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BIAS CRIME LEGISLATION: A CONSTITUTIONAL REBUTTAL TO *STICKS AND STONES* . . .

by

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INTRODUCTION

Within a few hours after midnight on June 21, 1990, a group of teenagers burned a cross on the lawn of the only black family in a white neighborhood in St. Paul, Minnesota.[1] No words were exchanged but the general message was clear: we hate you, we want you out, you should be afraid, we might hurt you. But words could only begin to convey the terror and threat that the burning cross was meant to symbolize.

The teenagers in this case were arrested and convicted under Minnesota statutes for the crimes of ethnic intimidation and racially motivated assault.[2] Such statutes criminalize certain bias-motivated activities or prescribe higher penalties for crimes motivated by bias. One of the teenagers convicted in the St. Paul case challenged the Minnesota statutes on First Amendment and Due Process grounds in the United States Supreme Court.[3] The parties, their acts, and the statutory attempts to punish them are not unique to Minnesota. They exist in a variety of

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[1] *In re* Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991); *see also* Brief *Amicus Curiae* of the American Civil Liberties Union, and American Jewish Congress, in support of Petitioner in R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538 (1992).

[2] St. Paul, Minn. Leg. Code 292.02 and 609.2231 (1990).

[3] R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992). In *R.A.V.* the Court struck down a statute which differed significantly from the prototype penalty enhancement statute discussed in this article. It provided:

> 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, creed, religion or gender commits disrderly conduct and shall be guilty of a misdemeanor.

St. Paul, Minn. Legis. Code § 292.02 (1990).

Petitioner was also convicted of racially motivated assault but did not challenge the constitutionality of that statute which provides in relevant part:

> Subd. 4. Assaults motivated by bias. (a) whoever assaults another because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability . . . , age, or national origin may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000 or both.

Minn. Stat. § 609.2231(4) (1990). *See R.A.V.*, 112 S. Ct. at 2541 & n.2. This statute is much more similar to the penalty enhancement statutes discussed in this article than is the one struck down by the Court.

forms throughout the United States[4] and have become the subject of much debate in academic and legal circles.

In a recent article, Susan Gellman of the Ohio bar provides perhaps the clearest and most persuasive arguments against these statutes both on constitutional and policy grounds.[5] This paper is, in many respects, a response to her arguments. It will first briefly discuss the need for bias crime legislation. It will then address the various forms of such statutes and respond to the constitutional objections of vagueness, overbreadth and infringement on free speech as set forth in Gellman's article. The paper will analogize the statutes to civil rights and anti-discrimination legislation and the principles behind sentencing discretion. Finally, the paper will conclude that, with proper drafting and tailoring, the statutes can be justified by a compelling state interest.

THE NEED FOR GOVERNMENTAL ATTENTION TO BIAS-RELATED CRIME[6]

In New York City, perhaps the most ethnically and culturally diverse city in the country, bias-related crimes made headlines throughout the latter half of the 1980's.[7] In Howard Beach and Bensonhurst, black men were chased, beaten and killed after entering white neighborhoods where "they didn't belong."[8] In Brooklyn, a house to be sold to a black family was set on fire to discourage blacks from moving into an all-white neighborhood.[9] Overall, New York City experienced a 300% increase in bias related crimes between 1983 and 1988.[10] Finally, in the first few weeks of 1992, black and latino school children found themselves the victims of racial violence when they were beaten and painted white.[11]

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[4] All but four states, Arkansas, Nebraska, Utah, and Wyoming, now have some form of bias crime legislation. *See* NAT'L L.J., May 21, 1990, at 3.

[5] Susan Gellman, *Sticks and Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws,* 39 U.C.L.A. L. REV. 333 (1991).

[6] The compelling policy reasons for legislative attention to bias crimes have been documented in great detail elsewhere. This section provides only a brief and limited synopsis of those articles. *See infra* notes 7-13.

[7] The recent rise in incidence of bias crimes is by no means limited to New York City, but rather seems to be a national trend. *See* Schoolman, *Bias Crimes Against Gays Increasing in Major U.S. Cities,* Reuters, March 6, 1991; *Attorney Richard Glovsky Responds to Hate Crimes Report,* PR Newswire Association, Feb. 6, 1991; *Proof that Bigotry Crimes Don't Pay,* CHICAGO TRIBUNE, June 19, 1990, at 14 (final ed.); Curry, *Apparent Rise in Bias Crimes May Lead to Records Law,* CHICAGO TRIBUNE, Oct. 1, 1989, at 31 (final ed.).

[8] *See,* N.Y. TIMES, Dec. 21, 1986, at A1, col. 3; N.Y. TIMES, Aug. 30, 1989, at B4, col. 3.

[9] ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CRIMINAL LAW COMMITTEE, PROPOSED LEGISLATION TO INCREASE PENALTIES FOR CRIMES MOTIVATED BY BIAS 1 [hereinafter CRIMINAL LAW REPORT].

[10] *Id.*

[11] *See* Richardson, *61 Acts of Bias: One Fuse Lights Many Different Explosions,* N.Y. TIMES, Jan. 28, 1992, at B1, col. 2 (late ed.).

As the white-face painting of the minority school children makes clear, the danger posed by bias crimes is in no way limited to the physical. In addition, acts of hate and violence directed at victims because of their immutable group characteristics impact not only the individual victims. A single bias crime can affect an entire community, leaving members of the victim's racial group both afraid and distrustful of society and in doubt of their own self-worth.[12] These feelings, in turn, lead to physical and psychological manifestations at school and on the job.[13] To combat such race-based stigma and restore the faith of minority populations in governmental authorities, state governments need to take some affirmative steps. One such way is through legislation.

EXISTING BIAS CRIME LEGISLATION

Currently, there exist three general forms of bias crime legislation: statutes which provide an enhanced penalty for existing crimes; statutes which explicitly proscribe certain presumptively bias motivated acts such as cross-burnings; and statutes which protect enumerated civil rights. Because most of the debate focuses on the penalty enhancement type of bias crime statutes, the constitutional objections to bias crime legislation in general will be addressed primarily with regard to these statutes. The constitutional arguments for and against each of these statutes are, however, analogous.[14]

While there are many variations of the penalty enhancement statutes, such as the one at issue in *R.A.V.*, the basic statutory scheme was drafted by the Anti-Defamation League. It takes existing criminal offenses and prescribes a higher penalty when the offender is motivated by bias.[15] Generally referred to as an ethnic intimidation statute, it provides:

> Intimidation:
>
> A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Sections __ of the Penal Code. (insert code provision for criminal

[12] *See* Note, *Combatting Racial Violence: A Legislative Proposal*, 101 HARV. L. REV. 1270, 1280 & nn. 45-6 (1988) (citing *Crimes of Prejudice a Matter of Motive*, N.Y. TIMES, Nov. 1, 1987, at E6, col. 3.).

[13] *See* Gellman, *supra* note 5, at 340-42; Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

[14] The biases covered by these statutes generally include those based on race and religion. In many states they also include sexual orientation. In some states they include gender and age as well. Throughout this paper, the biases will be discussed in terms of race for simplicity. The arguments apply generally, however, to all forms of bias against these groups.

[15] Gellman, *supra* note 5, at 339-40.

trespass, criminal mischief, harassment, menacing, assault and/or any other appropriate statutorily proscribed conduct).[16]

Despite the policy behind the enactment of penalty enhancement statutes, numerous objections to these statutes have been voiced. Challenges in state courts have had mixed results.[17] These challenges can be categorized as constitutional problems with vagueness, overbreadth and chilling of speech. Other objections concern arbitrary prosecution or under enforcement and resulting problems with equal protection.

Vagueness

Due process requires that a statute be specific enough to provide the person of ordinary intelligence with reasonable notice of what activities are prohibited.[18] The ADL model statute does not specify whose race, religion, etc. can be involved. Most likely it is intended to include those cases in which the direct victim of the crime is of a different race than is the offender. It might also be intended to include situations in which the offender and the direct victim are of the same race but the crime occurs "by reason of" the race of some party associated with the victim. For example, the statute might be intended to cover the assault by one white man of another white man because of his association with a black person.[19]

There are, however, situations which would fall into one of these categories but which the statute was not intended to cover. For example, if the statute were intended to cover the situation described above in which the race of a third party triggered the statute, it might also be construed to cover the situation in which a white man assaults another white man in response to the victim's racial epithets directed at a minority person. However, application of the statute in this situation would seem to contravene its very purpose.[20]

Finally, it seems completely unclear whether or not the statute would or should apply when the offender and the victim are of the same race, and the crime occurs "by reason of" the race of a completely unrelated third party such as a

[16] CIVIL RIGHTS DIVISION, ADL LEGAL AFFAIRS DEPARTMENT, ADL LAW REPORT: HATE CRIMES STATUTES: A RESPONSE TO ANTI-SEMITISM, VANDALISM, AND VIOLENT BIGOTRY 1 (1988 & Supp. 1990).

[17] *See, e.g.*, People v. Grupe, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988) (upholding New York's ADL type statutes); People v. Justice, No. 1-90-1793 (Mich. Dist. Ct. 1990) (striking down Michigan's ethnic intimidation statute similar to the ADL model statute); State v. VanGundy, No. 90-AP-473, 1991 Ohio App. LEXIS 2066 (April 16, 1991), *appeal granted*, 60 Ohio St. 3d 703 (1991) (finding Ohio's ADL type statute unconstitutional); State v. Wyant, No. 90-CA-2, 1990 Ohio App. LEXIS 5589 (Dec. 6, 1990), *appeal granted*, 60 Ohio St. 3d 703 (1991) (upholding Ohio's ADL statute); *see also* Gellman, *supra* note 5, at 344-53.

[18] *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). *See also* Gellman, *supra* note 5, at 355-57.

[19] *See generally* Gellman, *supra* note 5, at 355-57.

[20] *See generally id.*

political leader.[21] For example, should the statute apply in a situation where two white men get in a fight after engaging in a political argument about a racial figure such as Louis Farrakahn? If it should not, is it clear that it would not?

But, while vagueness may seem to present a problem, proper drafting can go far in eliminating the ambiguity inherent in the statute. For example, the model might be modified to read:

> A person commits the crime of intimidation if, by reason of bias against the actual or perceived race, color, religion, national origin or sexual orientation of the victim or another related individual or group of individuals, he violates Sections __ of the Penal Code. This section does not apply where the victim is not associated with the individual or group whose racial, ethnic, religious or sexual orientation is at issue.

This would eliminate the possibility that the statute would be invoked in the situation described above involving a fight over Louis Farrakahn. It would also eliminate the possibility that the statute would be invoked in the situation, also described above, involving a white person who hits another white person after the latter uttered a racial slur to a third person. Finally, it would not automatically apply in all situations where the offender and victim are of different races.[22]

The ADL model also suffers from vagueness with respect to the phrase "by reason of." The statute does not specify what degree of motive or purpose is required. That is, must the crime be committed *solely* because of, or can it be committed *primarily* because of, or *partially* because of another's race, religion, etc.? Without standards or some other form of clarification, the phrase "by reason of" will not indicate to the person of ordinary intelligence what mental state will trigger the higher penalty.

Again, better drafting and the inclusion of standards in the statute can solve the problem. By inserting the word "solely," "primarily" or "partially" before the phrase "by reason of," the legislators can provide adequate guidelines to put the public on notice as to what mental state is required during the commission of a crime to trigger the statute. While no format can provide complete preciseness, the drafting suggested above, perhaps with more detailed standards or examples in the comments or legislative history, can make the statute precise enough to pass constitutional muster.

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[21] *See generally id.*

[22] Some commentators have advocated such an automatic application, coupled with an affirmative defense, in cases where the victim is a member of a protected group and the perpetrator is not. *See* Note, *Combatting Racial Violence: A Legislative Proposal,* 101 HARV. L. REV. 1270 (1988); 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). Discussion of the constitutionality of such a legislative scheme is beyond the scope of this article.

Finally, the ADL model may be interpreted not as a penalty enhancement statute but as a statute which defines an entirely new crime.[23] Specifically, actions which might have been proscribed under existing statutes but are motivated by bias are not merely a variation of the existing crime, but rather an entirely different crime. The bias element adds a new dimension to the crime so as to change its very character. Critics then claim that the standards defining the non-bias crime can no longer be relied upon by potential offenders of the new bias-motivated crime.[24]

This objection poses a more interesting, if not more challenging, dilemma. It seems perfectly plausible for society to view the defacing of a synagogue with painted swastikas as a crime different in nature, rather than just degree, from defacing a subway car with generic graffiti. Thus, a statute proscribing such activity would not be one merely requiring a higher penalty for graffiti because of bias; rather it would be defining a different crime altogether. This should not, however, raise a constitutional problem; legislatures are in the business of defining new crimes and do so frequently. Simply because the actions proscribed by the two statutes are similar does not require identical or even similar culpability standards.[25] As with all other new crimes, the standards necessary for assessing guilt for a new crime can either be articulated by the legislature when enacting the statute or interpreted by the judicial system.

First Amendment Implications: The Creation of a Thought Crime and Overbreadth

Interpreted strictly as a penalty enhancement statute, opponents claim the statute creates a thought crime because a higher sentence is imposed simply because of the offender's motivating thoughts. The infringement on freedom of speech can seem blatant because the offender's words are often the only evidence to establish the motivating bias. For example, in *R.A.V.*, the conversations among the defendants in which the words "causing skinhead trouble" and "burning niggers" were introduced as evidence.[26] Likewise, a white man who assaults a black man while shouting racial epithets may be subjected to a stiffer sentence than he would have been had he not uttered the incriminating words. Opponents of bias crime legislation assert that such a possibility will have a chilling effect on speech.

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[23] The penalty enhancement interpretation does not implicate other vagueness problems but does implicate First Amendment problems.

[24] Gellman, *supra* note 5, at 357.

[25] For example, under the Racketeering Influenced and Corrupt Practices Act (RICO), Congress defined a new crime based upon the commission of two or more already existing crimes and a conspiracy. The definitions of the existing crimes remain the same but the culpability standards for the predicate acts and the RICO substantive offense are different. 18 U.S.C. §§ 1961-1968 (1988).

[26] These conversations were introduced as evidence of bias but were probably unnecessary because the drafting of the statute at issue in that case indicated a presumption that cross-burning implied a bias motive. *See* Brief Amicus Curiae of the American Civil Liberties Union, the Minnesota Civil Liberties Union, and the America Jewish Congress in support of Petitioner in R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992).

This argument is without substance. While the First Amendment undoubtedly protects a person's right to express thoughts or ideas, it does not permit wholly unfettered expression of any thought or idea.[27] It is not because the offender has such thoughts or ideas that he is punished under the statute, but rather because he chooses to act in a certain way because of them. The offender is constitutionally permitted to hold whatever beliefs he chooses and express them in many constitutionally protected ways. He may also choose to engage in criminal conduct and risk a penalty. It is not until he engages in criminal conduct because of his biases that he may be subject to the enhanced penalty.

The model statute can infringe upon First Amendment rights in more insidious ways. To show motive, the offender's associations or beliefs might be introduced as incriminating evidence. Thus, a known member of the KKK who commits a crime enumerated in a penalty enhancement bias statute may face a stiffer penalty because of his Klan membership.[28] Going even further, opponents fear that perhaps casual associations or interests (such as books owned or magazines subscribed to or lectures attended) may be used to show bias.[29] Thus, as with actual speech, people may be less willing to engage in such constitutionally protected activities.

This is a problem encountered in other situations as well. Certainly during the 1950's Red Scare, constitutional violations abounded.[30] More recently, in the rape trial of William Smith, the prosecution sought to introduce evidence of interactions between the defendant and other women.[31] In that same trial, the defense attempted to introduce evidence of the complainant's sexual history to show her willingness on the night in question.[32] The evidence in the recent examples, however, was appropriately not admitted. Similarly, evidence of a defendant's previous conversations, associations or interests not directly related to

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[27] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989) (government may impose time, place or manner restrictions of protected speech in public forum); Brandenburg v. Ohio, 395 U.S. 444 (1969) (no First Amendment protection for words intended or likely to produce imminent lawless action); United States v. O'Brien, 391 U.S. 367 (1968) (expressive conduct of burning draft card is symbolic speech and as such not entitled to full First Amendment protection); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (no First Amendment protection for fighting words).

[28] The inclusion of evidence of a defendant's membership in the Aryan Nation for sentencing purposes was challenged in the Supreme Court last term in Dawson v. Delaware, 112 S. Ct. 1093 (1992). While the Court prohibited the use of that evidence, it did so on such narrow grounds that the issue is far from settled. *See infra* note 46.

[29] *See* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CIVIL RIGHTS DIVISION, ANTI-BIAS LEGISLATION PROPOSED BY THE GOVERNOR 8 (1991) [hereinafter CIVIL RIGHTS REPORT].

[30] *See generally* Seth F. Kriemer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991).

[31] Under Florida law, evidence of prior acts or conduct can be admitted to show a pattern unless the judge finds the evidence unduly prejudicial. *See* WASH. POST, July 25, 1991, at A16 (final ed.); BOSTON GLOBE, Dec. 3, 1991, at 1.

[32] WASH. POST, Nov. 6, 1991, at A8 (final ed.).

the alleged offense should not be admitted in trials for bias crimes.[33] Since it can be done successfully in other trials, there seems little reason to doubt the possibility of success in this situation as well. Proper application of the rules of evidence, or perhaps adoption of more restrictive evidentiary standards for these crimes should solve the problem.

Other Objections: Arbitrary or Under Enforcement.

Opponents of bias statutes fear that they will be applied arbitrarily or disproportionately against those they were designed to protect. In New York, the majority of criminals are black men and the next largest group of criminals are hispanic men. Many victims are white females. Thus, if there is a presumption that the statute applies whenever the race of the victim is different from that of the perpetrator, the bias-crime statute is more likely to be applied to criminals who are members of the racial groups that the statutes were designed to protect.[34]

Likewise, bias crime statutes could frequently be used against those known to be racist or belonging to racist or unpopular organizations such as the KKK or the NAAWP. Such selective enforcement would infringe upon those individuals' constitutional freedoms of speech and association.[35]

Finally, some fear that these statutes may be enacted for symbolic reasons but will never be vigorously enforced.[36] For example, of the approximately 800 bias crimes that were brought to the attention of the New York City Bias Crimes Unit, only 33 were prosecuted.[37] With statistics like this, the existence of bias crime statutes may even be counterproductive; that is, they may serve to symbolize the government's blatant unwillingness to protect the recognized rights of its minority citizens.

Nevertheless, prosecutorial discretion in other areas has been constitutionally upheld.[38] Selective enforcement is often a problem, as many laws are more often enforced against minorities than against members of majoritarian groups.

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[33] *See* CIVIL RIGHTS REPORT, *supra* note 29, at 7-9.

[34] *See* CIVIL RIGHTS REPORT, *supra* note 29, at 3; Gellman, *supra* note 5, at 361-62; *see also* Fleischauer, *supra* note 22, at 703-06 (arguing that Florida's bias crime statute should be amended so as to not apply where the perpetrator is a member of a protected racial group.).

[35] *See* Barclay v. Florida, 463 U.S. 939 (1983); *Cf.* United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983).

[36] *See* CIVIL RIGHTS REPORT, *supra* note 29, at 2-4; Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 YALE L.J. 845 (1990).

[37] Note, *supra* note 36, at 846.

[38] *See* Morrison v. Olson, 487 U.S. 654, 727-28 (1988) (Scalia, J. dissenting) ("If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. . . . Under our system of government, the primary check against prosecutorial abuse is a political one.").

Likewise, under-enforcement is also a problem in other areas of law as well.[39] These problems should not serve to defeat either the constitutional validity or the policy basis for bias crime statutes. Proper monitoring devices -- such as requiring police departments and prosecutors' offices to maintain records of bias crime reports -- can go far in helping to diminish such problems.[40] Moreover, application of strict evidentiary standards -- such as not allowing evidence of unpopular group associations or the mere utterance of racial remarks to trigger a bias crime statute -- can avoid infringement on the constitutional rights of freedom of speech and association.[41] Finally, selective enforcement can be challenged in the political arena if it were to occur.[42] If the possibility of selective enforcement were enough to invalidate legislation, bias crime statutes would not be alone in being struck down.

COMPARISON TO OTHER AREAS OF LAW: ANTI-DISCRIMINATION STATUTES AND SENTENCING DISCRETION

While the First Amendment is appropriately accorded a preferred position in our scheme of constitutional rights, it does not afford any absolute rights.[43] One must acknowledge this fact and compare the First Amendment rights implicated by other areas of the law to those implicated by bias crime statutes to fully analyze the constitutionality of these statutes.

Sentencing Discretion

A good example of constitutionally valid enhanced penalties for thought is found in the discretion accorded judges and juries in sentencing. With respect to federal crimes, Congress has provided that "no limitation shall be placed on the information concerning the background, character, and conduct of a convicted offender which a federal judge may consider for sentencing purposes."[44] While state sentencing guidelines vary with each jurisdiction, the state trial judge also has been historically granted extremely wide latitude with respect to sentencing discretion.[45]

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[39] *See, e.g.*, DeShaney v. Winnegbago County, 489 U.S. 189 (1989) (egregious failure of state to investigate and prosecute report of child abuse); *see also* V. DE FRANCIS, CHILD ABUSE LEGISLATION IN THE 1970'S 2-13 (1974) (advocating reporting laws to encourage prosecution).

[40] *See* Note, *supra* note 36, at 855-56; CIVIL RIGHTS REPORT, *supra* note 29, at 9-11.

[41] *See* CIVIL RIGHTS REPORT, *supra* note 29, at 7-9.

[42] *See supra* note 38.

[43] *See supra* note 27.

[44] 18 U.S.C. § 3577 (1982); *see* United States v. Tucker, 404 U.S. 443, 446 (1972) ("judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come."). *Cf.* United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983).

[45] *See* Williams v. New York, 337 U.S. 241, 247 (1949).

Gellman denies the validity of comparing bias crime statutes to sentencing with respect to First Amendment implications.[46] Her argument is based upon the distinctions between motivation, the mental state punished by bias crime statutes, and purpose or intent, the mental state punished by other criminal laws and often considered in determining sentences. Citing the well-known criminal law hornbook by LaFave & Scott,[47] she states:

> when A murders B in order to obtain B's money, A's intent was to kill and his motive was to get money. . . . "Intent" thus refers to the actor's mental state as it determines culpability based on volition, "purpose" connotes what the actor plans as a result of the conduct . . . and "motive" is the term for the actor's underlying, propelling reasons for acting, which may have no direct relationship to the type of conduct chosen.[48]

These distinctions, while technically accurate, miss the point in this context. With respect to bias crimes, the bright lines between intent, purpose and motive become blurred. If the perpetrator of a bias crime is motivated by his victim's race, it is also true that he intends harm to someone of that race, or that his purpose is to harm someone of that race. In the context of bias crimes, motive can easily be rephrased as the intent to harm a representative of a racial group. When the distinctions are based on such semantics, the two concepts must be inextricably linked. Thus, to declare bias crime statutes as constitutionally illegitimate because they penalize motive as opposed to intent is to rely on an invalid textbook-like distinction.

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[46] In its recent opinion in Dawson v. Delaware, 112 S. Ct. 1093 (1992), the Supreme Court specifically acknowledged that First Amendment rights similar to those involved in bias crime statutes are also implicated through judicial discretion in sentencing. In that case, a Delaware man convicted of murder challenged the use of evidence of his membership in the Aryan Brotherhood, a "white racist prison gang," as indicative of his character for sentencing purposes. He argued, *inter alia*, that even if the association is indicative of his character, use of such association as an aggravating circumstance in his penalty hearing violates his First Amendment rights to free speech and association. *Id.* Although the Supreme Court held that the inclusion of the evidence in this case was unconstitutional, it did so because the prosecution failed to provide evidence of the characteristics of the organization to which Dawson belonged, not because inclusion of evidence regarding associations would be unconstitutional per se. In fact, the Court specifically stated that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.* at 1097.

Thus, it does not necessarily follow that bias crime statutes also unconstitutionally infringe upon First Amendment rights. Bias crime statutes criminalize actions based upon motivation; the associations and speech presented as aggravating circumstances in penalty hearings often have nothing to do with the crime for which the defendant was convicted but rather are relevant to the issues of future dangerousness or of remorse. *See id.* Further discussion of the constitutionality of sentencing discretion and evidence presented at penalty hearings is beyond the scope of this article.

[47] W. LAFAVE & A. SCOTT, CRIMINAL LAW (2d ed. 1986).

[48] Gellman, *supra* note 5, at 364 (quoting W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.6 at 227 (2d ed. 1986)).

Moreover, even if we accept the distinctions between motive and intent in bias crimes, the First Amendment's protection of motive, but not intent, is not constitutionally compelled. Intent often implicates the same beliefs and thought processes that motive does. For example, while murder statutes may penalize intent, such intent, like motivation, is a product of thought and is often proved by the defendant's words. For example, a man who states that he believes that a husband has the right to kill a wife who is unfaithful may have such a statement used against him to show the requisite intent for murder, as opposed to manslaughter, if accused of murdering his adulterous wife. If this statement were to provide enough proof of such intent, the defendant would be convicted of a crime with a higher penalty simply because of his statement of beliefs.

Conversely, a defendant's level of remorse, which is often shown through his speech, is also considered at sentencing. Remorse may be considered a mitigating factor at sentencing, thus leading to a lower sentence, or a reward for the criminal's mental state. Conversely, the consideration of such a mitigating factor necessarily has a punishing effect on some, as a higher sentence will likely be imposed if a defendant does not believe that what he did was wrong or does not communicate remorse.

Similarly, sentencing reports for federal crimes generally include statements of the convict's religious and other associations.[49] Although at least one court has ruled that evidence of a defendant's association with members of an unpopular religious organization may not be used as an aggravating circumstance at the penalty phase, speech or association can be used as a mitigating factor or one which can be used to support a penalty within the lower range of the judge's or jury's discretion. Thus, First Amendment rights of speech and association are implicated by omission; a convict's failure to advocate certain religious beliefs or failure to associate with certain organizations may subject him to a higher penalty than if he had done so. This sentencing discretion has repeatedly been upheld as valid, despite the arbitrary and uncertain nature of a judge's or jury's opinions, which renders such sentencing discretion even more violative of First Amendment rights than the motive element of bias crimes statutes.

Ironically, Senator Simon introduced a bill directing the United States Sentencing Commission to include penalty enhancements in sentencing guidelines in federal cases where the crime was motivated by bias.[50] This position seems

[49] *See* United States v. Lemon, 723 F.2d 922 (D.C. Cir 1983). In United States v. Daniels, 446 F.2d 967 (6th Cir. 1971) the Court held that the sentencing judge abused his discretion by not considering the fact that the defendant's criminal actions were *motivated* by his religious beliefs.

[50] S. 2522, 102nd Cong., 1st Sess. (1992) ("Hate Crimes Sentencing Enhancement Act of 1992") (introduced April 2, 1992). *See* 138 CONG. REC. S4786-02.

The ACLU recently struggled with this issue and is in the process of adopting a position substantially similar to that taken in this paper. Interview with Ralph Brown, Professor Emeritus, Yale Law School (April 10, 1992).

somewhat inconsistent. If this bill is adopted, not only would a defendant's First Amendment rights be subject to the same possible violations as in the bias crime statutes, but the defendant would also be deprived of the due process accorded through proper and exact statutory drafting. Moreover, the imposition of a higher penalty by an individual judge or by a jury seems more arbitrary than an individual penalty that is statutorily delineated.

Anti-Discrimination Statutes

Federal discrimination and civil rights statutes are another example of statutes which penalize actions based upon thoughts or beliefs.[51] Gellman denies the validity of this comparison; she states that discrimination statutes punish action regardless of mental state.[52] That is, they punish action which has a discriminatory effect or "disparate impact," rather than action based upon discriminatory beliefs.

Discrimination, however, is not a random occurence. It is the product of hundreds of years of biases which have become so ingrained in our culture as to often be subconscious. One theory behind the disparate impact aspects of anti-discrimination laws is that bias-related motives or intent[53] are impossible, or at least extremely difficult, to prove.[54] Thus, for anti-discrimination statutes to be anything more than meaningless rhetoric, the biases are essentially presumed.[55]

The Supreme Court's articulation of the "business necessity" defense under Title VII supports this theory.[56] Put simply, if an employer engages in a practice which has a disparate impact, he cannot be found liable if he can show a legitimate business reason behind that practice.[57] In other words, the presumption of

[51] *See, e.g.*, 18 U.S.C. §§ 241-247 (criminalizing deprivation of civil rights); 42 U.S.C. § 1981, *et seq.* (defining civil rights and providing civil remedies for deprivation thereof); § 2000e - 2000e17 (Title VII); § 3600 *et seq.* (Fair Housing Act) (1977 & Supp. 1990).

[52] Gellman, *supra* note 5, at 367-68. Gellman admits that 18 U.S.C. § 242 (1988) involves a cognitive element but also correctly points out that this statute prohibits racially discriminatory action taken under color of law. Since the government has no First Amendment rights, her denial of the constitutional comparison of this statute to bias crime statutes is valid. *See Id.* at 367 n. 161.

[53] Once again, the distinction between motive and intent largely disappears. In Segar v. Smith, 738 F.2d 1249 (1984), *cert. denied*, 471 U.S. 1115 (1984), and Gay v. Waiters and Dairy Lunchmen's Union, Local No. 30, 694 F.2d 531 (9th Cir. 1982), the Court held that proof of "illicit motive" was essential to a claim of disparate treatment under Title VII.

[54] *See* Furnco Construction Co. v. Waters, 438 U.S. 567 (1978); *see also* Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U.L. REV. 799, 801-08 (Spring, 1985).

[55] *See Furnco*, 438 U.S. at 577 ("a prima facie case of employment discrimination raises an inference of discrimination only because those acts are presumed, if otherwise unexplained, to be more likely than not based on consideration of impermissible factors.").

[56] 42 U.S.C. § 2000e - 2000e-17 (1982) (Title VII). The Supreme Court first articulated the business necessity defense in Griggs v. Duke Power Co., 401 U.S. 424, 432-36 (1971).

[57] *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 446-47 (1982); Dothard v. Rawlinson, 433 U.S. 321, 339-40 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-35 (1975); *Duke Power*, 401 U.S. at 432-36. *See also* Willborn, *supra* note 54, at 800-03.

discriminatory motives can be overcome by proof of a non-discriminatory motive. It is not the disparate effects that are prohibited, but rather actions which *in reality* are the result of bias.[58]

To categorize all anti-discrimination and civil rights statutes as penalizing only actions with disparate effects, however, is to vastly limit the scope of these statutes. Because disparate impact can suffice to trigger an anti-discrimination statute does not mean that evidence of bias is wholly irrelevant in anti-discrimination statutes. For example, if a small town were almost 100% white and an employer in that town received only one application from a member of a minority group, rejection of that applicant would have no disparate impact. If that person were rejected because of the employer's biases, the rejection would still be prohibited under federal anti-discrimination statutes.[59] The cognitive element of bias would be the aspect that converted an otherwise legal action into one which could be punished.

CONCLUSION

Bias crime statutes are playing a vital role in the continuing development of our system of legal rights and remedies. They recognize that certain crimes affect a population significantly larger than the group of individual victims and thus are far more serious crimes against society. The more severe punishments they impose reflect the more serious nature of bias crimes.

Those who challenge these statutes on First Amendment grounds raise valid points which legislators should bear in mind when enacting such statutes. Consideration of these challenges should result in more precise drafting and in the enactment of other constitutional safeguards; it should not result in the failure to enact these laws. The need for bias crime statutes is compelled by conditions within our society, and their constitutional precedent has already been established.

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[58] Admittedly, the Court's rhetoric provides support for the theory that anti-discrimination statutes punish impact, not motive. In *Griggs v. Duke Power,* the Court held that absence of discriminatory intent did not redeem employment practices that have a harsh impact on minorities because Congress was concerned about consequences rather than underlying motives. 401 U.S. 424, 430, 432 (1971). However, in that same case, the Court stated that Congress enacted Title VII to remove barriers that discriminate invidiously on the basis of race. *Id.* at 431. Although perhaps seemingly contradictory, the two motives behind Title VII, as articulated in *Duke Power,* are not mutually exclusive. Rather, as the case analysis here shows, the statute was designed to cover both intended discrimination regardless of group impact and unintentional discrimination which has discriminatory effects. As the Court goes on to state, "Congress directed the thrust of the Act to the consequences of employment practices, *not simply* the motivation." *Id.* at 432 (emphasis added).

[59] *See* Furnco Construction Co. v. Waters, 438 U.S. 567 (1978). *See also* Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique,* 65 CORNELL L. REV. 1, 10-11, 14 (1979); Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases,* 32 STANFORD L. REV. 1129, 1129-30 & n. 3 (1980); Willborn, *supra* note 54, at 800-01.