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DOWN THE PASSAGE WHICH WE SHOULD NOT TAKE: THE FOLLY OF HATE CRIME LEGISLATION

*Marc Fleisher**

INTRODUCTION

In her dissenting opinion to *State v. Mitchell*,¹ Judge Shirley Abrahamson, while voting to uphold the constitutionality of the hate crime law that was before the Supreme Court of Wisconsin, acknowledged that if she were a member of the state legislature, she would not support such a law because she did not think it would "accomplish its goal."² After briefly reviewing the United States Supreme Court's unanimous decision upholding the constitutionality of the Wisconsin statute,³ I will contend that such

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¹ 485 N.W.2d 807 (Wis. 1992), *rev'd*, 113 S. Ct. 2194 (1993).

² *Id.* at 818 (Abrahamson, J. dissenting).

³ *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993). For an excellent article that anticipates the Supreme Court's decision in *Mitchell* but more fully develops arguments supporting the constitutionality of hate-crime statutes than does the Court, see Eric J. Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 COLUM. L. REV. 178 (1993).

legislation⁴ will not only "fail to accomplish its goal" but will actually do harm.

Criminal trials are peculiarly ill-suited forums in which to determine what will often be unknowable anyway -- whether the victim of an interracial act of violence was intentionally selected *because of his race*.⁵ Such inquiries into the inner recesses of a defendant's mind, and attempts to draw a causal connection between the defendant's motives and the crime itself, are even more elusive in the criminal context than in the "mixed motives" cases that comprise the majority of Title VII employment discrimination cases.⁶ It would be simplistic to reply that prosecutors can choose to include a "bias" count in the indictment when the evidence is sufficient to convict and decline to do so when it is not.

Because interracial acts of violence tend to attract heightened media attention, and can be both provocative and painfully

⁴ This article will address only assaults and homicides committed because of the affiliation of the victimized person. It will not address bias-motivated harassment and vandalism. The definitions of "assault" or "battery" vary from state to state. Hereafter, "assault" or "battery" will be used to mean the intentional causing of physical injury to another.

⁵ For convenience, I will use "race" to include race, color, religion, national origin and sexual orientation. These are the categories enumerated in the Anti-Defamation League's Model Bill. It reads, in pertinent part:

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 Section ___ of the Penal Code.

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

⁶ See generally Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17 (1991).

evocative to members of the victim's community, such acts create particularly intense political pressure upon prosecutors to charge a bias crime when the evidence truly does not support it. The public tends to assume precipitately that any interracial violence is also racially motivated.⁷ Yet such assumptions often do not comport with the conclusions ultimately drawn by prosecutors and juries who must attempt dispassionately to apply the law as explained to them to the evidence as they find it. Regardless of the prosecutor's charging decision -- not to mention the jury's ultimate verdict -- bias-assault statutes provide yet another cause of racial tensions and loss of confidence in the already ailing criminal justice system. Moreover, they are used by prosecutors against the very members of historically disadvantaged groups that they are intended to protect.

In conclusion, I will argue that the state can more effectively respond to racially charged crimes by vigorously enforcing traditional criminal statutes to prosecute all acts of senseless violence, regardless of the racial or religious identity of attacker and victim. Accordingly, prosecutors will not be required to prove why a particular senseless attack was committed, thereby prolonging and

⁷ For example, on November 15, 1993, two black youths approached an Israeli rabbinical student in the Crown Heights section of Brooklyn and demanded his wallet. As he began to hand the wallet to them, one of the assailants shot him in the lower back. As the pair fled without the wallet, one of them said "[expletive] Jew." Was this an afterthought, a spontaneous addition of insult to injury or proof that the victim was intentionally selected because he was Jewish? Rabbi Jacob Goldstein, chairman of Community Board 9, saw no ambiguity in it: "If they said that, it's absolutely a bias crime." The victim himself was more circumspect: "I'm confused. I'm not sure to this minute whether it was because I'm a Jew or they really did want my money." Kyle Smith, *Victim: Crown Heights Thug Called Me %&* Jew*, N.Y. POST, Nov. 16, 1993, at 2.

Supporters of this legislation themselves acknowledge that the use of a racial or religious epithet does not, in and of itself, provide proof beyond a reasonable doubt that the victim was intentionally selected because of his race or religion. See e.g., Brief *Amicus Curiae* of the Anti-Defamation League in Support of Petitioner [hereinafter *ADL Brief*]); *Mitchell*, 113 S. Ct. 2194. However, one cannot expect the general public to view such crimes from this dispassionate perspective, nor be attuned to the rigorous proof requirements of a criminal prosecution.

complicating the trial and impeding the ultimate goal of swift and certain punishment.

Wisconsin v. Mitchell.⁸ *Intent or Motive -- What's in a Label? (The Conduct's the Thing)*

In 1989, Todd Mitchell, a young black man, began discussing the movie "Mississippi Burning" with a group of his black friends. The group discussed a scene in which a white man beats a black boy while he is praying. Mitchell asked the group, "Do you all feel hyped up to move on some white people?"⁹ Soon after, a young white boy walked by and Mitchell said, "You all want to fuck somebody up? There goes a white boy; go get him."¹⁰ Mitchell then counted to three and pointed at the boy, after which the group ran towards him, beat him into unconsciousness, and took his sneakers. The boy remained in a coma for four days.¹¹ At issue in *Mitchell* was the constitutionality of a Wisconsin statute which provides that defendants who commit certain crimes be subjected to greater punishment when their victim has been "intentionally select[ed]...because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."¹² Mitchell was convicted of aggravated battery, which carries a maximum penalty of two years' imprisonment.¹³

⁸ 113 S. Ct. 2194 (1993).

⁹ *Id.* at 2196.

¹⁰ *Id.* at 2196-97.

¹¹ *Id.*

¹² WIS. STAT. § 939.645 (1990) ("penalty; crimes committed against certain people or property"). This statute is adopted from the Anti-Defamation League's (ADL) model hate-crime statute which uses such language as "by reason of the actual or perceived" race. ADL MODEL BILL. As of the Wisconsin Supreme Court's decision in *Mitchell*, twenty-five other states had enacted such penalty-enhancement statutes. *See Mitchell*, 485 N.W.2d at 811.

¹³ WIS. STAT. § 939.645.

The jury then concluded, under the bias statute, that the defendant intentionally selected his victim because of the boy's race. This finding exposed Mitchell to a potential sentence of seven years.¹⁴ Without this finding, the aggravated battery conviction would have carried a maximum sentence of two years.

The Supreme Court of Wisconsin reversed the court of appeals' affirmance of the defendant's conviction, holding that the bias-crime statute under which Mitchell was convicted violated his First Amendment right to freedom of speech. The United States Supreme Court granted *certiorari* on this issue, and in a unanimous and brief opinion, reversed the Wisconsin Supreme Court's decision, resulting in the reinstatement of Mitchell's conviction.¹⁵

Until the Supreme Court decision, the First Amendment issue essentially boiled down to two basic arguments. Those who challenged the constitutionality of such statutes characterized them as punishing bigoted beliefs, arguing that since the defendant was already being punished for the assault, the bias statute served merely to impose greater punishment for his bigoted motive.¹⁶ On the other hand, proponents of these statutes countered that they were not directed at an individual's thoughts, but at his *conduct*, which they characterized as the "intentional selection of a victim because of his race." The defendant "is being punished for acting

¹⁴ WIS. STAT. §§ 939.05 and 940.19(1m). Mitchell was ultimately sentenced to four years. 485 N.W.2d at 809.

¹⁵ The Wisconsin Court of Appeals held that Mitchell waived his equal protection claim and rejected his vagueness challenge outright. *State v. Mitchell*, 473 N.W.2d at 2 (Wis. Ct. App. 1991). The Wisconsin Supreme Court declined to address both claims. 485 N.W.2d at 809 n.2 (Wis. 1992). Mitchell renewed his Fourteenth Amendment claims in the Supreme Court, but since they were not developed below and fell outside the issue upon which the Court granted *certiorari*, the Court did not reach these claims either. 113 S. Ct. at 2197, n.2.

¹⁶ See Susan Gellman, *Sticks and Stones Can Put you in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 343 (1991). In its majority opinion in *Mitchell*, the Supreme Court of Wisconsin based much of its reasoning on Professor Gellman's article. See generally *Mitchell*, 485 N.W.2d 807 (Wis. 1992).

on those thoughts in a way that makes his conduct more reprehensible."¹⁷

Of course, under either characterization, determining whether an actor "intentionally selected" his victim because of his race requires a careful examination of the actor's mental state. It is truistic that one cannot make an "intentional selection" unless it is one's intent to do so, and such an intent is unlikely to arise from reasons other than bigotry. While the underlying statute -- aggravated battery -- merely requires proof that Mitchell intentionally *injured* the victim, the penalty enhancement statute requires proof that racial bias was the reason *why* he injured this *particular* victim.¹⁸ Accordingly, the Wisconsin Supreme Court concluded that the state punished the defendant more severely for his racial motive in committing the battery.¹⁹ It noted that motive -- the reason *why* the defendant committed a particular social harm -- is not ordinarily an element of a crime which must be proven. It is traditionally at sentencing that the judge considers motive in attempting to make a more finely calibrated assessment of moral blameworthiness.¹⁸ However, the Wisconsin Supreme Court was unable to explain why this is constitutionally significant. After all, if it is permissible for a judge to take motive into account at

¹⁷ James Weinstein, *First Amendment Challenges to Hate Crime Legislation: Where's the Speech?*, 11 CRIM. JUST. ETHICS 6, 8 (1992) (Symposium: Penalty Enhancement for Hate Crimes). For a persuasive articulation of the premise that racially motivated violence causes an "added injury," see *id.* at 10-13.

¹⁸ The American Civil Liberties Union, among others, argued in its *amici* brief, that all the statute technically requires is intentional selection based on race for whatever reason. Brief *Amicus Curiae* of the American Civil Liberties Union in Support of Petitioner [Authored by Stephen R. Shapiro (counsel of record) and John A. Powell], *Mitchell*, 113 S. Ct. 2194 (1993) [hereinafter *ACLU Brief*]. While this may be accurate as a matter of conceptual possibility, in reality, such "intentional selections" will invariably be motivated by racial bias.

¹⁹ 485 N.W.2d 807, 811-13 (Wis. 1992); 113 S. Ct. at 2197.

¹⁸ Assuming there is no justification for injuring or killing another, the defendant has committed a social harm regardless of motive.

sentencing,¹⁹ why could not a legislature make a specific motive an element of the crime that must be established by proof beyond a reasonable doubt?²⁰ Indeed, the Court had held in a prior case that a defendant's racial bias could be considered at sentencing in a capital murder case, provided that the prosecution could show that the bias was connected to the actual commission of the crime.²¹ Moreover, the Court reasoned that "motive plays the same role under the Wisconsin statute as it does under federal and state anti-discrimination laws."²²

The Court also distinguished *Mitchell* from *R.A.V. v. City of St. Paul*,²³ in which it held that while the city of St. Paul could prohibit "fighting words" in general, it could not selectively proscribe those fighting words that it found particularly offensive.²⁴ It reasoned that while the ordinance in *R.A.V.* was directed at expression, the statute in *Mitchell* was "aimed at conduct unprotected by the First Amendment."²⁵ It characterized such

¹⁹ 113 S. Ct. at 2199.

²⁰ As the ACLU noted in its *amici* brief, including motive in the definition of the crime affords greater protection to the defendant. ACLU Brief at 14, n.14.

²¹ See *Barclay v. Florida*, 463 U.S. 939 (1983) (plurality opinion) (holding Constitution did not prohibit sentencing court in capital murder case from taking into account elements of racial hatred in murder). Compare *Dawson v. Delaware*, 112 S. Ct. 1093 (1992) (holding evidence at sentencing phase of capital murder case of defendant's membership in Aryan Brotherhood inadmissible because not related to specific crime).

²² 113 S. Ct. at 2200. The Court specifically referred to Title VII "which makes it unlawful for an employer to discriminate against an employee 'because of such individual's race, color, religion, sex, or national origin.'" *Id.* See 42 U.S.C. § 2000e-2(a)(1) (1988).

²³ *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992).

²⁴ 113 S. Ct. at 2200-01. Such proscriptions, reasoned the majority, are impermissibly content based. See also *R.A.V.*, 112 S. Ct. 2538, 2542.

²⁵ 113 S. Ct. at 2200-01.

conduct as "bias-inspired" and concluded that the state could reasonably single it out as causing a greater societal harm.²⁶

Finally, the Court suggested that in order to prove that a particular crime is bias-motivated, the state will often need to introduce evidence of a defendant's prior statements or associations. The defendant had argued that this would have a chilling effect on speech because individuals would not feel free to express their bigotry knowing that it might later be used against them in a bias-assault prosecution. The Court rejected this concern as bordering on fatuous. It noted that the First Amendment does not preclude using evidence of a defendant's prior statements when they are probative of a material issue.²⁷

²⁶ Citing the briefs from the state and its *amici*, the Court noted that a state legislature could rationally conclude that "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." *Id.* at 2201.

²⁷ 113 S. Ct. at 2201. Of course, this is incontrovertible. For example, in a criminal trial, evidence that a non-Arizona resident stated, "I'm looking forward to my trip to Phoenix on Friday," would be probative of the fact that the defendant had the opportunity to commit the crime in Phoenix that Saturday. Because of the statement's relevance to the issue of identity, its use against him at trial would neither violate his First Amendment right to express his enthusiasm about a city nor chill his constitutional right to interstate travel.

Unfortunately, the Court chose to illustrate the point with a uniquely infelicitous example -- a forty-six-year old treason case: *Haupt v. United States*, 330 U.S. 631 (1947). See *Mitchell*, 113 S. Ct. at 2201-02. In *Haupt*, the Court held admissible evidence of conversations carried on "long prior to the indictment," 330 U.S. at 642, because they revealed the defendant's "sympathy with Germany and Hitler and hostility toward the United States." Accordingly, the Court reasoned, these statements were probative of the defendant's treasonous intent. *Mitchell*, 113 S. Ct. at 2202 (citing *Haupt*, 330 U.S. at 642). In effect, the Court left the door wide open to the admission of evidence of past associations and conversations that are ostensibly probative of a defendant's racist intent. *But cf.* *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). Of course a trial judge would have to conclude that the probative value of this evidence outweighed its potential for prejudice. See FED. R. EVID. 403(b). The potential for prejudice would be that the jury might, in effect, use the evidence to punish the defendant for his bad thoughts. As Professor Weinstein notes, this potential First Amendment problem is not limited to hate crime prosecutions. Weinstein, *supra* note 17, at 20 n.58.

Where's the Proof?

A Hate Crime statute of the type enacted by the state of Wisconsin requires proof that the defendant engaged in two levels of conduct: (1) the battery and (2) the "intentional selection because of race." Accordingly, it requires proof of two levels of culpable mental states: (1) that the defendant intended to injure his victim and (2) that he intended to select the victim because of his race. This latter proof requirement, whether labeled as an issue of "motive" or "intent," requires a far more subtle inquiry into the defendant's mind than does proof of whether he intended to injure or kill the victim.²⁸ Proof that the defendant intended harm may

For example, in a recent Florida case, a white defendant became involved in a verbal altercation about a minor traffic accident. The defendant was indicted for first degree murder for the death of the black man with whom he had argued. *Florida v. Loeb*. (4th Jud. Cir. Duvall County 1992) (available on VHS as *Trial Story, People v. Loeb*, Courtroom Television Network, Video Library Service, 600 Third Avenue, New York, N.Y. (212) 973-2822). The defendant contended that he acted in self defense. The prosecution's own witnesses agreed that the deceased had threatened the defendant with a brick. The issue was whether the defendant reasonably believed that the deceased continued to pose a threat of deadly force when the defendant shot him. The defendant was a member of a white supremacist organization. The prosecution was permitted to offer evidence of previous racist writings of the defendant and show a video of a local television interview he gave in which he expressed his extreme racist views. The court, in determining that the evidence was relevant to prove motive, concluded that it did not unduly prejudice the defendant.

However, one juror acknowledged that the evidence of the defendant's racist views had a profound impact on her: "It showed me what a dark heart he had. It shocked me; I've never been the same since." She also asserted that the jury made substantial use of the evidence to "help determine motive." Telephone interview with juror (Feb. 23, 1994). No doubt the judge's inclination to admit the evidence would have been even stronger had the crime charged actually required the prosecution to prove a racist motive.

²⁸ One commentator argues, in the employment discrimination context, that intention is not necessarily a mental state that can be located in the mind. Gudel, *supra* note 6, at 82-88. See also A.C. MACINTYRE, *THE UNCONSCIOUS: A CONCEPTUAL STUDY* 53 (R.F. Holland ed. 1958). In the criminal context, this is intuitively appealing when one considers, for example, how quickly and easily a gun can be fired, without the actor necessarily hearing himself think "I intend

be inferred from the conduct itself. Yet it may often remain a mystery *why* a particular act of violence occurred. It may be described as senseless, gratuitous or arbitrary. Indeed, up until the very day of sentencing, the defendant's motives may remain enigmatic, even to himself.²⁹ Yet under the law of homicide or assault, the unjustifiable infliction of injury is -- regardless of the reasons behind it -- a punishable social harm. Moreover, the very arbitrariness of an assault can legitimately be considered an aggravating factor at sentencing. Conversely, if the defendant was particularly distraught at the time of the attack, perhaps responding to provocation by the victim, the sentencing judge might well consider this to be a mitigating factor.³⁰ To be sure, the reason why a defendant decides to injure or kill a victim (e.g, for money, or because he hates Jews) has traditionally been characterized not as an issue of intent, but one of motive.³¹ The nomenclature, however, is insignificant. A racial motive by any other name such as "intent" would be as difficult to prove.

When the race, religion, sexual orientation or gender of the victim and victimizers is different, that fact alone often creates the

to kill you." *See generally* Gudel, *supra* note 6. Professor Gudel argues that the defendant's conduct should be interpreted as one would interpret a painting or a text instead of trying to find the intent of the Title VII defendant, and then impose a tort model of "but for" causation between that intention and the discriminatory act. *Id.* at 86-87. However, he ultimately acknowledges that to understand the conduct as discriminatory, one will ordinarily have to inquire into the defendant's state of mind. *Id.* at 87-88.

²⁹ Even if the defendant thinks he knows why he did it, the answer to the question "What were *the* reasons?" may well differ from the answer to the question, "What were *his* reasons?" *See generally* R.S. PETERS, *THE CONCEPT OF MOTIVATION* (R.F. Holland ed. 1958).

³⁰ Indeed, murder may be reduced to manslaughter when the jury finds that the defendant acted out of a "heat of passion" resulting from adequate provocation, *see e.g.*, *California v. Berry*, 556 P.2d 777 (Cal. 1976), or acted under "extreme emotional disturbance" for which there was "a reasonable explanation or excuse." MODEL PENAL CODE, § 210.3 (1991).

³¹ *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, *CRIMINAL LAW* § 3.6 at 227 (2d ed. 1986). *See also* Gellman, *supra* note 16, at 364-66.

perception that the assailants³² intentionally selected the victim because of his group identity. Since crimes in which racial animus may play a role are ordinarily not conspiracies to target a specific member of a group,³³ but rather, are fast-escalating street encounters, how does one go about concluding whether an individual intentionally selected his victim "because of" his race? Can there be an answer? Since "hate crimes" have been compared to, and indeed are justified by employment anti-discrimination laws,³⁴ it might be useful to look briefly at the particular problems of proof that plague those cases.³⁵ This may shed light on the ways in which proving discrimination or intentional selection in the street-violence context presents even greater problems.

It should be noted, however, that there is a basic distinction between employment discrimination cases and "hate crimes." When an individual is assaulted or killed, such conduct is itself

³² I use the plural because "[t]he overwhelming majority of bias crimes are committed in groups of four or more." Abraham Abramovsky, *Bias Crimes: A Call for Alternative Responses*, 19 FORD. URBAN L. J. 875, 887 (1992) (Citing Daniel Goleman, *As Bias Crime Seems to Rise, Scientists Study Roots of Racism*, N.Y. TIMES, May 29, 1990, at C1).

³³ For example, a white supremacist group plots the attack on a newly-arrived black family in the neighborhood, or a gang of "gay bashers" cruises a neighborhood in search of a gay victim. Bias crimes "are usually street crimes spontaneously committed." Tanya Kateri Hernandez, Note, *Bias Crimes: Unconscious Racism in the Prosecution of Racially Motivated Violence*, 99 YALE L.J. 845 (1990). See also, James Jacobs, *Rethinking the War Against Hate Crimes: A New York City Perspective*, 11 CRIM. JUST. ETHICS 55 (1992) ("Hate crime appears overwhelmingly to be a phenomenon of individuals and youth gangs, not of organized racist and homophobic groups."); Brian Levin, *Bias Crimes: A Theoretical and Practical Overview*, 4 STAN. L. & POL'Y REV. 165, at 167 (1992/1993).

³⁴ *Mitchell*, 113 S. Ct. at 2200.

³⁵ For an intelligent and thought-provoking review of the history of Title VII litigation on the issue of proof of discriminatory treatment in the workplace, and what the author views as the underlying fallacy of the courts' approaches, see generally Gudel, *supra* note 6.

punishable.³⁶ In Title VII cases, the relevant underlying conduct, such as hiring, firing, and promoting is innocuous. It is only upon trying to resolve the thorny issue of whether the employment decision was made *because of* the plaintiff's race that the conduct becomes actionable. What makes the issue thorny, as anyone familiar with Title VII litigation is aware, is the typical "mixed motives" case in which it must be determined whether the employer's actions were taken "because of" the plaintiff's race, color, religion, gender, or national origin.³⁷ As one commentator put it, Title VII case law has revealed "a startling variety of approaches" to the meaning of the phrase "because of."³⁸ In determining what roles that discriminatory animus must play in finding intentional discrimination, courts have always required a showing of "but for" causality³⁹ for the employment decision. Recognizing the difficulty of proving causation, some courts have shifted the burden of proof to the defendant to establish that the adverse employment

³⁶ Therefore, the taking on of an additional and elusive level of proof is unnecessary to convict and punish the defendant. Later in this article I argue that taking on this burden of proof undermines, rather than promotes, the goal of swift, certain and even-handed prosecution of all unjustified acts of violence.

³⁷ These "mixed-motive" cases comprise the bulk of Title VII litigation. It is rare when evidence exists that an employer's sole reason for rejecting an applicant was personal animus towards the applicant's race. *See* Gudel, *supra* note 6, at 27. As Senator Case stated it in the Congressional hearings: "If anyone had an action that was motivated by a single cause, he is a different kind of animal from any I know of." 110 CONG. REC. 13837-38 (1964).

³⁸ Gudel, *supra* note 6, at 27. Professor Gudel's article presents an excellent and thorough review of the approaches taken by the circuit courts before the Supreme Court decided *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

³⁹ As Professor Gudel notes, to his chagrin, it is "universally accepted by courts and commentators, that the problem of mixed motives is a problem of causation, similar to problems of causation in tort law in which the causal link that courts must discover is one between an external event (the allegedly discriminatory act) and an internal entity or event (the discriminatory 'intent' or 'motive')." Gudel, *supra* note 6, at 19.

decision would have been made regardless of the defendant's discriminatory animus.⁴⁰

In the "mixed motives" employment discrimination cases the courts are ineluctably required to distinguish between the employer's legitimate and illegitimate motives, trying to determine whether the same decision would have been made absent racial animus.⁴¹ Professor Gudel has characterized this attempt as "hunting for unicorns."⁴² To be sure, in the criminal context, racial animus need not be the sole factor behind the selection process.⁴³ It is, however, clear that if the jury concludes that the incident would have happened anyway,⁴⁴ it is implicitly deciding that race was not a "motivating factor" -- that the victim was not "intentionally selected" because of his race.

⁴⁰ See Gudel, *supra* note 6, at 19. This approach was adopted in *Price Waterhouse*, 490 U.S. 228 (overruled in part and codified in part in the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (Supp. III 1991) (the 1991 Act retained the "but for" causation). Accordingly, the plaintiff would lose under a "but for" analysis if she were rejected for employment because of her race or gender but another applicant was so well qualified that he would have been hired even had the employer not rejected the plaintiff for impermissible reasons. Gudel, *supra*, note 6, at 96. In the criminal context, the only ostensible analogy to this "after-the-fact" approach which takes the bigoted employer off the hook would be the situation in which a gang's racial motives are placed into doubt because, during a rampage, they ultimately attacked a member of their own race as well. See SULLIVAN *infra* note 119 at 114.

⁴¹ A line of cases, however, interprets the mixed motives cases as giving the defendant the right to use after-acquired evidence of a legitimate reason to justify an employer's decisions. See Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusions of After-Acquired Evidence in Title VII Litigation*, 26 CONN. L. REV. 145 (1994) (publication pending).

⁴² Gudel, *supra* note 6, at 96. To convict a defendant for an act of violence, however, juries need not even imagine their existence.

⁴³ See, e.g., *United States v. Bledsoe*, 728 F.2d 1094, 1098 (8th Cir.), *cert. denied*, 469 U.S. 838 (1984).

⁴⁴ See *State v. Wyant*, 597 N.E. 2d 450 (Wis. 1992), *vacated* 113 S. Ct. 2954 (1993) (subsequent history omitted).

Imagine, then, that you are a juror in a criminal case and must determine, from the following account of an incident, whether in assaulting the victim, the defendant "intentionally selected" him *because of his race*.

The defendant, Shannon Siegel, a white high-school student, attends a party at which he is intoxicated. He becomes angry and uses racial epithets when he sees the victim, who is black, speaking with his former girlfriend, who is white. He had already known that the two were seeing each other. The victim and the defendant had previously socialized together among a racially-mixed group of students. It was common for these students to use racial epithets when bantering with each other. The defendant's feelings of rage and humiliation intensify when a group of the guests forces him to leave because of his boorish conduct.⁴⁵ Later that evening, the defendant, aided by four of his friends, stalks and brutally attacks the victim with a baseball bat.

This account is based on a case stemming from an incident that occurred in Atlantic Beach, New York that ultimately went to trial. Although New York did not (and as of this writing does not) have a bias-assault statute, the defendant *was* prosecuted under a misdemeanor aggravated harassment⁴⁶ statute which requires that the person be harassed "because of" his race.⁴⁷

⁴⁵ See Michael Alexander, "*I never Hit Him*"; *Suspect in Ewell attack says black youth was friend*, *NEWSDAY*, Nov. 19, 1992, at 4. (Nassau & Suffolk ed.).

⁴⁶ Aggravated harassment in the second degree. N.Y. PENAL LAW § 240.30 (McKinney 1991 & Supp. 1994).

⁴⁷ The statute provides, in pertinent part:

A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he: . . . 3. Strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race color, religion or national origin of such person.

Id. See also, N.Y. CIV. RIGHTS LAW §§ 40-c (Discrimination), 40-d (Penalty for Violation) (McKinney 1993) (This section of the Consolidated Laws of New York provides civil remedies for discrimination, and defines "harassment" by

Accordingly, the jury had to determine, under the harassment charge, whether the defendant attacked the victim *because of* his race or whether his rage was attributable more to racially transcendent factors -- feelings of jealousy about a former girlfriend and feelings of humiliation at being ejected from the party. A certain callow and intoxicated youth might resort to violence and might do so regardless of his victim's race. Indeed, where is the evidence that race played any part in the incident? It cannot be in the mere fact that the victim and the defendant were of different races. The two were not strangers to each other. And given the portrait of a drunk, jealous, rejected, and humiliated adolescent, how could the jury conclude beyond a reasonable doubt that the defendant was selected because of his race? By his use of racial epithets earlier at the party?⁴⁸ If he simply used the word in anger as a crude, vulgar and offensive attempt to wound his victim verbally as well as physically,⁴⁹ that might make him a racist, but it would not establish that he intentionally selected his victim "because of" his race.⁵⁰ And how does the defendant try to

reference to N.Y. PENAL LAW § 240.30).

⁴⁸ There was apparently some conflict at the trial about whether racial epithets were used. One witness alleged that the police coerced her to say that she heard the defendant use racial epithets and another witness was unable to recall the use of racial slurs. Michael Alexander, *Damaging Testimony in Beating Trial*, NEWSDAY, Oct. 31, 1992, at 12 (Nassau & Suffolk ed.). For the purpose of this discussion, I will assume that the defendant did use racial epithets earlier at the party.

⁴⁹ The defendant's former girlfriend, Nicole Diamond, testified that he had previously asked her "[w]hat are you doing with nigger money?" At the party, Diamond told Ewell, the victim, about the remark. Michael Alexander and Eric Nagourney, *Guilty of Assault, Siegel Innocent of Attempted Murder*, NEWSDAY, Nov. 22, 1992, at 3. There was no evidence that racial epithets were used during the attack.

⁵⁰ Indeed, the ACLU, which submitted an amicus brief supporting the constitutionality of the Wisconsin statute, has opposed a Florida bias statute which merely requires that in committing a crime the defendant "evidence[] prejudice." See ACLU Brief, at 8 n.6; FLA. STAT. § 775.085(1) (1991). The Florida statute shifts the focus from the conduct of "intentional selection." On its

convince the jury that he did not intentionally select the victim because of his race? In this particular case, the defendant's father took the stand and testified that his son had many black friends: "I'd say three-quarters of his friends are black. They have slept over at the house and call him on the phone."⁵¹ The father also asserted that his son "idolized" one of his black friends who was away at college.⁵²

It is not surprising that the defense wanted to adduce that "some of his best friends are black,"⁵³ although it is impossible to

face, it permits punishment of people who appear to be racists while committing a crime more than non-racists who commit crimes or for that matter, racists who do not evidence their racism as they are committing the crime. *See Richards v. Florida*, 608 So. 2d 917 (Fla. App. 1992) (holding statute "does not define with sufficient due process particularity what additional criminal act is required").

⁵¹ Alexander, *supra* note 45.

⁵² *Id.*

⁵³ This is the very type of abstract evidence of a defendant's racial attitudes of which the admissibility is highly questionable when offered by the prosecution because it has no connection to the crime charged. *See generally, supra* note 27 and *infra* note 81. While the Supreme Court took a cavalier approach to the issue of the state offering such evidence, it did not even address the fact that the defendant himself has the right to adduce character evidence that he is not a racist, and will often feel constrained to do so. *See* FED R. EVID. 404(a)(1). However, it is not clear what constitutes evidence of not being a racist, nor at times what a "racist" is, as the use of the word is ever expanding and ever open to different opinions as to its meaning.

As reported in the *New Republic*, a white man in Ohio also tried to prove he was not a racist by citing his relationships with black people. This prompted the following cross-examination:

Q. And you lived next door to [Mrs. Ware, a 65-year-old black neighbor]?

A. Yes

Q. Never had dinner with her?

A. No

Q. Never invited her to a picnic at your house?

A. No

Q. I want you to name just one [black] person who was a really good friend of yours.

know what effect it had on the jury. As it so happens, the jury convicted Siegel of first-degree assault, and acquitted him of the aggravated harassment and civil rights charges.⁵⁴ As one juror stated, "We asked ourselves: 'Would this have happened if Jermaine Ewell was white?' Our consensus was it would have. There was [sic] a great number of reasons that motivated the attack . . . embarrassment, ego being bruised and jealousy."⁵⁵

In an employment discrimination case, where the defendant acted with mixed motives, a plaintiff has a difficult enough time proving her case. In such cases, however, there may be evidence of other circumstances in which the defendant denied employment to qualified minority applicants or evidence that the person who was ultimately hired was not as qualified as the plaintiff. One thing

Jeffrey Rosen, *Court Watch: Bad Thoughts*, NEW REPUBLIC, July 5, 1993, at 16.

⁵⁴ Siegel was sentenced to the maximum penalty for first-degree assault: five to fifteen years. See N.Y. PENAL LAW § 120.10 and Art. 70 (McKinney 1987).

⁵⁵ Craig Gordon, *The Jermaine Ewell Case; What's Next? After Siegel's conviction, fewer witnesses against others*, NEWSDAY, Nov. 23, 1992, at 3 (Nassau and Suffolk ed.). The jury was instructed that under both the aggravated harassment and civil rights charges it would have to conclude that race was the sole factor which motivated the defendant to attack the victim. This is contrary to the federal courts' interpretation of its "private action" bias-crime statute, 18 U.S.C. § 245 (1983), which reads, in pertinent part:

- (b) Whoever, whether or not acting under color of law, by force or threat of force wilfully injures, intimidates or interferes with, or attempts to injure, intimidates or interferes with, or attempts to injure, intimidate or interfere with--
 - (2) any person because of his race, color, religion or national origin and because he is or has been --
 - (B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

See, e.g., Bledsoe, 728 F.2d 1094 (8th Cir. 1984) (discriminatory animus can be one of a number of motivating factors). *See also* *United States v. Ebens*, 800 F.2d 1422, 1429 (6th Cir. 1985). However, by concluding that the attack would have occurred even if Ewell had been white, the jury was implicitly concluding that it was not a motivating factor at all.

has remained a constant throughout these cases: there must be evidence of an intent to discriminate, and as in *Price Waterhouse v. Hopkins*,⁵⁶ that discriminatory animus must be a motivating factor in the employer's decision.⁵⁷ A number of commentators believe that this requirement unreasonably ignores the existence of unconscious racism; after all, a plaintiff is no less injured by an adverse employment decision merely because the defendant himself is oblivious to his own bigotry. In the *Price Waterhouse* case, the defendants professed that they denied the plaintiff partnership status because she lacked interpersonal skills when it was more likely they were engaging in impermissible gender stereotyping. It is certainly true that many who inappropriately allow gender or race to affect their decision-making do not admit this, even to themselves.⁵⁸

The argument that plaintiffs in employment discrimination cases should not have to prove that the defendant engaged in purposeful discrimination is surely untenable in the criminal law context.⁵⁹ Indeed, it would be unimaginable for a criminal court

⁵⁶ 490 U.S. 228 (1989).

⁵⁷ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Once the plaintiff establishes that it was a "motivating factor," the burden shifts to the defendant to establish that the employment decision would have been made anyway. This retains, as the dissent pointed out, the requirement of "but for" causation while tinkering with procedure. *Id.* at 279-94.

In the criminal context, without this "but for" requirement, one is no longer punishing conduct but instead punishing attitudes divorced from conduct. In any event, if a jury considers race a "motivating factor" in an assault, it would be paradoxical also to conclude that had the victim *not* been of that race, he would have been assaulted anyway.

⁵⁸ See Stephen Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 442 (1987). See also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1986-87); R.S. PETERS, *supra* note 29.

⁵⁹ In criminal law, an individual is only considered to have intentionally done something when it was his "conscious objective" to do so. See, e.g., N.Y. PENAL LAW § 15.05(1) (McKinney 1987). Accordingly, it would be a contradiction in terms to suggest that the defendant unknowingly intended to select a victim

to conclude that the "because of" requirement of a bias-crime statute could be satisfied by a jury finding of a causal connection between a defendant's *unconscious* racial motive and the race of his chosen victim.⁶⁰

because of race or intentionally selected his victim because of race when he was merely negligent or reckless with respect to the possibility that race inspired his selection.

Imagine, for example, that the jury concluded that although Siegel *himself* sincerely disavows it, the *real* reason he attacked Jermaine Ewell was that he couldn't tolerate the notion that a black man was with his white ex-girlfriend. Suppose it further concludes that he would not have resorted to violence had Ewell been white. Should he be punished more severely for what the jury concludes was his unconscious motive?

Consider the recent case of the American sailor who pleaded guilty in a military court to murder with intent to inflict great bodily harm. The fatal beating of the defendant's fellow shipmate was appallingly severe. The attack was widely perceived, by both sides of the debate over the military ban on homosexuals, as motivated by the victim's sexual orientation. Although there was no bias-crime statute under which the defendant could be prosecuted, the possibility that this was a case of gay bashing arose at the sentencing phase of the proceedings. The defendant testified that he had a temper: "I prayed that I could get rid of it, but I cannot." A psychiatrist testified that steroids, alcohol, and severe beatings suffered as a child at the hands of his stepfather may have helped trigger the defendant's violent rage. When asked whether he killed the victim because of the victim's homosexuality, the defendant responded, "No, I didn't. In all honesty I did not attack him because he was a homosexual." *See Tearful Murderer Discounts His Victim's Homosexuality*, N.Y. TIMES, May 27, 1993, at A16. How might a prosecutor prove him wrong? By calling a psychiatrist to testify that the defendant was a homophobe who had long-simmering unconscious conflicts about his sexuality which inexplicably came to the fore in a homicidal rage? Ironically, such evidence would provide a plausible mitigating defense under MODEL PENAL CODE § 210.3(1)(b) (extreme emotional disturbance).

Once it is acknowledged that the defendant is guilty of murder, should the defendant be punished more severely if the jury concludes that although the victim's race or sexual orientation was not his conscious reason for committing the act, psychiatrists and the jury know better?

⁶⁰ Nevertheless, a student commentator suggests that statutes should address "spontaneous violence" caused by "unconscious racism." *See generally*, Hernandez, *supra* note 33. This issue could only arise under those statutes, such as the model statute drafted by the ADL, which omit the words found in the Wisconsin statute -- "intentionally selects" -- and simply refer to the victim being

assaulted "because of" his race. It is certainly plausible to conclude that a person acted the way she did "because of" an unconscious motive. *See, e.g., MACINTYRE, supra* note 28, at 60.

Bias-crime statutes have been attacked in the past as being unconstitutionally vague on the theory that they do not specify the *mens rea* with respect to the conduct of selecting the victim. *See, e.g. Richards v. State*, 608 So. 2d 917, 921 (Fla. App., 3d Dist. 1992) (statute unconstitutionally vague because in providing for enhanced punishment when the defendant merely evidences prejudice in committing the underlying crime, "it is not clear whether a conscious prejudice is even required apart from the proscribed act itself, whatever that might be."); *see also State v. Van Gundy*, 1991 WL 60686 (Ohio App. 1991), 624 N.E.2d 722 (Ohio 1994); Gellman, *supra* note 16, at 355-57. In *Mitchell*, 113 S. Ct. 2194 (1993) the Supreme Court offered no guidelines whatsoever as to how such statutes should be drafted to pass Constitutional muster. The ACLU, in its *amici* brief had requested that the Court do so. *See* ACLU Brief.

Some courts have resolved the problem by reading in a requirement that the defendant intentionally select the victim because of his race. For example, the California Court of Appeals considered an attack against a statute prohibiting crimes "committed against [a] person . . . for the purpose of . . . intimidating or interfering" with her constitutional rights "because of the other person's race." CAL. PENAL CODE § 422.7 (1994); *People v. Joshua H.*, 17 Cal. Rptr.2d 291 (Cal. App. 1993). The court simply inferred that the statute required proof of a specific intent as to both the deprivation of the individual's constitutional or statutory rights and as to the act being committed "on account of the person's status." *Id.* at 295.

This is consistent with the federal courts' interpretation of 18 U.S.C. § 245 as requiring that the defendant "willfully injured . . . [the victim] because he was a black man." *See, e.g., United States v. Bledsoe*, 728 F.2d 1094, 1097 (8th Cir. 1984). In *Bledsoe*, the Eighth Circuit went on to explain, as other federal courts have done, that while race need not be the sole motive, it must be a "substantial motivating factor." *Id.* As such, one would have to conclude that "but for' the victim's protected status, the perpetrator would not have selected the victim for the crime." *Wisconsin v. Mitchell*, 485 N.W.2d 807, 827 (Wis. 1992) (Bablitch dissenting) (arguing that the words "because of" in the statute are not unconstitutionally vague).

In *Oregon v. Plowman*, 838 P.2d 558 (Ore. 1992), the statute at issue proscribed two or more persons from causing injury to another "because of their perception of that person's race." OR. REV. STAT. § 166.165(1)(a)(A) (1989). The defendant argued that this invites prosecution whenever the race of the victim is merely different from that of the defendant. The court concluded that the "because of" language required establishing a "causal connection between the infliction of injury and the assailants' perception of the group to which the victim belongs." The court analogized this standard to certain aggravating factors in

As discussed above, for the plaintiff to prevail in the civil context, it has always been necessary to establish that the defendant had a conscious intent to discriminate.⁶¹ The rationale for requiring a showing of such intent is even stronger in the criminal context because the consequences to the defendant are greater punishment and greater moral condemnation.⁶²

Moreover, insofar as the discriminatory selection is considered an essential element of the proscribed conduct,⁶³ a defendant who is not conscious that he is intentionally selecting the victim because of his race would be committing an involuntary act with respect to the bias aspect of the assault.⁶⁴

Oregon's murder statute in which a causal connection must be established between the murder and the victim's status as a witness, a juror, or some one else connected to the criminal justice system. By implication, the victim must be someone "whom the assailants have *targeted because of* their perception that the victim belongs to a particular group." *Plowman*, 838 P.2d at 563 (emphasis added).

Later in this article, I will argue that the mere difference in race often causes the public to assume that the act was racially motivated, which intensifies pressure on prosecutors to indict for a bias crime even when evidence of such motive is problematic.

⁶¹ See, e.g., 42 U.S.C. § 1981 (1991).

⁶² See, e.g., Pamela S. Karlan, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983). As Professor Karlan points out, in distinguishing constitutional law from criminal law cases, "[t]he central concern for equal protection law is remediation for victims; [in contrast to criminal law] any burden laid on equal protection defendants is incidental." *Id.* at 117. See definition of "Intention" *supra* note 59.

⁶³ See *State v. Mitchell*, 113 S. Ct. 2194 (1993); *Plowman*, 838 P.2d 558. This is the linchpin of the argument that such statutes are constitutional because they punish conduct that the state may reasonably view as more harmful to society. To be sure, as the Supreme Court acknowledged, there is a necessary interrelationship between the conduct and the mens rea. See *Mitchell*, 113 S. Ct. at 2199. Indeed, the very word "selection" implies conscious choice.

⁶⁴ National Conference of Commissioners on Uniform State Laws & American Law Institute, MODEL PENAL CODE § 2.01 (1980). The model statute provides in pertinent part:

Finally, the notion, incongruous to criminal law, that an unconscious intention could provide the requisite mental state for a criminal statute is to be distinguished from the strict liability doctrine, which makes irrelevant what the defendant may or may not have been conscious of or even should have been conscious of with respect to a specific element of the proscribed conduct. A finding of unconscious intention makes manifestly relevant the existence of a particular mental event in the defendant's mind⁶⁵ and a causal connection between that event and the ultimate selection of the victim.

Two student commentators have proposed a solution to the perception that it "is difficult, if not impossible, for any tribunal to accurately identify an accused's motives at the time of the alleged offense."⁶⁶ They suggest creating a "mandatory presumption of racist motivation in all violent interracial crimes,"⁶⁷ thus shifting to the defendant the burden of proving as an affirmative defense that he did *not* act out of racial animus or intend to select his victim because of his race.⁶⁸ This proposal contemplates prosecut-

(2) The following are not voluntary acts within the meaning of this section: . . .

(b) a bodily movement during unconsciousness or sleep.

⁶⁵ See generally MACINTYRE, *supra* note 28, at 45. Psychiatric testimony about unconscious motives may of course be relevant when the defendant himself interposes the defense of insanity.

⁶⁶ Helen L. Mazur-Hart, *Racial and Religious Intimidation: An Analysis of Oregon's 1981 Law*, 18 WILLAMETTE L. REV. 197, 204 (1982); see also Note, *Combatting Racial Violence: A Legislative Proposal*, 101 HARV. L. REV. 1270 (1988).

⁶⁷ 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, 701 (1990).

⁶⁸ Such burden shifting is generally constitutional so long as the state proves beyond a reasonable doubt all the elements of the crime as it is defined by the legislature. See *United States v. Patterson*, 432 U.S. 197 (1977). Under this proposal, the state would merely have to prove (1) the underlying crime of assault, and (2) that the defendant is white and the victim is a member of a

ing only those acts of violence committed "by whites against minorities."⁶⁹ No bias statute to date, whether state or federal, has prohibited prosecution when either a non-minority is a victim or a minority is a potential defendant.⁷⁰

Even assuming this "one-way street" approach to interracial violence did not violate the equal protection clause,⁷¹ it would certainly be politically unpalatable.⁷² These statutes are already criticized as valuing the safety of certain groups over others.⁷³

minority group. However, as one of the proponents acknowledges, the definitions of "white" and "minority" are themselves subject to ambiguity. *Combating Racial Violence*, *supra* note 66, at 1272 n.9. Then, in the second phase of what would be a bifurcated trial, the defendant could attempt to prove that the victim was not intentionally selected because of his race.

⁶⁹ See *Combating Racial Violence*, *supra* note 66, at 1272 ("it is limited to interracial violence directed at minorities . . . [Such] crimes would carry a heavier punishment than regular intraracial or inter-minority crimes of physical violence." See also Fleischauer, *supra* note 67, at 703 ("only criminal penalties involving white offenders and minority victims should be enhanced"). Fleischauer emphasizes that "it will be absolutely necessary to exempt minority offenders from the presumption of racist intent in interracial crimes." *Id.* at 703. For convenience, he uses the term "race" to include the following categories: "race, religion, ethnicity, color, ancestry and national origin." *Id.* at 703 n.38. Accordingly, under this proposal, any violence between blacks and Jews would not qualify since blacks are a racial minority and Jews are a religious minority, nor between Asians and Blacks, as Asians would be considered a minority under "national origin." And since sexual orientation does not fall within Fleischauer's categories, any assaults on gays, even those committed by straight White Anglo-Saxon Protestants, would not be included under his proposal.

⁷⁰ Jacobs, *supra* note 33.

⁷¹ See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); see also *City of Richmond v. J.A. Crosson Co.*, 488 U.S. 469 (1989).

⁷² For example, during the Crown Heights disturbances, the killing of Yankel Rosenbaum, committed as a mob of blacks yelled "kill the Jew," see Stephen Labaton, *Reno To Take Over Inquiry In Slaying In Crown Heights*, N.Y. TIMES, Jan. 26, 1994, at A1, would not be covered by such a statute as it was committed by a member of a "disadvantaged minority."

⁷³ See, e.g., Gellman, *supra* note 16, at 389.

They have been successfully defended against such charges by the very fact that they apply to all racially-motivated assaults; theoretically, no group is to be given favored treatment.⁷⁴

However, the aspect of the proposal which would require the defendant to prove the absence of racial motivation as an affirmative defense requires more extensive comment. Part of the rationale offered for shifting the burden to the defendant is the perceived need to curtail prosecutorial discretion in such cases.⁷⁵ Accordingly, the argument goes, District Attorneys would no longer be able to indulge their own prejudices by declining to prosecute

⁷⁴ See Nat Hentoff, *No: Equality among Victims*, A.B.A. J., May 1993, at 45. ("Why should one victim be more precious than the other in the eyes of the law?"). Hentoff's point is not merely one of favoritism. He questions whether bias attacks are more harmful to the community than any other type of violence. To the extent that Hentoff's question may imply favoritism toward minority groups, the answer comes from, for example, the dissenting opinion of Judge Bablitch in *State v. Mitchell* ("[This statute] singles out no particular group for different treatment, and thus no suspect classification is involved"). 485 N.W.2d at 830. See also, Mazur-Hart, *supra* note 66, at 215 (the statute is easily defended from equal-protection attack because it "applies equally to all racial and ethnic groups"); Grannis, *supra* note 3, at 215 ("Penalty enhancement statutes do not . . . punish crimes against certain groups. Rather they can be applied to crimes against members of any group, thus avoiding the equal protection problem. . . .").

It should be noted that the equal protection argument in *Mitchell* was not that these statutes unjustifiably afford minority groups greater protection from assault. The defendant, after all, was a black youth being charged with a racial attack against a white boy. He argued instead that the statute discriminates against the poor and uneducated because they are the ones most likely to *commit* the underlying crimes eligible for penalty-enhancing bias statutes. *Mitchell*, 485 N.W.2d at 830 (dissenting opinion) The Supreme Court, while unanimously agreeing with the Wisconsin court dissenting judges' view that the statute did not violate the First Amendment, declined even to address the respondent's equal protection argument as untimely. *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2198 n.2 (1993).

⁷⁵ *Combatting Racial Violence*, *supra* note 66, at 1274.

such offenses under the guise that it is difficult to prove racial motivation.⁷⁶

A basic problem with this approach is that if a prosecutor believes that an interracial crime was not racially motivated, it would be unethical for her *not* to exercise her discretion and simply proceed with a charge of interracial assault. A decision to charge the defendant would expose the defendant to an enhanced penalty by requiring him to prove, at his peril, the absence of racial motivation.⁷⁷ Furthermore, such "overcharging" would only serve to increase the prosecutor's plea bargaining leverage.⁷⁸ It is even legally questionable whether a conviction for "interracial assault" would withstand an appeal under those circumstances.⁷⁹

⁷⁶ *Id.* at 1274. The author states: "Because the ambiguous and complex nature of the concept of racial motivation precludes anything except subjective judgments about the presence of racial motivation, prosecutors can give effect to their own racist sentiments under the pretext of finding no racial motivation." *Id.* at 1275.

Of course, the evidence will be no less "ambiguous" or "complex" to a jury. Shifting the burden of proof to the defendant merely makes it more likely that he will be convicted by jurors exercising particularly "subjective judgments."

Both the ACLU and ADL, in their *amici* briefs, cited the very fact that the state of Wisconsin made "intentional selection" an element of the crime which must be proven beyond a reasonable doubt as significant in addressing First Amendment and due process concerns that defendants might be convicted on marginally relevant evidence concerning their statements and beliefs. *See* ACLU Brief at 22. *See also*, ADL Brief, at 23.

⁷⁷ *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1993); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8, cmt. (1983) (prosecutor's obligation to seek justice).

⁷⁸ In 1988, the New York City Legal Aid Union opposed the enactment of bias legislation in part because it believed prosecutors would be given a coercive plea-bargain advantage over the defendant in being able to "trade" the bias-motivated crime for the underlying crime. Richard Barbieri, *Legal Aid Union Opposing Higher Penalty in Bias Cases*, MANHATTAN LAWYER, June 14-20, 1988, at 3.

⁷⁹ *See* *People v. Lyde*, 469 N.Y.S.2d 716 (N.Y. App. Div. 1983). In New York, a defendant is guilty of robbery in the first degree when he displays "what appears to be a pistol." N. Y. PENAL LAW § 160.15(4) (McKinney 1988). It is,

Moreover, shifting the burden to the defendant to prove he did *not* select the victim because of his race would, even in the absence of proof of racial motivation, make it even more likely that the defendant would feel constrained to adduce the type of evidence presented by, for example, Shannon Siegel, whose father testified about all the black friends his son has.⁸⁰ In attempting to establish that he is not the type of person who would be motivated by racial animus, the defendant would probably present evidence that includes not only his past associations, but his previous statements, and even books he may have read: the very type of evidence about which proponents of bias-crime legislation themselves expressed First Amendment concerns.⁸¹

however, an affirmative defense, reducing the charge to robbery in the second degree, when what is displayed is not a loaded weapon readily capable of producing death." N.Y. PENAL LAW §§ 160.15(4), 160.10(2)(b) (McKinney 1988). In *Lyde*, the defendant was convicted of robbery in the first degree because he failed to request a jury charge on this affirmative defense. The evidence established, and the People conceded on appeal, that what the defendant displayed was a toy gun. On appeal, the First Department reduced the first degree robbery conviction to second degree in the "interest of justice," declaring it error "to submit to the jury the crime of robbery in the first degree." *Lyde*, 469 N.Y.S.2d at 717-18. It is now the practice of the District Attorney's Office in New York County not to charge robbery in the first degree -- which would force the defendant to raise the affirmative defense -- when it knows that what was displayed was not a loaded weapon. Likewise, if the prosecutor believes that the defendant would satisfy the requirements for the affirmative defense to Felony Murder, she will not charge Felony Murder and require the defendant to interpose the affirmative defense. Interview with Kristine Hammann, Assistant District Attorney and Director of Training, New York County District Attorney's Office, Mar. 4, 1994.

⁸⁰ See *supra* text accompanying notes 51-53.

⁸¹ In focusing its First Amendment concerns on the type of evidence that would be admissible to establish that a crime was motivated by bias, defenders of these statutes, such as the ACLU, were not only caught short by the Supreme Court's blithe disregard for these concerns, but seem to have ignored the pressure that will be placed on *defendants* themselves to adduce this type of evidence. See *supra* note 53.

Under the rules of evidence, the defendant himself may adduce evidence about his character to prove he is *not* the type who would assault someone

The difficulty of proving that the defendant intentionally selected the victim because of his race is only compounded when bias crimes involve more than one attacker, as they typically do.⁸² As in the case of the principal, to be guilty as an accomplice one must "act [] with the mental culpability required for the commission [of the crime]."⁸³ Proving accomplice liability can be problematic even in simple assault cases. For example, mere presence on the scene, regardless of the person's mental state, is not enough to convict the defendant. On the other hand, if one can establish that the actor did *something* to assist another in the attack, his intent to injure is naturally inferable from his participation in the violent conduct. However, to convict any one defendant in an ostensible *bias* assault committed by a group, one would also have to prove that each defendant chose to participate in the attack because of the victim's race.⁸⁴

because of his race. FED. R. EVID. 404(a)(1); *see also* N.Y. CRIM. PROC. LAW § 60.40(2) (1992) (prosecutor can then rebut defendant's evidence of his good character). Once he does so, the door opens for an adjudication that might aptly be entitled: "Are you now, or have you ever been a racist?"

The limitations placed on the *state* to adduce such evidence stem not only from the First Amendment, but from basic rules of evidence. The potential for prejudice to a defendant in revealing his racist speech or associations will probably outweigh its probative value when unconnected to the specific crime charged. *See, e.g.*, FED. R. EVID. 403; *People v. Ventimiglia*, 420 N.E.2d 59 (N.Y. 1981). *Cf. Dawson v. Delaware*, 112 S. Ct. 1093 (1992) (at sentencing phase of capital murder case, evidence of defendant's membership in Aryan Brotherhood inadmissible because not connected to murder of victim). *But see Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2201 (1993) (*citing* *Haupt v. United States*, 330 U.S. 631, 642 (1947)) (allowing evidence of conversations carried on "long prior to the indictment"). A related principle is that prior bad acts or crimes of a defendant are inadmissible to show he has the propensity to commit the particular crime with which he is charged or, for that matter, crimes in general. FED. R. EVID. 404(b).

⁸² *See Abramovsky supra* note 32.

⁸³ N.Y. PENAL LAW § 20.00 (McKinney 1987).

⁸⁴ Regarding the attack on Jermaine Ewell, *see supra* notes 45-55 and accompanying text, Stephen Worth, the attorney for Siegel's accomplice, James Peralta, stated, after his client pleaded guilty, "It was a matter of backing up his

Prosecutorial Discretion, Racial Politics, and the Media

It seems that almost every day someone discovers -- or claims to discover -- racism in others and publicly denounces it, sometimes out of anguish, sometimes out of anger, sometimes out of habit, and sometimes out of political calculation.⁸⁵

A prosecutor's decision to charge or *not* to charge a particular defendant with a bias crime will often cause resentment and increased racial tensions among members of the victim's or defendant's community.⁸⁶ Even well-meaning prosecutors, being political animals and human beings, are not immune from the pressures that members of a racial or religious constituency will bring to bear on them to charge a bias crime even when the evidence of bias motivation is ambiguous. While New York to date has no bias

buddies, right or wrong." Michael Alexander, *3-to 9-year Sentence in Ewell Beating* *NEWSDAY*, June 8, 1993, at 27. If true, that would make Peralta an accomplice only to the assault itself. If he correctly believed that Siegel was intentionally selecting Ewell because of his race, he could be guilty of the separate and less serious crime of criminal facilitation with respect to that charge. See N.Y. PENAL LAW Art. 115 (McKinney 1987). Given that most participants in bias crimes are teenagers, *see, e.g.*, Abramovsky *supra* note 32, at 887, whose assaultive behavior is sudden and unplanned, *see generally, supra* note 33, determining the respective motives of each participant would be, to say the least, enormously difficult and, as another decision forced upon prosecutors, judges (who must rule on the legal sufficiency of evidence) and juries, another gratuitous cause of racial tensions. Indeed, the attempt to prove accomplice liability for the murder of Yusuf Hawkins in the Bensonhurst case -- even without the additional burden of proving that each defendant intentionally selected the victim because of his race -- was a dismal failure. *See Hedges, infra* note 108.

⁸⁵ Andy Logan, *Race to the Finish*, *NEW YORKER*, Oct. 18, 1993, at 48.

⁸⁶ In discussing the possibility of a bias-assault bill being enacted in the New York State legislature, Frank Breslor, counsel to the Senate Codes Committee, said the issues to be worked out included "whether calling attention to the racial, ethnic or political differences of the parties of a crime will really further the climate of racial harmony or make it worse." Barbieri, *supra* note 78, at 3. *See infra* McQuiston note 127.

assault statute, such tensions and political pressures have already taken their toll. Public officials are pressured to *label* (or decline to label) a crime as bias motivated.⁸⁷ Having such a statute would additionally require prosecutors, grand juries, and petit juries to make very controversial decisions about whether the evidence is sufficient to charge or convict the defendant of a bias crime.

The climate of racial tension and sensitivity being what it is these days, the already natural tendency of people to make quick judgments and to assume the worst is particularly acute in cases of interracial crimes of violence. Indeed, some protesters even seize upon interracial violence as an emblem of "black innocence and white guilt."⁸⁸ Political activists can be particularly

⁸⁷ Indeed, the New York City police department at one point expanded the definition of bias crimes because of pressure from advocacy groups for minorities who felt the numbers of reported incidents were misleadingly low. The definition came to include crimes in which bias was "some part of the impulse." Alison Mitchell, *Police Find Bias Crimes are often Wrapped in Ambiguity*, N.Y. TIMES, Jan. 27, 1992, at B2.

However, the New York police department subsequently altered its policy to refrain initially from calling *any* incident a "bias crime" and began to limit its conclusion that the defendant was motivated by bias to the characterization "possible bias crime." It did so upon the realization that identifying crimes of violence which are motivated by bias is often elusive and that labeling crimes as such is itself a cause of racial tension. This occurred after New York City Mayor David N. Dinkins rather precipitately labeled an assault by Hasidic Jews as a bias attack against a black man they alleged was trying to commit a burglary. "It's a heavy burden on the mayor's office to make the right call each time," said government consultant Joseph Giordano, referring to the mayor having set a precedent by commenting shortly after each ostensibly bias-motivated incident. Jane Fritsch, *Police Dept. Vows a New Caution in Labeling Crimes as Bias Cases*, N.Y. TIMES, Dec. 22, 1992, at A1.

It is questionable as to who benefits from a mayor's pre-indictment public conclusion about the guilt of a suspect of any crime, much less one which has a racial dimension. At the very least, the mayor need not make public pronouncements about whether a victim was intentionally selected because of race to denounce a random act of violence (or vigilantism) as a crime against humanity and as destructive to the body politic.

⁸⁸ SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* 14 (1990). Steele characterizes it as "victimization metamorphosed into power via innocence."

Steele further writes:

adept at staging street demonstrations which attract news producers because they make for "good television."⁸⁹ Television, to be sure,

But this formula . . . binds the victim to his victimization by linking his power to his status as a victim. And this, I'm convinced, is the tragedy of black power in America today. It is primarily a victim's power. . . .

So we have a hidden investment in victimization and poverty. One sees evidence of this in the near happiness with which certain black leaders recount the horror of Howard Beach, Bensonhurst and other recent instances of racial tension.

As one is saddened by these tragic events, one is also repelled at the way some black leaders -- agitated to near hysteria by the scent of victim power inherent in them -- leap forward to exploit them as evidence of black innocence and white guilt.

Id. at 14-16.

⁸⁹ Perhaps no one is better at creative confrontations than the Reverend Al Sharpton. As one author has put it, "His mastery of pithy phrases that worked just right on the evening news shows were a boon for producers and reporters." JOHN DeSANTIS, *FOR THE COLOR OF HIS SKIN: THE MURDER OF YUSUF HAWKINS AND THE TRIAL OF BENSONHURST* 105 (1991).

As one observer of television news in general explains it:

The one ingredient most [television news] producers interviewed claimed was necessary for a good action story was visually identifiable opponents clashing violently. This, in turn, requires some form of stereotype: . . . [for example] black versus white. . . . Demonstrations or violence involving less clearly identifiable groups make less effective stories, since, as one CBS producer put it, "It would be hard to tell the good guys from the bad guys."

JERRY MANDER, *FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION* 274 (1978), (*quoting* EDWARD J. EPSTEIN, *NEWS FROM NOWHERE: TELEVISION AND THE NEWS* (1973)).

It is, in part, for this reason that racially charged incidents tend to be considered "big news." JACK LEVIN & JACK McDEVITT, *HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED* 197 (1993). The authors give as an example the coverage of a Ku Klux Klan rally on August 16, 1992. It took place in Janesville, Wisconsin, which has a population of 50,000. About a hundred

has always been better at depicting confrontation than at exploring ambiguity and complexity.⁹⁰ The perceived truth, as received through the media, gets fixed early in the public's mind,⁹¹ and almost invariably turns out -- once the case gets to trial -- to be far more complex and elusive than originally portrayed. And this early, pre-trial truth tends to be reinforced by the "pack" instincts of journalists.⁹² It is also reinforced by the reluctance, not just of the media but of public officials, to question whether a particular victim was indeed intentionally selected because of his race for fear that they themselves will be accused of racism.⁹³

The Atlantic Beach incident is instructive in illustrating how the perceived pre-trial truth often develops. The incident received

klansmen attended as well as approximately the same number of anti-Klan demonstrators. The rally was covered not only by the local TV stations, but by newspapers from Milwaukee and Madison. Ultimately, it became a national news story when the talk-show host Geraldo Rivera punched a klanman. *Id.* at 197-98.

⁹⁰ As Robert McNeil, executive editor and co-anchor of the "McNeil-Lehrer News Hour" explains it, producers of news shows believe "that bite-sized is best, that complexity must be avoided, that nuances are dispensable, that qualifications impede the simple message, that visual stimulation is a substitute for thought, and that verbal precision is an anachronism." Robert McNeil, *"Is Television Shortening Our Attention Span?"* 14 N.Y.U. EDUCATIONAL QUARTERLY 2 (Winter 1983).

⁹¹ It is interesting to note that in compiling statistics on bias crimes, one of the criteria the FBI uses is whether the public perceives these crimes to be motivated by bias. Joseph M. Fernandez, Comment, *Bringing Hate Crimes into Focus -- The Hate Crime Statistics Act of 1990*, *Pub. L. No. 101-275*, 26 HARV. C.R.-C.L. L. REV. 261, 286 n.129 (1991).

⁹² As one journalist wrote: "Above all, we know that the greater the horror, the better the story; journalists, too, operate within a pack psychology." JIM SLEEPER, *THE CLOSEST OF STRANGERS: LIBERALISM AND THE POLITICS OF RACE IN NEW YORK* 201 (1990).

⁹³ See generally Sam Roberts, *Race and Politics: Issues that Most Still Sidestep*, N.Y. TIMES, July 19, 1993, at B3.

a great deal of media coverage.⁹⁴ One columnist, appearing on a local television broadcast, invoked the holocaust in describing the incident.⁹⁵ A protest march, although sparsely attended, was "heavily covered by the media."⁹⁶ Editorials were written by two major New York newspapers citing the incident as exemplifying the need for bias-crime legislation⁹⁷ and Anthony Lewis wrote an "op-ed" piece characterizing it as emblematic of the persistence of racism in our society.⁹⁸ Racially motivated or not, the brutal gang assault of Jermaine Ewell with a baseball bat and sticks was incontrovertibly vicious and cowardly. And it certainly *appeared* to be racist, redolent of past lynchings of black men in the south for having the temerity to look at or speak to a white woman.

⁹⁴ Of the newspapers subscribed to by Nexis, there were forty stories in the first nine days after the incident. The Chicago Tribune falsely reported that the attack occurred "as [the victim] talked with a white female classmate." *Black Teen Beaten by Gang of Whites*, CHI. TRIB., June 7, 1991, at 20.

⁹⁵ Similarly, the Crown Heights disturbances, in which blacks vented rage over an automobile accident in which a Hasidic driver killed a seven-year-old black boy, were hyperbolically characterized by, among others, the Republican candidate (and soon to be mayor-elect) Rudolph Giuliani, as a "pogrom." Bob Herbert, *In America; Dangerous Turf*, N.Y. TIMES, Oct. 3, 1993, § 4, at 15.

⁹⁶ Steve Jacobson, *Dealing with a Tragedy*, NEWSDAY, June 9, 1991, at 7.

⁹⁷ Editorial, *A Better Response to Hate Crimes*, N.Y. TIMES, June 8, 1991, at 22; Editorial, *Moral Outrage Isn't Enough to Help Alfred Ewell*, NEWSDAY, June 6, 1991, at 66 (Nassau & Suffolk ed.).

⁹⁸ Anthony Lewis, *The Color of His Skin*, N.Y. TIMES, June 10, 1991, at A17.

There were, to be sure, articles written by one New York Times reporter in which area residents, both black and white, spoke of the incident as incongruous in an integrated area they described as relatively free of racial tension. See Sarah Lyall, *Sharpton Gets Mixed Reception in Protest March at Atlantic Beach*, N.Y. Times, June 9, 1991, at 34. There was also an article in which the principal defendant, Shannon Siegel, was described by area residents as having many black friends and himself seeming to identify with black people. Sarah Lyall, *Atlantic Beach Struggles to Explain Assault on Black Youth*, N.Y. Times, June 7, 1991 at B1.

Siegel was appropriately charged with attempted murder, among other felonies. Yet despite there being no tactical advantage to doing so, the prosecutor also charged Siegel with the misdemeanor of aggravated harassment and with a civil rights violation.⁹⁹

The prosecutor may well have felt constrained to do so by the widespread perception of the incident as a racial attack. But by doing so, he took on the added burden of proving that not only did the defendant try to kill another human being by smashing his head repeatedly with a baseball bat, but that the defendant would not have done so had the victim been white. While much of the public might have assumed that this was a latter-day lynching, they would never know as much about the horrific assault on Jermaine Ewell as the twelve jurors who took an oath to decide the case based on the extensive evidence presented in court. The jury was to learn that it was not just *some* "white girl" the victim was with at the party, but the defendant's former girlfriend. The jury would also find out that the victim wasn't just any black man randomly selected for a racial attack, but one of many young black people with whom the defendant had socialized¹⁰⁰ and that the defendant, who was drunk, and his friends had just been unceremoniously (and, it would appear, deservedly) kicked out of a party by their peers. Upon this evidence the jury concluded that Siegel did not

⁹⁹ Siegel's defense to the crime charged was that it was not he who participated in the attack on Ewell. Since the jury could not rationally conclude that he "punched, kicked, shoved or otherwise annoyed [Ewell] because of his race," N.Y. PENAL LAW § 240.30 (aggravated harassment), without also concluding that it was Siegel, among others, who intended to kill or seriously injure Ewell with a baseball bat, the prosecutor had nothing to gain by tacking on this misdemeanor charge because it could not result in a longer sentence. See N.Y. PENAL LAW § 70.25 (McKinney 1987). There was, however, a tactical disadvantage -- the jury might, in a compromise verdict, convict him of this misdemeanor charge and acquit on the more serious felony charge. Moreover, by including these charges, the prosecutor was ensuring that the trial would be longer and the issues for the jury more complex.

¹⁰⁰ Siegel's father testified that about "three-quarters of his friends were black." Ewell, the victim, testified that Siegel was an acquaintance of his with whom he had gotten a ride into New York City a few times. Siegel testified that Ewell was his "friend." See Alexander, *supra* note 45, at 4.

attack Ewell because of his race, but because he was jealous, his ego was bruised, and he felt humiliated.¹⁰¹

The jury first had to consider whether it was Siegel who attacked Ewell with the bat, and if so, whether he intended to kill Ewell (attempted murder) or to cause him serious physical injury by using a dangerous instrument (Assault in the First Degree).¹⁰²

As to the "racial motivation" counts, what significance did the jury accord the father's testimony about all the black friends that the defendant had? Was there an extensive debate about the meaning of this defendant asking his ex-girlfriend, "What are you doing with this nigger money?" One can imagine three possible views: 1) that the evidence tended to prove the defendant selected Ewell to victimize because he was black; 2) that it merely showed his crude way of expressing his anger and jealousy; or, 3) that he used the word routinely in a variety of contexts.¹⁰³

If New York had enacted a "Wisconsin-type" penalty enhancement statute, then Siegel's acquittal on those charges would have been significant, and not just to him. In politically or racially charged cases, a jury acquittal on a major count can carry a powerful symbolic message for many, at times reaffirming the perception that the system is racist.¹⁰⁴ And so, while the prosecu-

¹⁰¹ Gordon, *supra* note 55.

¹⁰² The jury ultimately convicted Siegel of the assault charge and he was sentenced to the maximum of five to fifteen years. This means he must serve five years before being eligible for parole and would serve no more than ten years if he does his time without disciplinary problems.

¹⁰³ Such language was often used in the group. One black student reportedly said that Siegel liked rap music and hung out with black students and sometimes acted as though he were "really black on the inside." Said a white student, "The way you see him walk, and the way you see him talk, as far as you know, Shannon is black." Sarah Lyall, *Atlantic Beach Struggles to Explain Assault on Black Youth*, N.Y. TIMES, June 6, 1991, at B1.

¹⁰⁴ The converse is often true as well; when the twelve citizens in question apply the law to the facts in a manner which jibes with our perception of the case, the verdict is often said to "restore our faith in the system." As UCLA Law professor Peter Arenella put it:

tor might have initially appeased a pressure group by charging bias motivation, he ultimately burdened himself with having to prove this elusive element at trial. A failure to meet that burden will constitute yet another cause for racial tension. In reality, the verdict may simply reflect a conscientious jury's attempt -- in the face of a difficult issue -- to do justice in the specific case before it.

Even the notorious Bensonhurst case turned out to be more complex than the initial, and for many, lasting impression of it: "[t]he initial assessment evoked vivid images of a crazed urban lynch mob,¹⁰⁵ armed with the most primal of weapons, chasing four young blacks down a city street that they had every right to walk on, reserving the modern weaponry for the coup de grace, a

We have come to look at our criminal justice system as more than a mechanism to decide guilt or innocence but also as a mechanism to somehow resolve fundamental rifts in the community. People naively expect that a trial can somehow give them justice, but that is literally impossible because people in the community have different substantive expectations of what justice demands.

Seth Mydans, *Looking to the Courts for Catharsis*, N.Y. TIMES, Oct. 3, 1993, at § 4, at 3.

¹⁰⁵ Indeed, one columnist compared it to the 1955 lynching of Emmett Till. See Les Payne, *Don't Call Racial Harmony Justice*, NEWSDAY, May 27, 1990, at 11.

Another journalist attended a forum entitled "Youth, Media, and Race Relations" at which two black students who attended school at Bensonhurst joined white students in complaining that "the media had presented a picture of Bensonhurst so grotesque that none of them, black or white, could recognize it." SLEEPER, *supra* note 92, at 305. Referring to the column in Newsday, one of the black students, Jason Garel, said, "Give me a break! Up here, African Americans are victims much more often in their own neighborhoods. You people in the media influence a lot of people. You don't realize that you have great power. I go to Bensonhurst every day to school, and my mom expresses a lot of fear now." *Id.* at 306. Both of the black students with whom Sleeper talked after the forum expressed the opinion that the "Hawkins killing was more about 'turf' and the psychology of 'Packs' than about color -- precisely what the black attorney Charles Simpson told me in defending Jon Lester in Howard Beach." *Id.* at 307.

bullet to the chest.¹¹⁰⁶ Despite the more complex reality,¹⁰⁷ this

¹⁰⁶ DESANTIS, *supra* note 89 at 81 (1991).

The incident actually began when a neighborhood crack addict, Gina Feliciano, told "everyone," including one of the defendants, Keith Mondello, that as a surprise to the neighborhood, on her birthday, her Hispanic friends were bringing a large group of their black friends to "beat the shit out of all of yez." *Id.* at 59. A large group of white neighborhood youths, perhaps as many as thirty, gathered and as was the custom in anticipation of a rumble, proceeded to "break out the bats." *Id.* at 60. As DeSantis writes:

The idea among any of the participants who answered the call to arms on Sixty-eighth Street that they may have been doing something wrong probably never occurred to most of them. Rumbles between groups from different blocks was [sic] certainly acceptable, even mandatory behavior, and if anyone had second thoughts, tremendous real or imagined peer pressure might have much to do with a decision to go ahead and come.

Id. at 62. Some of the bats were supplied by a black member of the Bensonhurst gang, Russell Gibbons, and his white friend Charles Stressler. *Id.* at 71. At one point, a neighborhood teenager, having spotted Yusuf Hawkins and his four friends, who were there merely trying to find an address in response to an ad for a used car, called to the others: "They're here! They're here! Black kids are here!" *Id.* at 75. DeSantis then describes the scene:

The four black youths heard footsteps approaching. Luther turned and saw a group of white men -- he would later figure twenty or thirty -- coming toward them from further down the street. . . . [T]he mob surrounded the four blacks. . . . There were shouts of 'Is this them?'

'What are you niggers doing here?' somebody hollered. Yusuf, Luther, and Troy were half-herded and half-propelled around the nearest corner, at Bay Ridge Avenue. Yusuf, clutching his half-eaten Snickers bar, pressed his back against the brick wall.

'We're looking for an address,' Troy said, offering the crumbled piece of the Buy-Lines.

Keith Mondello -- who was to be indicted for murder -- looked at Stressler and shook his head. 'I ain't gonna hit them. These are babies,' he said. 'They're kids. These aren't them.'

simplistic assessment persisted -- and for many still persists -- long after the juries hearing the cases rejected it.¹⁰⁸ The shooter,

'I ain't gonna hit them either,' Stressler said, and turned to leave as an excited John Vento ran up and the larger crowd pressed closer.

'Is this them? Is this them?' Vento asked, and drew back his arm, preparing to hit Hawkins.

A short figure dressed in all white, later identified by witnesses as Joseph Fama, stepped forward. In his right hand was a .32-caliber chrome-plated revolver.

'To hell with beating them up. I'm gonna shoot the nigger!' he reportedly said.

James Patino hollered 'No!' But it was too late.

Yusuf's jaw dropped as he saw the pistol pointed directly at him. He stammered and managed to get out a stifled 'Oh, shit!'

Four quick pops sounded in rapid succession, and Yusuf Hawkins screamed as he reeled and staggered for about twelve feet, clutching his chest. He crumpled to the pavement, still clutching the Snickers bar.

Id. at 76.

¹⁰⁷ *See generally, Id.*

¹⁰⁸ Defendants Patino, Stressler and Curreri were acquitted of all charges. Defendants Mondello, Serrano and Vento were convicted of lesser charges. Robert D. McFadden, *U.S. Decides Not to Pursue Hawkins Case*, N.Y. TIMES, Dec. 21, 1991, § 1, at 21. The Vento jury, "stunned" by what they perceived as the weakness of the prosecution's case, included four black people and one Hispanic person. According to one juror, the jury as a whole did not perceive the incident as racially motivated:

The impression you got from the coverage of this case was that it was a racist incident," said one of the jurors, "We all felt that this was really more about mistaken identity and that if the four youths had gone to the same section of Bensonhurst on any night, other than that night, these people would not have been involved in a racist incident.

Chris Hedges, *Man Acquitted on Major Count in Racial Killing*, N.Y. TIMES, July 4, 1990, § 1, at 1.

Joseph Fama,¹⁰⁹ himself was ultimately convicted of this senseless, brutal, and cowardly murder and sentenced, without benefit of a bias-crime statute, to a term of 32 years and eight months to life.¹¹⁰

It is also understandable that given the outcry that this shocking and historically evocative incident aroused, the prosecutor chose to, in effect, brand others present at the scene as murderers by presenting the jury with an accomplice liability theory that although legally plausible,¹¹¹ was rejected by a jury as tenuous if

¹⁰⁹ Fama, who had a 72 IQ, was described as having "depressed intelligence, memory and cognitive flexibility consistent with early brain injury." DESANTIS, *supra* note 89, at 73 (quoting the State University of New York Health Science Center Department of Neurology, based on examinations conducted "as late as 1987"). Fama also had a history of violence.

¹¹⁰ See William Glaberson, *Judge Gives Maximum Sentences To 2 in Bensonhurst Murder Case*, N.Y. TIMES, June 12, 1990, at A1. In New York, this means that he must serve 32 years before he is eligible for parole. See generally N.Y. PENAL LAW Art. 70.

¹¹¹ Section 20.00 of the New York Penal Law provides:

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, impurtones, or intentionally aids such person to engage in such conduct.

N.Y. PENAL LAW § 20.00.

If one characterizes the "conduct which constitutes an offense" as the actual shooting of Hawkins, then the others present at the scene of the crime were not guilty as accomplices since the evidence strongly suggests that Fama acted on his own impulse. It is however plausible to characterize the conduct as joining a volatile gang, some of whom were armed with bats, "under circumstances evincing a depraved indifference to human life" creating "a grave risk" that someone might be killed in *some fashion*. See N.Y. PENAL LAW § 125.25(2) (McKinney 1987).

not counterintuitive. As defense lawyer Jack Eszeroff argued at summation, "Nobody has ever been shot with a baseball bat."¹¹²

The jury also rejected the prosecutor's contention that each defendant intentionally chose the victim because of his race.¹¹³ Joseph Fama may have shot Hawkins because he was black. But what about the others? Were they simply responding to the challenge -- the gauntlet thrown by Gina Feliciano -- that outsiders described as her "black and Puerto Rican friends" were coming to the neighborhood to beat them up?¹¹⁴ Had they been told that certain non-minority outsiders were coming in for the same purpose would they have shrugged it off and stayed out of harm's way?¹¹⁵ With respect to trying to answer either of those questions, how does one differentiate between the tag-along,¹¹⁶ indifferent to the race of the victim, who may be motivated by an adolescent desire to "score points" with his peers and the racially-motivated participant? When Russell Gibbons, the black youth who supplied some of the bats which were ultimately wielded by members of the group, asserted that race had nothing to do with it and that he was merely backing up his buddies in an anticipated rumble, was he

¹¹² DESANTIS, *supra* note 89, at 232. See Hedges, *supra* note 108.

¹¹³ *Id.* The prosecutor charged all the defendants with the same misdemeanor civil rights statute used against Shannon Siegel, despite the fact that it would not expose the defendants to additional jail time.

¹¹⁴ The juries concluded that this was a not a racial incident but a case of mistaken identity; had Hawkins been in the neighborhood on any other night, this would not have happened. See *generally*, *supra* note 108.

¹¹⁵ A rumble was not an uncommon occurrence nor frowned upon by many of the young men of Bensonhurst. Indeed, for some of them, it was "mandatory behavior." DESANTIS, *supra* note 89, at 62.

¹¹⁶ The tag-along who intentionally aids the principal in the assault or homicide with the *mens rea* necessary for the crime is certainly guilty as an accomplice to assault or homicide.

more credible on this point because he himself is black?¹¹⁷ These are some of the issues which prosecutors must confront in bias-crime charging decisions, just as they do in any ordinary group crime: did each defendant have the mental culpability required for the commission of the crime? Ignoring for the moment whether the prosecutor could possibly fathom the respective *motives* of each member of the group, if the media, community activists, and the public in general paint them with the broad-brush rubric of "lynch mob," what is the likelihood that the prosecutor will even try to make these *mens rea* distinctions? And if she has the political courage and the ability to do so, how will she explain them to the public?

"Calling it Both Ways"

In basketball, coaches often scream "call it both ways!" at the referee for making a call against a player when, in the coach's view, a comparable foul had previously been committed, but not called, by an opposing player. Sometimes, referees will call what is perceived as a "give back" or "make-up" foul. This means that the referee unjustly whistles the player for an infraction to compensate for a controversial call made against an opposing

¹¹⁷ Gibbons was *not* prosecuted for the murder of Hawkins even though his conduct fit the state's theory of accomplice liability like hand to glove. If one followed the logical extension of the prosecution's theory of the case, Gibbons, in supplying the bats, intentionally aided others to engage in activity which created a grave risk of death that someone might be killed. See N.Y. PENAL LAW § 125.25(2). While one cannot presume to know the motives of the prosecutor in declining to indict Gibbons, it is fair to assume that a black defendant's presence as a co-defendant would have undermined, if only subliminally, the theory that the alleged accomplices were motivated by race. Defense attorney Mathew Mari believes that having Gibbons as a witness at his client's trial was a significant factor in convincing the jury that the case was about mistaken identity, not race. Telephone interview with Mathew Mari, Nov. 19, 1993 (on file with the author).

teammate, as part of a general attempt to even out the close calls during the course of the game.¹¹⁸

The perception that the prosecutor may not be "calling it both ways" in an interracial incident is more likely to occur if one of the calls she has to make is whether the victim was intentionally selected because of his race. For example, many whites in Bensonhurst could not understand why what they viewed in their neighborhood as a case of mistaken identity was portrayed as racial while at the same time the assault by black and latino youths on the white Central Park jogger was not.¹¹⁹ In fact, the New York

¹¹⁸ See EARL STROM WITH BLAINE JOHNSON, *CALLING THE SHOTS: MY FIVE DECADES IN THE NBA* 32 (1992) (Strom himself denies ever doing this).

¹¹⁹ DESANTIS, *supra* note 89, at 128. See also Lorrin Anderson, *Crime, Race, and the Fourth Estate*, 42 NATIONAL REVIEW 52 (1990). Except for the statement of one defendant, there was no evidence that the attack was racially motivated. Among the victims of the marauding gang was an elderly Latino man. TIMOTHY SULLIVAN, *UNEQUAL VERDICTS: THE CENTRAL PARK JOGGER TRIALS* 23 (1992). A study done by a "think tank" about media coverage of the "central-park jogger" case found that of the 406 news items examined during a particular fifteen day period, 54 cited race as a possible factor. There were only six references to it as a crime against women." *Id.* at 57.

The other day this author told a white person about an incident which took place in a predominately white neighborhood. A man was walking down the street and came upon a group of black teenagers who passed him on both sides. He inadvertently brushed shoulders with one of them who then turned around and said: "Hey man, you dissed me." The teenager then pummeled the man, knocking him to the ground, and shot him, leaving him in the street where he was almost hit by oncoming traffic. His life may well have been saved by a good samaritan, a black woman, who then helped the police find and arrest two of his assailants. When my interlocutor learned that the victim was white, he immediately concluded that racial bias motivated the youths. Yet anyone who lives in a violent neighborhood, or reads newspapers, should know that such stories -- in which schoolchildren kill each other over real or imagined slights -- have distressingly become ever more common. Indeed, in October of 1993, Jesse Jackson noted that 362 black people under the age of 21 had been killed by other blacks in New York City alone that year. See also Robert D. McFadden, *Report Finds 20% of Students in New York City Carry Arms*, N.Y. TIMES, Oct. 15, 1993, at B3; Bob Herbert, *Blacks Killing Blacks*, N.Y. TIMES, Oct. 20, 1993, Op-ed, at A23. Of course, these incidents don't automatically become racially motivated simply because the victim is of a race different from that of the assailant. Yet racial tensions have reached the point where such incidents are

County District Attorney's office assiduously *avoided* approaching the brutal gang rape and attempted murder of the jogger as a racial issue.¹²⁰ Tactically, the prosecutor had nothing to gain by injecting race as an issue in the trial. Yet, as it happens, evidence existed that one of the defendants, Jermaine Robinson, later explained that he participated in the attack to avenge a beating he once suffered by a gang of white youths¹²¹ and he asserted that others in the gang were also "going to get some whites."¹²² Had New York enacted a penalty enhancing bias-crime statute, a decision not to indict on that count, in the aftermath of Howard Beach and Bensonhurst, would inevitably be viewed by many as exercising a double standard. Yet a decision *to* indict would be premised on an exceedingly shaky rationale. Would it really make sense to single Robinson out as the most culpable of the defendants because he had it in his mind that he was selecting the jogger because she was of the same race as a mob who once attacked him? Among the many who either brutally gang-raped or sexually abused her and beat her so severely that she lost 80 percent of her blood and suffered substantial brain damage, would there truly be a coherent rationale for singling Robinson out on the basis of bias?

almost invariably viewed through a racial prism, so that if racism could ostensibly have been the motivating factor, it is assumed to be so.

¹²⁰ Robert Morgenthau, the District Attorney of New York County, unequivocally asserted in a press conference that race was not at issue in the case. See SULLIVAN, *supra* note 119, at 167.

¹²¹ *Id.* at 166-67.

¹²² *Id.* at 67. Robinson also admitted in his written statement that his accomplices called some cyclists "fucking white people." *Id.* However, it is worth noting that among the victims of this marauding gang was a dark-skinned Hispanic man. Accordingly, how could it be proven that the jogger was chosen because she was white rather than because she happened to be the first woman to appear at that fateful moment?

In any event, Robinson's racial revenge statement can just as plausibly be interpreted as an after-the-fact rationalization¹²³ rather than an accurate report of what was truly going on in his mind at the time. But there still would be that pressure on the prosecutor to "call it both ways," to indict him for bias assault. Had a white person made an analogous custodial statement about why he chose his black victim, and asserted that his gang was "going to get some blacks," he surely would have been indicted for bias assault.

The Nassau County District Attorney's office, which had included misdemeanor racial bias charges in the prosecution of Shannon Siegel, proved that it would "call it both ways" in its recent 93-count indictment against the Long Island Railroad alleged mass murderer Colin Ferguson. By all accounts, the gunman was a tormented, deeply disturbed individual with a racial persecution complex.¹²⁴ Not content with twelve counts of murder, nineteen counts of attempted murder, thirty-four counts of assault and assorted gun possession charges, all of which taken together

¹²³ Although this statement does not even ostensibly provide a mitigating defense, it is possible to imagine a situation in which a member of an historically disadvantaged group chose a white victim under circumstances that might legitimately *reduce* his actions from murder to manslaughter. *Split Second*, a play by Dennis McIntyre, tells the story of a black police officer who catches a white car thief late at night on a deserted west side street. While he has the thief handcuffed, the latter unrelentingly taunts him with ever increasing vituperativeness, ultimately spewing the vilest racist tirade imaginable. The officer, enraged, suddenly shoots and kills him. DENNIS MCINTYRE, *SPLIT SECOND* (Samuel French, Inc. 1984).

Normally, this would provide a viable mitigating defense of "heat of passion" resulting from provocation, *see, e.g.*, CAL. PENAL CODE § 195(2) (West 1988), or "extreme emotional disturbance." MODEL PENAL CODE § 210(1)(b).

¹²⁴ When caught, Ferguson had notes in his pockets expressing racial animosities towards whites, Asians, and "Uncle Tom" blacks. *See* Lena Williams, *After Train Killings, Worry About Backlash*, N.Y. TIMES, Dec. 13, 1993, at B6; *See also* Richard Perez-Pena, *Woman in '92 Subway Dispute With L.I.R.R. Suspect Says All the Signs Were There*, N.Y. TIMES, Dec. 13, 1993, at B6; Jonathan Rabinovitz, *Judge Delays Ruling in L.I.R.R. Shooting Case*, N.Y. TIMES, Jan. 5, 1994, at B6.

exposed Ferguson to 175 years in prison,¹²⁵ the prosecutor charged Ferguson with the misdemeanor of "intent to harass, annoy, threaten and alarm" his victims "because of their race, color or national origin."¹²⁶ Accordingly, if the case goes to trial, much of the focus will be on race and proving that had the train been filled with black people whom the deranged defendant would not consider to be "Uncle Toms," he would never have engaged in this carnage. Who benefits from this?¹²⁷

The recent turmoil in the Crown Heights section of Brooklyn, New York exemplifies how the existence of a bias assault statute elevates the pressure to "call it both ways" and creates an additional reason for members of the community to perceive the criminal justice system as favoring one group over another. Racial tensions between the Orthodox Lubavitcher Hasidim and the black community had existed for some time in Crown Heights¹²⁸ but came to a head when a Lubavitcher driver lost control of his car and tragically killed a seven-year-old black

¹²⁵ As the prosecutor put it, "it is not infinity, but it will do." See John T. McQuiston, *Grand Jury Indicts Suspect on 93 Counts in Attack That Killed 6 on Long Island Rail Road*, N.Y. TIMES, Jan. 19, 1994, at B5.

¹²⁶ See N.Y. PENAL LAW § 240.30 (aggravated harassment). These misdemeanor charges will simply merge with the ultimate sentence. See generally, *supra* note 99.

¹²⁷ As Jesse Jackson concluded "We should not derive from this a race motif, but a sick motif." See John T. McQuiston, *Mineola Woman is 6th to Die in Rail Shooting*, N.Y. TIMES, Dec. 13, 1993 at B1. One shooting victim later declared, "Race is not the issue here. For anyone to say that these shootings were racist . . . misses the point and trivializes the horror." See Thomas F. McDermott, *He Stared Blankly at Me, then Fired*, N.Y. TIMES, Dec. 17, 1993, at A39 (op-ed.).

¹²⁸ Alison Mitchell, *Grand Jury Hears Evidence in Crown Hts. Case*, N.Y. TIMES, Dec. 8, 1992, at B1 (mentioning frequent charges by black residents that "Hasidim get preferential treatment by the police and countercharges by Orthodox Jews that the legal system provides them with no protection against crime by blacks").

boy named Gavin Cato.¹²⁹ The district attorney's office concluded that the death was accidental and not the result of criminal negligence on the part of the driver. Therefore, no charges were brought against him. Some members of the black community reacted in anger, in part, because of a long-standing perception that the police gave preferential treatment to the Lubavitchers. In this case, there was a perception that the driver was tended to by emergency medical personnel and whisked off to the hospital before anything was done for the mortally wounded boy.¹³⁰ However, the police asserted that they merely wanted the driver taken away as quickly as possible to avoid a riot since a large and angry crowd had assembled after the accident. Some time later, the infamous Crown Heights riots occurred in which, to the chant of "kill the Jew," a young rabbinical student named Yankel Rosenbaum, visiting from his native Australia, was knifed to death.¹³¹ A young black man, Lemrick Nelson, was indicted for murder and ultimately acquitted by a jury composed predominately of racial minorities.¹³²

About a month later, Moshe Katzman, a 24-year-old rabbinical student, was arraigned in Brooklyn Criminal Court on charges that he was among a crowd that beat Mr. Nimmons, a black man, hit him with a rock and a stick, and shouted epithets such as "black nigger."¹³³ Leaders of the ultra-orthodox sect maintained that its members caught Mr. Nimmons in the act of

¹²⁹ John Kifner, *Clashes Persist in Crown Heights for 3d Night in Row*, N.Y. TIMES, Aug. 22, 1991, at B1.

¹³⁰ *Id.*

¹³¹ Apparently, but for the negligence of medical personnel at the hospital who failed to notice a second knife wound on his body, Rosenbaum would probably have lived. John Kifner, *Stabbing Victim's Brother Seeks Answers*, N.Y. TIMES, Nov. 11, 1991, at B3.

¹³² George F. Fletcher, *Convicting the Victim*, N.Y. TIMES, Feb. 7, 1994, at A17.

¹³³ Alison Mitchell, *Dinkins Faces New Criticism in Crown Heights*, N.Y. Times, Dec. 3, 1992, at A1.

burglarizing a postgraduate rabbinical school.¹³⁴ Mr. Nimmons admitted to police that a set of tools turned into the local precinct, including a screwdriver, a wrench, a box cutter, and an awl were his, but said that he was not carrying them for illegal purposes.¹³⁵ As it turned out, Mr. Nimmons had an extensive criminal record that included a conviction for possession of burglar's tools.¹³⁶ Perhaps eager to convince the black community that the Hasidim were *not* in fact given special treatment, the police commissioner and the mayor immediately categorized the assault on Nimmons as racially motivated.¹³⁷ Meanwhile, the Brooklyn District Attorney, already having been blamed by Jewish residents for his office's failure to achieve a conviction against Nelson for the Rosenbaum slaying, was at the same time accused by black activist Al Sharpton as being too close to the Hasidim. Indeed, Sharpton, not uncharacteristically, called for a special prosecutor in the Nimmons case. Lost in the cacophony of these disputatious voices was the following: (1) given Mr. Nimmons's criminal record and the tools he admittedly possessed at the time, he probably *was* attempting to commit a burglary; (2) given the sheer numbers of Hasidim who were there, and the injuries sustained by Mr. Nimmons, he may well have been criminally assaulted -- instead of simply held until the police arrived -- as a form of vigilante street justice,¹³⁸ and

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ After this incident, he was convicted and sentenced to two years for *inter alia*, two counts of criminal possession of stolen property. Patricia Hurtado, 'Beating Victim' Found Guilty, *NEWSDAY*, July 28, 1993, at 23 (City ed.).

¹³⁷ Patricia Hurtado, *Hasidic Anger; 100 jam B'kln courthouse*, *NEWSDAY*, Dec. 3, 1992, at 5 (City ed.).

¹³⁸ Black activist Al Sharpton made the point that no matter what Nimmons was doing, he did not deserve to be assaulted by his captors. Catherine S. Margold, *The Reformation of a Street Preacher*, *N.Y. TIMES*, Jan. 24, 1993 § 6, at 18. It would have to be established that a citizen making an arrest exceeded the force necessary to do so. See *N.Y. PENAL LAW* § 35.30 (4) (McKinney 1987).

(3) given the fact that suspected robbers and burglars of all races and religions have, from time to time, been the victims of street justice when caught by angry and frustrated citizens of all races and religions, there was no basis to conclude that, because the respective races of these angry citizens were different from that of the suspected felon, racial epithets notwithstanding,¹³⁹ *this* particular case of vigilante justice was racially motivated.

Since Nimmons never appeared to testify in the grand jury, the case was dismissed. Had Nimmons testified, and had New York enacted a bias assault statute, it is fair to assume that his alleged principal assailant, Moshe Katzman, would have been charged under it, given the conclusions already drawn by the mayor, the police commissioner, and the District Attorney's representative. At trial, the prosecutor would then have had to prove beyond a reasonable doubt that despite the alleged victim's extensive criminal record for the same or similar crimes¹⁴⁰ and despite his possession of what could reasonably be characterized as burglar's tools,¹⁴¹ he was assaulted not because he was thought to be in the process of committing a burglary, but because he was black.

Within a day of that incident, according to a white sixteen-year-old girl, a black teenager tried to steal her purse and when she resisted, he called her a "Jewish bitch."¹⁴² Imagine the prosecutor, after charging Moshe Katzman for a bias assault against a career criminal, now trying to explain to his Jewish constituents that like

¹³⁹ As stated before, the use of racial epithets does not necessarily mean that the speaker intentionally chose the victim because of his race.

¹⁴⁰ As the complaining witness, there would be no limitations on the defense attorney's right to cross-examine him about every conviction and bad act he may have committed. *See* FED. R. EVID. 609 (limitations on cross-examination about prior convictions apply to defendants only).

¹⁴¹ Nimmons, who had previously been convicted of possession of burglar's tools, had in his pocket, at the time of the incident, "a sharpened screwdriver; a sheet-metal knife; a T-bar lug wrench; a pizza cutter and a plastic instrument." Hurtado, *supra* note 137, at 5.

¹⁴² Alison Mitchell, *Dinkins Faces New Criticism in Crown Hts.*, N.Y. TIMES, Dec. 3, 1992, at A1.

as not, the teen-age robber opportunistically chose his victim not because of her religion but because she seemed good prey and, in the face of her resistance, expressed his frustration and resentment by uttering anti-semitic and gender-biased remarks.¹⁴³

"Calling it against minorities"

It is readily apparent that bias statutes have been and will continue to be used against the very disadvantaged groups whom these statutes are meant to protect.¹⁴⁴ In addition to the danger of majoritarian prosecutors enforcing these laws discriminatorily is the disturbing reality of the disproportionate number of minorities who commit the very types of crimes which will expose them to penalty enhancement.¹⁴⁵ Worse still, the instances in which whites have been the victims of hate crimes perpetrated by blacks is on the rise.¹⁴⁶ Those who make the cogent argument that "bias-

¹⁴³ See Smith, *supra* note 7.

¹⁴⁴ Referring to hate speech statutes, one commentator has noted: "it may actually be angry members of underprivileged groups that end up being prosecuted most often" under these laws. KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 301 (1989). See also ACLU Brief at 22-23 (citing Gellman, *supra* note 16, at 387. A black man was charged in Florida for "Evidencing Prejudice While Committing an Offense" under FLA. STAT. § 775.085 (1991) because in threatening a white police officer, he used the epithet "white cracker." The charges were ultimately dropped for insufficiency of evidence. *Hate Crime Charge Dropped Against Black Man in Florida*, N.Y. TIMES, Aug. 31, 1991, at 10. See Gellman, *supra* note 16, at 361 n.134.

¹⁴⁵ Mitchell himself argued that the statute violated equal protection because a disproportionate number of the crimes eligible for penalty enhancement under the statute were committed by the "poor and uneducated." *State v. Mitchell*, 485 N.W.2d 807, 830 (Wis. 1992).

¹⁴⁶ James Garafalo reported that in New York, "a surprising proportion of the racial incidents handled [in 1987 and 1988] by the BIU [Bias Incident Investigating Unit] -- 209 of 585 -- were directed against whites. This figure does not include acts of anti-semitism which the author categorizes as "religion cases." JAMES GARAFALO, *BIAS AND NON-BIAS CRIMES IN NEW YORK CITY: PRELIMINARY FINDINGS* 5 (Nov. 9, 1990) (unpublished manuscript, presented to the American Society of Criminology, on file with the author) (cited in Levin,

inspired¹⁴⁷ violence "inflicts distinct emotional harms on [its] victims"¹⁴⁸ unquestionably mean *minority* victims.¹⁴⁹

It is somewhat ironic, then, that the bias-crime case decided by the Supreme Court concerned the victimization of a white boy, Gregory Reddick, by a young black defendant, Todd Mitchell. The question must be asked: was the harm done to Gregory Reddick, a white boy who did not grow up experiencing the pain and degradation of racism, distinctly greater than would have been any vicious, brutal and arbitrary attack upon an innocent, unoffending fourteen-year-old boy? Adding to the irony is that the attack was prompted by the defendant's angry response to a scene from "Mississippi Burning"¹⁵⁰ in which a white man, with impunity, beats a young black boy who is praying. Now, thirty years after the scene depicted in "Mississippi Burning," Mitchell may well hear his "bias-enhanced" sentence as society's message that he should be punished more severely because he, a black man, victimized a *white* boy, rather than a black boy. And how might the black community of Milwaukee have reacted? The vast majority may well have deplored the attack itself. They may also have viewed

supra note 33).

More recently, the Southern Poverty Law Center's Klanwatch, which monitors hate crimes, reported that in the last three years, 46 percent of racially motivated killings were committed by blacks. *See* Peter Applebome, *Rise Is Found in Hate Crimes Committed by Blacks*, N.Y. TIMES, Dec. 13, 1993, at A12.

¹⁴⁷ This is the Supreme Court's characterization. *State v. Mitchell*, 113 S. Ct. 2194, 2200.

¹⁴⁸ *See, e.g., ACLU Brief*, at 18.

¹⁴⁹ These statutes are primarily intended "for groups that have been the traditional targets of bigotry" who "bear the special burden of being selected for victimization on the basis of their race or other characteristics." Grannis, *supra* note 3, at 33. Indeed, those who have been most vigorous in their support for bias statutes have been representatives of historically disadvantaged groups (for example, the ADL and the Gay and Lesbian task force).

¹⁵⁰ *MISSISSIPPI BURNING* (Orion 1988) (directed by Alan Parker). The movie had a number of scenes evoking the brutality and injustices blacks were subjected to in Mississippi in the early 1960s.

the use of a "penalty enhancer" in this instance with a certain sardonic irony, having experienced the ravages of black-on-black crime and perhaps felt that the police and prosecutors do not give those cases quite as much attention.¹⁵¹

CONCLUSION

If bias-assault statutes will result in difficult proof problems, exacerbate racial tensions, and be used against the very groups they were intended to protect, then why enact them at all? The ostensible answer is that such statutes send a message that society condemns such conduct and views it as particularly serious.¹⁵²

¹⁵¹ To be sure, this perception can and does exist independent of whether a particular jurisdiction has a bias-crime statute. However, the possibility of enhancing the penalty when the victim is white will tend to reinforce the perception that a white-dominated criminal justice system cares less about black-on-black crime. Indeed, a black person is more likely to be executed for killing a white person than for killing another black person. *See McCleskey v. Kemp*, 481 U.S. 279 (1987). Moreover, both blacks and whites will not fail to notice that because of the response from black activists and greater media coverage, prosecutors give more attention to the occasional racially charged white on black crime than to the quotidian tragedy of black on black crime. I say "occasional" because, as Brian Levin, a strong proponent of Hate Crime legislation, has noted, "a black is far more likely to be victimized by another black than by a racially motivated assault" and "[a] Jew is more likely to be killed in a motor vehicle accident than to be personally victimized in an anti-Semitic incident." *See* Brian Levin, *supra* note 33, at 172, 172 nn. 83-84 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 12 (2d ed. 1988)).

¹⁵² Certainly it provides an easy way for politicians to demonstrate to their constituents that they are doing something about a problem without actually doing anything about it. *See, e.g.,* Weinstein, *supra* note 17, at 16 ("Enhancing punishment for racially motivated crimes seems to me to be part of a larger American syndrome of adopting harsh punishment as an expedient response that deals only with the most superficial manifestations of complex, deep-seated problems.").

Moreover, one can well imagine a legislator's fear of a negative "soft on crime" thirty-second commercial depicting a menacing looking skinhead with the following voice-over: "Opposed legislation that would have cracked down on vicious hate crimes which have torn at the fabric of our society." On the flip

However, once the press conferences announcing the enactment of such statutes are held and the message sent, one is left with real, not symbolic, legislation which creates real, not symbolic problems. In any event, a message can effectively be sent by enforcing statutes that do not include a second tier of proof with respect to whether the defendant chose his victim because of race. For example, New York City has created a bias-crime unit within its police department. While its determinations of what is or is not a bias crime is, as discussed previously, treacherous, the very existence of the unit itself sends the message that such crimes are being treated seriously by law enforcement. And of course the very public and rigorous prosecutions of the Howard Beach, Bensonhurst and Julio Rivera "gay bashing"¹⁵³ murder cases sent a message without the need of penalty-enhancing bias-crime legislation.

Moreover, there are legislative responses to such incidents which will not bring with them the kind of self-defeating baggage that comes with bias statutes. For example, the overwhelming majority of bias crimes are committed by groups of four or more.¹⁵⁴ In the state of New York, one of the aggravating circumstances which raises robbery in the third degree to robbery in

side, there appear to be certain legislators in New York who have balked at such legislation -- which also protects those who are intentionally selected because of their sexual orientation -- for fear that support for a law which would ostensibly protect, among others, gays and lesbians from violence, would actually be interpreted by their conservative constituents as support of the "gay lifestyle." Perhaps, in *their* imagination, they see a negative thirty-second commercial depicting a homophobe's worst nightmare, a flamboyantly effeminate man mugging for the cameras in a gay pride parade, as the ominous if dulcet baritone voice-over tells the world that they have supported legislation which would give "special consideration" to "deviants."

¹⁵³ See Curtis L. Taylor & Peg Tyre, *2 Queens Men Convicted In Fatal Gay-Bias Attack*, *Newsday*, Nov. 21, 1991, at 5. See also, Joseph P. Fried, *2 Get 25 Years to Life in Gay Man's Slaying in Queens*, *N.Y. TIMES*, Jan. 11, 1992, at 23.

¹⁵⁴ See Abramovsky, *supra* note 32, at 885.

the second degree is the presence of at least one accomplice.¹⁵⁵ It is self evident that when a victim is confronted by more than one person with either the use or the threat of immediate use of force,¹⁵⁶ his fear of harm is likely to be greater as will be the potential for harm. This is so, despite the fact that the crime of robbery is not defined as requiring injury to the victim. Why then, is there no analogous provision in the New York assault statutes? The policy for making the participation by two or more people an aggravating circumstance is even stronger for assaults which, by definition, require that the victim suffer physical injury.¹⁵⁷

Moreover, although hate crimes are ordinarily not committed by organized groups,¹⁵⁸ when there has been a previous agreement, as for example, when a white supremacist group sets out to terrorize a black family which has just moved into the neighborhood, both state and federal conspiracy laws can be used to sentence the defendants consecutively to the substantive crime that was ultimately committed.¹⁵⁹

¹⁵⁵ N.Y. PENAL LAW § 160.10 (McKinney 1988) (Robbery in the second degree) provides in pertinent part:

A person is guilty of robbery in the second degree when he forcibly steals property and when:

1. He is aided by another person actually present

¹⁵⁶ See N.Y. PENAL LAW § 160.00 ("Robbery; defined").

¹⁵⁷ See generally N.Y. PENAL LAW Art. 120.00 (McKinney 1987). In New York, proposed bill § 1424 (Feb. 2, 1993), asserts that "[c]urrent New York State Law treats too leniently the crime of assault." Proponents of § 1424 would create a new crime called "gang assault" in which the defendant must be aided by "two or more persons actually present," and would accordingly be punished more severely. This proposal also calls for the sentencing judge to "consider as a factor in sentencing whether the crime was bias motivated."

¹⁵⁸ Jacobs, *supra* note 33, at 57.

¹⁵⁹ See 42 U.S.C. § 1985 (1981) (conspiracy to interfere with civil rights) (defendant need not be acting under color of state law). That the crime of conspiracy does not merge with the substantive crime is well settled in New

As for homicides, the existing statutes provide ample punishment and opportunity to send a message. After all, was the message sent by the convictions in Bensonhurst, Howard Beach and the Julio Rivera killing in Queens any less resounding because the homicide statutes under which the defendants were convicted did not require proof of *why* innocent blood was shed?

York. *See, e.g.*, *People v. Epton*, 227 N.E.2d 829, 836 (N.Y. 1967) (citations omitted). One can conspire to commit a crime without ever committing it, and commit a crime without having previously conspired to do so. *See also* 42 U.S.C. § 1983 (deprivation of civil rights under color of state law); *People v. McGee*, 399 N.E.2d 1177 (N.Y. 1979).

