but constitutionally valid, solutions to the inefficacy of current hate crimes statutes lie in reducing prosecutorial discretion to charge individuals with hate crimes, clarifying the standard of causation required for proof of racist motive, and encouraging civil damage actions.

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87 Mason & Thompson, *supra* note 28, at 86.

88 "What the Klan and the neo-Nazis are doing now can be regarded as a kind of testing, both of public opinions and of official responses. Official responses which are tolerant, apathetic or simply ineffective are likely to encourage more extremist action." Subcommittee on Crime of the House Committee on the Judiciary, *Increasing Violence Against Minorities*, 96th Cong., 2d Sess. 9 (1981).

89 *See generally* Fleischauer, *supra* note 14; *Combatting Racial Violence*, *supra* note 9.

90 Easing the prosecution's burden of proof in this manner is often justified because facts peculiarly within the defendant's knowledge are difficult to prove. *See* John Calvin Jefferies, Jr. & Paul B. Stephan III, *Defenses, Presumptions and Burdens of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1335 (1979). *See also* Pamela Cowan, *Criminal Law-Affirmative Defenses in the Washington Criminal Code: The Impact of Mullaney v. Wilbur*, 51 Wash. L. Rev. 953 (1976).

91 These rights are based on the Equal Protection Clause of 14th Amendment and the constitutional rights of a criminal defendant to proof beyond a reasonable doubt. *See, infra* notes 105-166 and accompanying text.

A. SHIFTING THE BURDEN OF PROOF

According to proponents, many of the problems which undermine current hate crimes laws could be alleviated if state legislatures shifted the burden of proof on the issue of motive from the prosecution to the defense.[92] With the reduced burden of proving only one of the four traditional *mens rea* mental states, prosecutors undoubtedly would obtain more convictions and bring more charges under the statutes given the increased likelihood of success on the merits of their cases. Shifting the burden of proof would also encourage more victims of hate crimes to pursue civil damage actions against perpetrators of racially-motivated violence.

Under this proposal, state legislatures would remove the element of racial motivation from the offense of hate crime and establish a presumption of racial motivation in any case of violence by a white defendant against a member of a minority group. Proof by the prosecution that the crime involved a "white" defendant and a victim of a minority race, religion, or ethnicity would automatically trigger the presumption of racial motivation.[93]

Proponents urge states to create an affirmative defense of no racial motivation in order to afford white defendants the opportunity to rebut the presumption of racial motive. Like any affirmative defense, the presumption of racial motivation would shift the burden of production and ultimate persuasion onto the accused.[94] In the event that the accused demonstrated that he or she acted without racial motivation, the jury could acquit the accused of the alleged hate crime.[95]

Proponents cite a number of rationales in support of shifting the burden of proof of motive to the defendant in hate crimes cases. While these rationales have some persuasive force, they fail to adequately justify the risk of convicting persons whose conduct was not motivated by racism which such a proposal would entail.

The most persuasive rationale offered by proponents is that shifting the burden of proof would increase the number of successful prosecutions and civil actions under existing statutes. Proponents correctly point out that shifting the burden of proof on the

92 *See generally* Fleischauer, *supra* note 14; *Combatting Racial Violence*, *supra* note 9.

93 *Combatting Racial Violence*, *supra* note 9, at 1272.

94 Traditionally, the accused must prove affirmative defenses by a preponderance of the evidence. Allen, *supra* note 15, at 60. *But see*, MODEL PENAL CODE § 1.12(2)(a); Leland v. Oregon, 343 U.S. 790 (1952) (upholding Oregon's requirement that the accused prove the defense of insanity by proof beyond a reasonable doubt).

95 Fleischauer, *supra* note 14, at 705 (proposed jury instructions to be given under the reformed statute).

issue of motive would ease prosecutors' difficult burden of proof.[96] Proponents also argue that criminal defendants would have greater incentives to reveal their inner motives under the reformed statutes in order to overcome the presumption of racial motivation.[97] The problem of inferring motive from circumstantial evidence thereby would be lessened, as would the difficulties of introducing evidence of the accused's racist character. Finally, proponents argue that shifting the burden of proof would eliminate the possibility of arbitrary and inconsistent verdicts by juries.[98] Under the proposed reform, a jury would need to rely less heavily on its own intuitions and subjective considerations about the motivations of the accused. Instead, the jury would simply engage in traditional fact-finding, namely determining whether the defendant is a member of a different racial, religious or ethnic group than the victim.

These rationales alone cannot justify shifting the burden of proof to the defendant. If the state could alter the burdens of proof in a criminal trial simply to facilitate convictions, many of the rights of criminal defendants under the Due Process Clause of the Fifth Amendment would be eviscerated. In addition, while the accused undoubtedly can prove his or her motives more ably than a prosecutor, this reason alone cannot justify imposing criminal liability on a defendant who has trouble disproving racial motivation.[99]

At heart, however, proponents' rationales fail because they do not address the real risk inherent in a "whites only" presumption of racial motivation. The presumption may facilitate the conviction of persons who do not commit interracial crimes for racist motives. Proving that racial motivation did not contribute to one's actions will be a very difficult task for criminal defendants. For example, consider the case of a white defendant who wrongfully believed that a gang of black youths had threatened his life and who shot the youths unjustly.[100] The accused will have a nearly impossible burden to prove that racism did not motivate his actions, at least in part. For example, maybe the accused was precipitous in acting to protect himself because of his own racist attitudes towards his would-be attackers.

Because of the racist nature of society, everyone suffers from

96 *Combatting Racial Violence*, *supra* note 9, at 1274.

97 *Id.* at 1274, n.17.

98 Mazur-Hart, *supra* note 10, at 204.

99 *See* Mullaney v. Wilbur, 421 U.S. 684, 702 (1975).

100 *See* People v. Goetz, 497 N.E.2d 41 (N.Y. 1986) (court reverses the defendant's acquittal on attempted murder charges for shooting and wounding four youths on a New York City subway train).

unconscious racism.[101] The law, however, should not hold individuals criminally liable for harboring attitudes that are inescapable to us all.[102] Instead, the law should deter the most overt manifestations of racism.[103] The proposal to shift the burden of proof fails to distinguish between individuals whose actions are motivated by racism and those whose actions are motivated by other factors but influenced by unconscious racism. The proposed statute would inevitably lead to the conviction of persons who cannot disprove the presence of some racial motivation, but who should not be labelled as hate criminals.[104]

B. THE CONSTITUTIONALITY OF SHIFTING THE BURDEN OF PROOF

Shifting the burden of proof to the accused on the issue of motive would also effectively eviscerate the accused's fundamental right to proof beyond a reasonable doubt. The Due Process[105] and Proportionality Clauses[106] limit legislative efforts to shift the burden of persuasion to the accused in criminal cases through the use of affirmative defenses.

The Supreme Court recognized the standard of proof beyond a reasonable doubt as a constitutional right in *In re Winship*.[107] The *Winship* court stated that the prosecution may not shift the burden of proof to the accused on "the facts necessary to convict" him or her of the crime charged.[108] In that case, the Court invalidated a New York juvenile delinquency statute which allowed the prosecution to prove guilt by a preponderance of the evidence. The Court reasoned that the reasonable doubt standard serves as a deliberate bias in favor the criminal defendant and is therefore essential to the fundamental right of innocence until proven guilty.[109]

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101 Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

102 *Id.* at 326.

103 As one commentator noted, ". . .the presumption makes the statement that everyone in the world is racist. . .and equates prejudice with racism." *Combatting Racial Prejudice*, *supra* note 9, *discussed in* Hernandez, *supra* note 9, at 855, n.45.

104 Shifting the burden of persuasion on any issue may be effective at eliciting relevant evidence, but it also has the effect of resolving close cases against the defendant. *See* Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1333-34 (1977).

105 "No person shall be. . .deprived of life, liberty or property without due process of law." U.S. CONST. amend. V.

106 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

107 397 U.S. 358 (1970).

108 *Id.* at 359.

109 The reasonable doubt rule reflects a general judgment that defendants should be protected from erroneous convictions. Underwood, *supra* note 104, at 1322.

The exact scope of the constitutional right recognized in *Winship*, however, remains unclear.[110] The Court has considered the issue of the reasonable doubt standard in three different cases since the *Winship* decision.[111] These cases have failed to establish a coherent test for deciding which facts are necessary for the prosecution to prove in order to convict the accused of the crime charged.

In *Mullaney v. Wilbur*, the Court, purporting to follow the decision in *Winship*, invalidated a murder statute requiring the defendant to prove the affirmative defense of heat of passion.[112] The Court's decision suggested that the requirement of proof beyond a reasonable doubt prohibited the state from shifting the burden of proof to the defendant on any issue relevant to culpability.[113]

Only two years later, the Court essentially reversed its *Mullaney* holding. In *Patterson v. New York*, the Court upheld a statute nearly identical to the one at issue in *Mullaney* on the grounds that the state can shift the burden of proof on any issue not defined as an element of the offense with which the defendant is charged.[114] While not explicitly overruling *Mullaney*, the Court adopted a formalistic approach in determining the scope of the reasonable doubt standard. The Court held that New York did not violate the reasonable doubt standard as long as it provided the defendant an affirmative defense to rebut the presumption created by the shift.[115]

The Court followed *Patterson*'s lead in *Martin v. Ohio* where it upheld a murder statute which allowed the accused to prove the affirmative defense of self-defense.[116] The Court stated that the Due Process Clause does not prohibit a state from shifting to the defendant the burden of proving an element of a crime, as long as the state removes that issue from the crime's definition.[117]

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110 *See* Ronald J. Allen, *Rationality and Accuracy in the Criminal Process: A Discordant Note on the Harmonizing of the Justices' Views on Burden of Persuasion in Criminal Cases*, 74 J. CRIM. L. & CRIMINOLOGY 1147, 1148 (1983).

111 Mullaney v. Wilbur, 421 U.S. 684 (1975) (Court invalidates a Maine murder statute shifting the burden of proof on the issue of provocation on the grounds that the safeguards of the reasonable doubt rule are not rendered unavailable just because a determination of guilt has been made); Patterson v. New York, 432 U.S. 197 (1977) (court upholds affirmative defense in New York murder statute); Martin v. Ohio, 480 U.S. 228, *reh'g denied*, 481 U.S. 1024 (1987) (court upholds Ohio murder statute on the same grounds as stated previously in *Patterson*).

112 *Mullaney*, 421 U.S. 684 (1975). *See supra* note 111.

113 *See* Jeffries & Stephan, supra note 90, at 1339 (arguing that the requirement of proof beyond a reasonable doubt standard is not limited by the characterization of the state law but applies to some facts extrinsic to the formal definition of the offense).

114 *Patterson*, 432 U.S. 197 (1977). *See supra* note 111.

115 *Id.* at 206-207.

116 Martin v. Ohio, 480 U.S. 228, *reh'g denied*, 481 U.S. 1024 (1987).

117 *Id.* at 232-233.

Winship and its progeny have produced an enormous amount of scholarly attention and debate.[118] Commentators have proposed at least three different approaches to the question of which facts the state may legitimately shift to the defendant without violating the right to proof beyond a reasonable doubt.[119] These approaches suggest the existence of general limitations on the ability of states to shift the burden of proof on important issues which implicate criminal liability.[120]

First, the suggestion of *Winship*'s progeny that the state may shift the burden of proof on any issue not defined as an element of the crime is clearly erroneous.[121] If the reasonable doubt standard only limited states to shifting the burden of proof on such issues, states could merely remove certain elements from a crime's description and force criminal defendants to prove the absence of these elements through an affirmative defense.[122] This so-called "elements test" approach suffers from a number of logical inconsistencies, the principal one being that a state's decision to define an issue as an element of a crime is essentially arbitrary.[123]

Commentators have suggested a more coherent approach to this question which involves an examination of the limits on the types of substantive issues the state may require the accused to prove.[124] Under this approach, the reasonable doubt standard prohibits the state from shifting the burden of proof on issues that define the culpability of the criminal conduct at issue.[125] Whether a state can force the defendant to prove a particular issue depends on

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118 *See* Allen, *supra* note 110, at 1147.

119 *See, e.g.*, Underwood, *supra* note 104 (the due process approach); Jeffries & Stephan, *supra* note 90 (common law substantive approach); Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321 (1980) (modified substantive approach).

120 That some limitations on legislative discretion exist is undisputed. *See* Jeffries & Stephan, *supra* note 90, at 1348.

121 *See* Allen, *supra* note 15, at 48, for a discussion of the so-called "elements theory."

122 Jeffries & Stephan, *supra* note 90, at 135.

123 *Id.*; Allen, *supra* note 15, at 48.

124 *See* Allen, supra note 119, at 343 ("the fundamental concern with protecting the defendant's liberty interest articulated in *Winship* can be fully satisfied only if the procedural safeguard of the reasonable doubt standard is linked to a substantive standard guaranteeing that the state's determination of criminal conduct is fair and does not carry the potential for disproportionate punishment."); *but see* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457 (1989) (criticizing the substantive school for looking for an impossible definition for criminal culpability).

125 Note that this approach implies limitations on a state legislature's prerogative to shift the burden of proof. *See* Underwood, *supra* note 114, at 1312 ("The Constitution imposes very few restraints on the substantive conditions for criminal responsibility, leaving the field largely open to the policy choices of legislatures.").

a three-part inquiry.[126]

In the first part of this inquiry, a court must determine the effect of shifting the burden of proof to the defendant through an affirmative defense or some other evidentiary device.[127] If shifting the burden of proof provides the defendant with an opportunity to mitigate criminal liability which the state already has proven, then the affirmative defense favors the defendant's interests.[128] Because the state's action is essentially gratuitous, it does not violate the reasonable doubt standard.[129] If the shift disfavors the defendant's interests, meaning that failure to prove the affirmative defense subjects the defendant to the maximum penalty under the offense, the state may have violated the reasonable doubt standard depending on the liability imposed under that penalty.[130]

Second, a court must decide whether the penalty imposed is proportional to facts proven by the prosecution. The Eighth Amendment protects a criminal defendant from punishment which is not proportional to his or her culpability.[131] A state, therefore, may only impose criminal liability proportional to the issues proven beyond a reasonable doubt by the prosecution.[132] In determining whether the state can impose liability absent proof on a particular issue, courts focus on such factors as the gravity of the offense, the defendant's culpability in relation to other crimes, and the punishment facing the defendant.[133] If the criminal liability faced by the defendant is roughly proportional to his or her culpability, the state has fully protected the accused against an unwarranted deprivation of liberty. The state, therefore, can establish an affirmative defense, subject only a fairness review.[134]

Finally, a court must determine whether the presumption underlying the affirmative defense is accurate or fair.[135] If the state

126 *See* Allen, *supra* note 119, at 341.

127 *Id.*

128 Allen, *supra* note 15, at 43 ("...permitting the defendant to reduce the sentence he receives below the permissable level through proof of an affirmative defense is constitutional.").

129 By its very definition, a gratuitous defense is one which the legislature has the power to eliminate. *See* Underwood, *supra* note 104, at 1325.

130 Jeffries & Stephan, *supra* note 90, at 1376 (arguing that there must be some limit on the severity of authorized punishment in order to avoid legislative excess in the infliction of serious penalties for trivial misconduct).

131 *See* U.S. CONST. amend. VIII, *supra* note 106.

132 *See* Allen, *supra* note 15, at 46.

133 *See* Solem v. Helm, 463 U.S. 277, 290-92 (1983) (identifying three factors with which punishments must be compared to determine proportionality).

134 Allen, *supra* note 119, at 341.

135 *Id.*

could merely presume any fact without reference to whether the presumption is accurate, the state could require the accused to prove something that is common-sensical.[136] Since presumptions are intended to facilitate the fact-finding process, the state must demonstrate a rational correlation between the facts proven by the prosecution and those presumed.[137]

The proposal to shift the burden of proof on the issue of motive would violate the standard of proof beyond a reasonable doubt under this three-part inquiry. First, the state clearly disfavors the defendant's interests by shifting the burden of proof. The presumption of racial motivation encourages the jury to draw an inference that it likely would not normally draw and that has not been proven by the prosecution. In essence, the presumption tells the jury that racism, more often than not, motivates individuals to attack members of another race, religion, or ethnicity.

More profoundly, the presumption also subjects defendants to the maximum penalties possible under hate crimes statutes. In so doing, shifting the burden of proof to the defendant raises Eighth Amendment proportionality concerns. State hate crimes statutes impose stiffer penalties on perpetrators of racial violence than those who commit more traditional criminal offenses. Under the proposed statutes, defendants who fail to prove lack of racial motivation would face increased penalties even though the state has affirmatively proved only the elements of these traditional crimes. The state may justify these penalties in light of the dangers inherent in interracial violence.[138] Questions remain, however, regarding whether these penalties are proportional to the crime committed according to the prosecutor's proof.

Finally, and most importantly, shifting the burden of proof would establish a presumption whose underlying facts are inaccurate. Proof that the accused attacked a member of a different race, religion, or ethnicity would trigger a finding of racial motivation. Common-sense, however, suggests no strong connection between the majority of crimes involving persons of different groups and ra-

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136 A presumption in the case of an affirmative defense of lack of racial motivation is the presence of racial motivation.

137 *See* Allen, *supra* note 119, at 323 (describing the elements and application of the "rationally-connected" test: there must be significant assurances that the presumed fact is more likely than not to flow from the proved fact upon which it is based); Jeffries & Stephan, *supra* note 90, at 1389 (presumed fact must, more likely than not, flow from the proved fact on which it is made to depend).

138 *Combatting Racial Violence*, *supra* note 9, at 1273-74 (arguing that interracial violence imposes significant harms regardless of its motivation and independently of racial animus).

cial motivation.[139] In conclusion, therefore, the proposal to shift the burden of proof of motive in hate crimes would violate the constitutional rights of criminal defendants to proof beyond a reasonable doubt.

C. A "WHITES ONLY" PRESUMPTION OF RACIAL MOTIVATION

Commentators have also proposed that states shift the burden of proof on the issue of motive only in cases where a white defendant stands accused of attacking a minority.[140] Under this proposal, proof that the accused is white and that the victim is a member of a minority group would trigger a presumption of racial motivation. The proponents of this idea would explicitly exempt minority defendants from the presumption or racial motivation.[141] This proposal misunderstands the nature and dangers of interracial violence and would violate the Equal Protection Clause of the Fourteenth Amendment.[142]

1. Rationale for the Proposal

The principal rationale offered by proponents for this proposal is that, in subjecting white defendants to a presumption of racial motive, the state would discourage traditional prosecutorial bias against minorities. Proponents argue that prosecutors use existing hate crimes statutes against minority members at a higher rate than against white offenders because of their own prejudices.[143] While proponents offer no support for this statement, they argue that if states shift the burden of proof on the issue of motive and thereby ease convictions, prosecutors might exercise even more vigorous enforcement against minorities.

While some prosecutors may exercise their own racist beliefs in making decisions to prosecute individuals for hate crimes, proponents overstate this danger. State and local prosecutors increasingly have felt pressures to respond fairly to the problem of interracial

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139 The "rationally-connected" test requires proof that the proved facts normally evidence the inferred facts of a presumption. For examples of the test's application, see MacMillan v. State, 358 So. 2d 547, 549-50 (Fla. 1978) (Florida Supreme Court invalidates a statute making proof of tampering with utility meters presumptive evidence that the consumer of the services had done the tampering); State v. Curtis, 372 A.2d 612, 615 (N.J. Super. Ct. App. Div. 1977) (upholding similar statute as rational).

140 *See generally* Fleischauer, *supra* note 14; *Combatting Racial Violence*, *supra* note 9.

141 Fleischauer, *supra* note 14, at 703.

142 The Equal Protection Clause of the Fourteenth Amendment guarantees that a state shall not ". . .deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

143 Fleischauer, *supra* note 14, at 706.

violence. These pressures have made prosecutors more sensitive to the explosive nature of community responses to appearances of bias against minorities.[144] In addition, there exist numerous other means, such as independent watch-dog agencies and specific guidelines for the prosecution of hate crime cases, to address the problem of inadequate enforcement of hate crimes that do not raise the kinds of constitutional questions implicated in the whites only presumption of racial motivation.

Proponents also argue that the presumption of racial motivation in cases of violence committed by white defendants against minorities would deter the most egregious forms of racism. Violence by whites, according to proponents, produces harms not associated with other forms of interracial violence.[145] For example, consider the case of the beating of a minority by a white police officer.[146] Many minorities may consider the beating not an isolated incident of individual racism but an illustration of the racist nature of white society. Such incidents regularly create racial violence themselves.[147]

Proponents' argument in this regard fails in a number of ways. First, available statistics indicate that interracial violence between members of minority groups and by minorities against whites occurs frequently enough to warrant the attention of the criminal justice system.[148] For example, racially motivated violence against Asian Americans often involves members of traditional minority groups.[149] Depending on the makeup of the racial majority of the city or neighborhood where interracial violence occurs, offenders may be white, black, or another minority.[150]

Second, this type of violence poses the same types of dangers as white-on-minority violence motivated by racism. An attack on a

144 Witness the raucous atmosphere of the trial of six black teenagers accused of assaulting and raping a white jogger in Central Park in 1989. Denis Barricklow, UPI GENERAL NEWS WIRE, Dec. 11, 1990.

145 Fleischauer, *supra* note 14, at 1271.

146 Consider the beating of Rodney King by members of the Los Angeles Police Department in 1991.

147 The beating death of Arthur McDuffie, a black insurance executive, sparked large-scale racial rioting in Miami in 1980. When a jury acquitted the two white police officers accused of beating McDuffie, the black community regarded the trial as proof of the failure of the criminal justice system to condemn violence against blacks. U.S. COMMISSION ON CIVIL RIGHTS, *Confronting Racial Isolation in Miami* 242 (June 1982).

148 *See generally* U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 4.

149 *Id.* at 11.

150 The U.S. COMMISSION ON CIVIL RIGHTS reports that 144 of the 156 incidents of racial attacks in Boston against person of Asian descent were committed by whites. In Seattle, most perpetrators of similar violence were Hispanic and black. *Id.* at 38.

white person by members of a racial minority can create serious racial tensions and incite violence against minorities which is no less dangerous than white-on-minority violence.[151]

Third, proponents fail to define the categories of groups to be considered "white" or "minority" under the proposal. Existing hate crimes acts do not require the prosecution to prove the racial heritage of the accused or his or her victim. Under this proposal, however, states would need to develop explicit standards to assist the judge and jury in making consistent determinations of white or minority status.[152] Even if states could successfully elaborate clear guidelines for the determination of minority and white status,[153] these standards inevitably will fail to adequately protect persons victimized because of their religion. For example, "whites," like individuals of Jewish descent, apparently would not be protected under the proposed statutes even though they are victimized because of their religious beliefs. Similarly, the proposal would exempt racially-motivated violence by persons who are racial minorities but religious majorities. Finally, however state legislatures define racial categories, these definitions will neglect situations in which the accused mistakenly identifies the victim as a minority group member.

In conclusion, the rationale supporting a "whites only" presumption of racial motivation fails to account for the problems posed by interracial violence committed by minorities against other minorities or against whites. Furthermore, problems in defining the categories of "white" and "minority" persons undermine the proposal. More troubling, the proposal may fail to provide protection to other significant, historical victims of hate crimes, such as religious minorities.

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151 Consider the controversy which erupted after the attack on a Central Park jogger in New York City by a gang of black youths. For many, the attack and the criminal trial which followed indictment of the youths illustrated the city's highly charged racial atmosphere, not simply a case of rape. *See* Andrew Hacker, *Blacks' Silence on Blacks*, N.Y. TIMES, Dec. 13, 1990, at A31.

152 Proponents recognize that such standards will be needed but fail to note the contentious nature of ascertaining which minority groups should be protected under the statute. *See Combatting Racial Violence*, *supra* note 9, at 1272, n.7.

153 This process could undoubtedly provoke heated controversy. Homosexuals and women, for example, arguably have strong cases for inclusion under the category of "minority". *See* Lisa Heinzerling, *So Rape Isn't Hatred*, L.A. TIMES, May 4, 1990, at B7 (arguing that misogynist attacks on women are hate crimes); 136 Congressional Record, Vol. 1423, at H1424-1425 (April 3, 1990) (heated debate during passage of the Hate Crimes Statistics Act about the inclusion of sexual orientation as a category of persons victimized by hate crime).

2. *The Constitutionality of a "Whites Only" Presumption*

The "whites only" presumption of racial motivation also raises serious equal protection concerns.[154] The Equal Protection Clause protects individuals from discrimination based on race, religion, national origin, and sex. In order to guarantee individuals equal protection, courts subject any classification based on race to strict scrutiny.[155] Strict scrutiny analysis requires states to prove that such classifications are narrowly tailored to serve compelling government interests.[156] The proposed "whites only" presumption of racial motive clearly violates this standard.

Proponents, however, characterize the "whites only" presumption as a form of benign racial discrimination intended to benefit rather than disfavor minorities.[157] While the proposal implicates equal protection concerns, proponents argue that the proposal should be subject only to intermediate scrutiny.[158] Intermediate scrutiny analysis requires the state to demonstrate that racial classifications are substantially related to important government purposes.[159] Proponents argue that the presumption of racial motivation against white defendants will serve the important government objectives of remedying past discrimination in the prosecution of crimes against minorities and eradicating the most troubling forms of interracial violence.[160] The use of a presumption disfavoring whites, proponents argue, substantially relates to the achievement of these objectives.[161]

The proponents' argument is flawed in at least two ways. First,

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154 Current statutes which are not based on these types of classifications by race have survived equal protection challenges. *See* State v. Beebe, 680 P.2d 11, *appeal denied*, 683 P.2d 1372 (Or. Ct. App. 1984) (Oregon Supreme Court upholds the state's hate crimes act on equal protection grounds).

155 Strict scrutiny analysis originated in United States v. Carolene Products Co., 304 U.S. 144, 152, n.4 (1938).

156 Regents of the Univ. of California Board v. Bakke, 438 U.S. 265, 298 (1978) (invalidating a medical school's admissions quota policy on equal protection grounds).

157 Fleischauer, *supra* note 14, at 708, n.158; *Combatting Racial Violence, supra* note 9, at 1282 (benign racial discrimination is any legislation adopted by the majority that disfavors the majority).

158 This notion is based on a reading of the Fourteenth Amendment as intended to protect discrete and insular minorities rather than individuals generally. According to the argument, statutes which protect these groups but disfavor whites should be subject to intermediate scrutiny rather than strict scrutiny. *See* John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 728 (1974), *cited with approval in* Fleischauer, *supra* note 14, at 707-708.

159 *See generally* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, 16-33 (2d ed. 1988); Craig v. Boren, 429 U.S. 190, 197 (1976).

160 *Combating Racial Violence, supra* note 9, at 1284.

161 *Id.* at 1285.

the Supreme Court explicitly has rejected the notion that forms of benign racial discrimination, such as the proposed presumption, should be subject to intermediate scrutiny.[162] All race-based classifications, with the exception of those enacted by Congress, must pass the strict scrutiny standard for equal protection determination.[163] While states arguably have a compelling interest in remedying past discrimination and deterring white-on-minority violence, the proposed "whites only" presumption is clearly not tailored to serve these objectives.

In determining whether a state has narrowly tailored a statute to serve its interests, courts will examine whether non-racially based alternatives might have adequately served those same ends.[164] The proposed presumption undoubtedly would improve the ability of prosecutors to obtain hate crimes convictions, but better enforcement of existing statutes arguably would achieve these same objectives.[165] In addition, racial classifications, like the one implicit in the "whites only" presumption, must remedy specific forms of past discrimination rather than general societal imbalances in order to serve compelling government interests.[166] The presumption will not compensate minority members victimized in the past because of their race. Only past victims who find themselves newly victimized will have an opportunity to recover civil damages from the persecutors under the statutes. Others, who may understandably take pleasure in seeing white defendants serve increased penalties for committing interracial violence, will hardly be remedied by that experience.

Second, the presumption of racial motivation violates the Equal Protection Clause's prohibition on statutes which are either over- or under-inclusive.[167] The problem of including religious and other minorities under the "whites only" presumption clearly indicates

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162 City of Richmond v. Croson, 488 U.S. 469, 493 (1989) ("Absent a searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple race politics.").

163 Proponents' argument for the "white's only" presumption falters here by relying on Fullilove v. Klutznick, 448 U.S. 448 (1980), to support their argument for intermediate scrutiny. *Combatting Racial Violence*, *supra* note 9, at 1283. Fullilove held that Congress may constitutionally adopt set-aside programs for minority contractors without violating the Equal Protection Clause. The Court has subsequently held that states, in contrast to Congress, are subject to strict scrutiny analysis for Equal Protection purposes. Croson, 488 U.S. at 490.

164 United States v. Paradise, 480 U.S. 149, 171 (1987).

165 Mazur-Hart, *supra* note 10, at 214.

166 Croson, 488 U.S. at 507.

167 *Id.* at 506.

that the presumption suffers from over-inclusion. The proposal will exclude large groups of persons victimized by racially-motivated violence, like religious minorites, while including "innocent" white defendants unable to prove the affirmative defense of no racial motivation.

3. Suggestions for Change

The proposal to shift the burden of proof to white defendants in hate crimes prosecutions fails, in large part, because its proponents do not adequately distinguish unconscious racism from racial animus.[168] Any effort to make existing hate crimes statute more effective must consider how each form of racism plays a role in the commission and prosecution of hate crimes.

States' failure to clarify the evidentiary standard intended by the requirement of proof that the accused attacked his or her victim "because of" racial motivation allows many expressions of racial animus to go unprosecuted under current statutes. The establishment of a standard to determine whether an individual's acts evidence racial animus or unconscious racism would assist prosecutors in securing proper convictions while guaranteeing that offenders free of racial animus are not unjustly labeled as hate criminals. Possible standards include determining whether the defendant's sole, primary, substantial, or appreciable motivation in committing the crime was racism.

A "sole" or "primary" causation standard for racial motivation would seriously limit the ability of prosecutors to secure hate crimes convictions because of the problems inherent in proving a single motive behind an individual's conduct.[169] As noted previously, individuals are rarely motivated by any single animus, whether it be racism or some other factor. Proving racism was the sole or primary motivation of the defendant, accordingly, would be unduly burdensome of prosecutors.

An "appreciable" causation standard, on the other hand, would subject individuals whose conduct was influenced only by unconscious racism to conviction under existing hate crime stautes.[170] Ra-

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168 "Unconscious racism" can be defined as the baggage of prejudgments and stereotypes that each individual carries with him or her when meeting a person of a different background. "Racial animus" is the translation of those prejudices into actions which directly injure persons of these different backgrounds. *See* Hernandez, *supra* note 9.

169 The Supreme Court has expressly rejected this standard in the context of discriminatory legislative motive. *See* Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

170 *But see* Administrator of Massachusetts v. Feeney, 442 U.S. 282 (1983) (Marshall,

cism may play an appreciable role in much of the interraction between persons of different backgrounds, particularly when each is ignorant of the other's background. To adopt an appreciable causation standard of racial motivation, accordingly, would very likely subject many such persons to conviction, even though their racism was unconscious.

A "substantial" causation standard for racial motivation would appear to be the best means of distinguishing racial animus from unconscious racism.[171] Under this standard, proof by the prosecutor that the defendant's acts were substantially motivated by racism would result in conviction, regardless of the defendant's claims of other motivating factors.[172] At the same time, this standard would allow defendants whose acts, in fact, were substantially motivated by factors other than racism to introduce evidence to that effect. For these reasons, states should amend existing hate crimes statutes to include a requirement that racism was a substantial cause of the defendant's conduct.

States' failure to provide prosecutors with explicit guidelines for determining whether a criminal act was motivated by racism also allows many forms of racial animus to escape prosecution under existing hate crimes statutes. Without such guidelines prosecutors must rely on subjective factors in making decisions about whether to charge an individual with a hate crime.[173] These factors will inevitably include prosecutors' own beliefs about the types of incidents that constitute hate crimes and those that do not. Given the prevalence of unconscious racism in society, prosecutors will not bring hate crimes charges in many cases involving defendants of their own race, religion, or ethnicity.[174]

The establishment of prosecutorial guidelines and oversight mechanisms would reduce the influence of unconscious racism in the enforcement of hate crimes statutes. First, states should require prosecutors to report all crimes where there is evidence that the de-

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J., dissenting) (proposing an "appreciable role" analysis in determining discriminatory legislative motive).

171 This standard has been adopted by courts in determining whether individuals have violated 18 U.S.C. § 245(b) which prohibits the deprivation of another's constitutional rights because of that person's race, religion, or ethnicity. *See, e.g.*, United States v. Bledsoe, 728 F.2d 1094 (8th Cir. 1984).

172 *Id.* at 1098 (rejecting defendant's claim that his killing of a black transient was not solely motivated by racism).

173 Mason & Thompson, *supra* note 28, at 112.

174 "Unconscious racism causes many prosecutors not to treat racial violence as a serious crime or consider its victims true victims." Stephan L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 421, n.3 (1988).

fendant selected his or her victim on account of race, religion, or ethnicity.[175] Factors which prosecutors might consider in determining whether the defendant selected the victim for these reasons include any racial slurs used during the altercation, the past relations between the defendant and victim, and neighborhood racial or religious tensions.[176] Second, states should establish independent agencies to oversee prosecutorial decisions to charge persons with hate crimes.[177] These agencies would investigate accusations of bias by prosecutors and establish regulations for punishing prosecutors who demonstrate patterns of racially-biased decision-making.

The adoption of mechanisms to encourage victims of hate crimes to bring civil actions against their persecutors would also make existing hate crimes statutes more effective.[178] Such mechanisms might include actual assistance of litigants in the preparation of their cases and public information directed at informing the general public of the existence of civil remedies to hate crimes. Because of the difficulty of proving racial motivation beyond a reasonable doubt in criminal cases, the deterence of hate crimes might be more effectively accomplished through civil damage actions under the preponderence of the evidence standard.

V. CONCLUSION

Current hate crimes statutes require prosecutors to prove that the accused acted out of racist motives in committing a criminal act. Due to the inherently ephemeral nature of motive, this burden has proven extremely difficult for prosecutors to meet. Only a small number of persons have been successfully prosecuted under the statutes, while many others whose acts evidenced racial animus have escaped hate crimes prosecution.

In response, commentators have proposed that states shift the burden of proof on the issue of racial motivation to white defendants who attack members of minority groups. While this proposal would undoubtedly enable prosecutors to obtain more hate crimes convictions, it also would violate the Due Process and Equal Protec-

175 *See, e.g.*, Special Order, Community Disorders Unit, Boston Police Dept., S.O. No. 78-28, April 7, 1988 (*reprinted in* U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 3, at 30). *See also*, MN. STAT. ANN., Ch. 626.5531 (West 1991) (police reporting requirements for crimes evidencing hate).

176 *Id.* at 37.

177 Hernandez, *supra* note 9, at 855-860.

178 Civil damage actions may be the preferred option for many victims of hate crimes. *See* Robb London, *Sending a $12.5 Million Message to a Hate Group*, N.Y. TIMES, Oct. 21, 1990 at B20 (jury awards $12.5m in civil damages to relatives of an Ethiopian man beaten to death by members of the White Aryan Resistance).

tion Clauses and subject persons influenced by unconscious racism to unwarranted convictions.

The solutions to the problems experienced by current hate crimes legislation lie in distinguishing racial animus and unconscious racism. First, states must adopt a clearer standard of proof of the defendant's motivation. States should require prosecutors to prove that racism was the substantial motivating force behind the defendant's conduct. Second, states must provide guidelines and oversight over prosecutorial decisions to charge individuals with hate crimes. These decisions may be influenced by the racism of prosecutors themselves unless checked by states. Finally, states should establish agencies to encourage victims of hate-motivated violence to bring civil damage actions. Only when states adopt these measures will we begin to resolve the inherent problems of the motive requirement of existing hate crimes statutes.

JAMES MORSCH