

Book Review*

***Punishing Hate: Bias Crimes Under American Law.* By Frederick M. Lawrence. Cambridge, Mass.: Harvard Univ. Pr., 1999. 269p. \$39.95.**

*Reviewed by Sharon Carton***

¶1 Before society's current emphasis on precision in speech, we used to call attacks on individuals for no reason other than their ethnicity "hate crimes." Today, scholars prefer the term "bias crimes" for the same phenomenon, thus underscoring the unhappy fact that these acts of physical and emotional brutality do not necessarily stem from emotions. Quite often, they spring instead from a cold, calculated desire to keep women and persons of color in a subservient status. Contemporary studies such as *Punishing Hate* by Frederick Lawrence,¹ thus accurately reject the somewhat vacuous argument that most, if not all, acts of violence are motivated by anger or hate.² Lawrence's offering in the growing genre of studies and evaluations of "hate crimes" offers new and valuable insights. Lawrence strongly supports legislation against bias crimes, which, in their various incarnations, merit legislative condemnation and retribution. He proposes that the role of legislating against bias crimes should extend beyond the several states, to fall squarely within the province of federal jurisdiction.³

¶2 Lawrence begins his argument by drawing a distinction between different categories of bias crimes, which emphasizes the conclusion that these crimes do not all arise due to hatred.⁴ Initially, he categorizes bias crimes as coming within either the "racial animus"⁵ or the "discriminatory selection"⁶ model. For a crime to fall within the more traditionally-recognized "racial animus" theory, the defendant must have "acted out of hatred for the victim's racial group or the victim for being a member of that group."⁷ What Lawrence refers to as the "discriminatory selection" theory, "requires that the defendant has selected his victim because of

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1. FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* (1999). Lawrence serves as Associate Dean and Professor of Law at Boston University School of Law.

2. Interview with Bill Wassmuth, Director, Northwest Coalition Against Malicious Harassment, in Seattle, Wash. (June 1998). Courts and the media do not seem to have jumped on the semantic bandwagon, however. A recent *New York Times* report of argument before the Supreme Court, in *State v. Apprendi*, 731 A.2d 485 (N.J. 1999), *cert. granted sub nom Apprendi v. New Jersey*, 120 S. Ct. 525 (1999), bore the headline, "Supreme Court Weighs a Hate-Crime Law." Linda Greenhouse, *Supreme Court Weighs a Hate-Crime Law: Dispute Involves Whether Judge, Not Jury, Can Add to Prison Term*, N.Y. TIMES, Mar. 29, 2000, at A21.

3. LAWRENCE, *supra* note 1, at 2.

4. *Id.* at 4.

5. *Id.*

6. *Id.*

7. *Id.*

the victim's membership in a particular group."⁸ Although on its face the distinction may seem more semantic than substantive (as even Lawrence concedes),⁹ it underscores the more modern viewpoint, and Lawrence wisely continues to focus on the two groups' commonality: the perpetrator's "state of mind."¹⁰

¶13 Bias crimes normally involve underlying activity, or "parallel"¹¹ crimes, that would be criminal even without any bias motive.¹² The *actus reus* may remain the same, but with a bias crime the *mens rea* receives an enhancement due to the bias of the actor. Lawrence believes the bias crime should deserve treatment independent from the parallel crime, for bias crimes inflict a more egregious harm to the victim and as such are intrinsically actionable. "The victim of a bias crime is not attacked for a random reason—as is the person injured during a shooting spree in a public place—nor is he attacked for an impersonal reason, as is the victim of a mugging for money. He is attacked for a specific, personal reason: his race."¹³ Bias crimes therefore deserve treatment as completely separate crimes with accordingly heightened penalties given their effect upon the victim.¹⁴ He bolsters this argument by noting that bias crimes harm the whole of American society, and accordingly legislatures must condemn and punish the activity as separate and apart from the parallel crime.¹⁵

¶14 Thus, according to Lawrence, the difference in harm to the victim and to society distinguishes a bias crime from a parallel crime.¹⁶ He regrettably weakens what to this point has proved a compelling argument by taking his logic a step further, and a step that seems untenable. Lawrence suggests that the "level of intentionality"¹⁷ also distinguishes between a bias crime and its parallel crime. This proposal, however, ignores the question of whether any bright line of distinction between motive and intent does in fact exist. One intends a criminal act when one, for example, desires to bring about the ensuing result. Motive, in contrast, is the reason for an individual's desire. Society often makes a value judgment when it incorporates intent as an element of a crime, although motive seldom figures in a normal criminal statute. On the other hand, as a matter of proof, intent and motive normally tend to merge during the trial of a criminal matter. Intent, as an element in any cause of action, is often inferred from activity, and, to an extent, motive for a bias crime can be inferred from prior statements, racist letters to a friend, or

8. *Id.*

9. *See id.* at 3–4.

10. *Id.* at 4.

11. *Id.*

12. *See id.* at 4–5.

13. *Id.* at 40.

14. "A bias crime thus attacks the victim not only physically but at the very core of his *identity*. It is an attack from which there is no escape." *Id.*

15. *Id.* at 43.

16. *Id.* at 39–44.

17. *Id.* at 5.

homophobic literature found in the defendant's home.¹⁸ Thus, arguing that motive and intent differ seems an argument with little practical applicability.¹⁹ Lawrence never adequately addresses this issue, and as a result this portion of his argument suffers. Still, this omission takes little away from an otherwise forceful portion of the book.

¶15 Lawrence, by establishing appropriate criteria²⁰ for classifying a crime as a bias crime, cautions against establishing legislation that paints with too broad a brush. Bias crimes stem from prejudice and bigotry recognized as socially undesirable motivations. Some actors, however, dislike their victims for reasons which society does not deem problematic. Lawrence gives the reader two examples to illustrate how legislatures might evaluate the merit of legislating against a crime based on the actor's negative feelings against the target victim.

Suppose that A decides in advance of meeting B that he does not like B because B is Jewish and A believes that Jews cannot be trusted. A is acting out of prejudice. A's dislike for B is based on false stereotypical views of B's religious group. Anti-Semitism in America is a group antipathy that has a social context. If, on the other hand, C decides in advance of meeting B that he does not like B because B has blue eyes and C believes that blue-eyed people cannot be trusted, we consider C to have a rather odd peccadillo where eye color is concerned—like the narrator in Poe's *The Tell-Tale Heart*, who obsesses over his victim's "pale blue eye, with a film over it"—but we would be hard pressed to call his behavior prejudiced in a deep sense.²¹

Should A decide to shoot B, a legislature would justifiably stigmatize the act as a bias crime. On the other hand, if C shoots B, any action by a legislature to denominate the act as a bias crime would be improper.

¶16 The book then addresses the propriety of categorizing gender and sexual orientation as bases for inclusion in bias crime legislation. As Lawrence notes, some commentators believe crimes against either women or those oriented to same-sex relationships, unlike crimes directed against particular ethnic groups, do not merit bias crime status. In both instances, those arguing against inclusion attempt to draw support from claimed societal justification.

Legislators and commentators have taken two approaches in deciding where societal fissure lines fall. One approach is to begin with the classic societal fissure lines and to look for common elements in other groups to determine if they should be included in bias crime

18. *See id.* at 107.

19. On the other hand, recent argument before the Supreme Court has emphasized the distinction, but in an unusual instance. "Whether a defendant had the requisite intent to commit the crime, essential to the finding of guilt, remained as it always has been, a question for the jury under New Jersey's approach, [a deputy attorney general from New Jersey argued]. But the question of motive, or why the defendant committed the crime, was traditionally treated as a sentencing factor, she said." Greenhouse, *supra* note 2. New Jersey's statute leaves the determination that bias motivated the criminal activity to the judge, rather than to the jury, and thus in that isolated case proof of intent and motive do not merge.

20. *See* LAWRENCE, *supra* note 1, at 11.

21. *Id.* (footnote omitted).

laws. This approach has been applied most frequently to gender. Opponents generally do not argue that women as a class are unsuitable for bias crime protection. Sex is generally an immutable characteristic, and no one seriously argues that women are not victimized as a result of their gender. Instead, opponents argue that crimes against women are not *real* bias crimes, that is, that they do not fit the bias crime model.

The other approach looks to the qualities of the characteristic itself, an approach taken most frequently with respect to sexual orientation. Many legislators, either because they view sexual orientation as a choice [e.g., “sexual preference”] and not as an immutable characteristic, or because they are wary of giving special rights to gays and lesbians, argue that homosexuals do not deserve inclusion in bias crime statutes.²²

¶17 Having noted the problems posed by those seeking to deny bias crime status to criminal acts based on gender or sexual orientation, Lawrence first examines targeting women as a category for bias crime protection. The arguments employed by those who oppose such legislation come down to two main points: “that victims of many gender-related crimes are not interchangeable, and that victims often have a prior relationship with their attackers.”²³ But as Lawrence deftly points out, neither argument can withstand logical scrutiny. A prior relationship is not definitive in proving or disproving the bias element.²⁴ He offers the example of a Canadian man who fatally shot a roomful of women and then killed himself, leaving behind a note deploring all women as feminists who had ruined his life. Lawrence argues that these women were killed because they were women; hatred toward or bias against women was the reason they were chosen as victims.²⁵ Thus, bias crimes actually have a dual paradigm directly antithetical to that posited by those who would deny bias status to crimes against women or those with a same-sex orientation: “(1) victims are interchangeable, so long as they share the characteristic; and (2) victims generally have little or no pre-existing relationship with the perpetrator that might give rise to some motive for the crime other than bias toward the group.”²⁶

¶18 Lawrence emphasizes, though, that the bias element may not be the predominant motivation behind a perpetrator’s acts, and where it is not, with regard to inclusion of gender in the bias crime category—or against any other target group identified in legislation—criminal acts should not be considered bias crimes.²⁷ For example, a bank robbery in which two patrons, one Caucasian, the other African-American, were shot and killed by the robbers, would not constitute

22. *Id.* at 14 (footnotes omitted).

23. *Id.* at 14-15 (footnotes omitted).

24. *Id.* at 16.

25. *Id.* at 17.

26. *Id.* at 14. Lawrence does acknowledge that in many instances his second paradigm is not true in a rape prosecution: “Particularly in cases of acquaintance rape and domestic violence, the prior personal relationship between victim and assailant makes it difficult to prove that gender animus, and not some other component of the relationship, is the motivation for the crime.” *Id.* at 15.

27. *Id.* at 17.

a bias crime. In this instance, the race of the latter victim is irrelevant, unless facts are introduced to counter the seemingly random selection of victims. On the other hand, Lawrence maintains, the fact that motive is a difficult element to prove should not in and of itself, bar its use as an element in legislating against crimes requiring proof of the suspect's motive.²⁸

¶19 Lawrence similarly argues that the mere existence of other legislation which would be duplicative of bias crimes should not prevent an independent bias crime statute,²⁹ if for no other reason than to send a message that bias crimes should meet with zero tolerance at both the state and national governmental levels. But Lawrence cites further reasons against the argument. He responds to the similar argument employed against gender-based bias crime legislation—that it would duplicate other criminal laws protecting women against abuse or other violence—by noting that laws already on the books protect women beyond their “parallel” crime.³⁰ Rape, for example, is not punished merely as assault; rape is punished as a separate crime that, in most states, is second only to murder in terms of severity of punishment. Similarly, in the context of domestic violence, many states have become increasingly active in trying to develop specialized responses by law enforcement. Lawrence includes the comment of Texas state representative Scott Hochberg, an opponent of including gender in the Texas bias crime law: “[W]e have very specific rape statutes, and we have sexual abuse statutes and we have family violence statutes. . . . Crimes against women that are gender-specific crimes, we have other mechanisms to take care of.”³¹

¶10 In addressing the specialized arguments made regarding sexual orientation as a characteristic of a protected target group³² in bias crime legislation, Lawrence is equally emphatic:

Just as . . . [with] gender in bias crime statutes, the state makes a normative statement about the treatment of gays and lesbians when it frames its bias crime law. Failure to include sexual orientation implies that gays and lesbians are not as deserving of protection as racial, religious, or ethnic minorities, and that sexual orientation is not as serious a social fissure line as race, religion, and ethnicity. We see . . . that there is no “neutral” bias crime law.³³

28. *Id.* at 18.

29. *Id.*

30. *Id.* at 15.

31. *Id.* (footnote omitted).

32. *Id.* at 19. At this juncture of the book, Lawrence is focusing on the specific debate over whether sexual orientation should be included as a category appropriate for statutory protection. He argues that the inclusion of target groups like sexual orientation does not offer them any advantage but merely protection against crimes perpetrated based on the victim's status as a member of that category. Thus, since the member of the group would not have been targeted had he or she not been a member of that group, the statute is merely the legislature's response to that group's vulnerability, much as anti-discrimination laws counteract discrimination. It is only when an individual is a member of a category that is vulnerable to discrimination that anti-discrimination law is needed to right the wrong.

33. *Id.* at 20.

¶11 Having established the need for bias crime legislation generally, Lawrence then turns to the question of federal legislation, and the title of the book itself—*Punishing Hate: Bias Crimes under American Law*—most dramatically indicates the debate over legislating against bias crimes. The American knee-jerk antipathy for penalizing a person for that person’s beliefs prompts an instinctive reaction against punishing someone for hating a person or hating a group.³⁴ Yet when a perpetrator couples hatred with harmful activity, the public will subordinate its animus to the point that it will accept punishment. Nevertheless, the deeply-ingrained American desire to protect one’s beliefs, no matter how heinous, has placed legislation against bias crimes in disfavor. When criminality rests upon the perpetrator’s belief, or when the penalty is determined by the perpetrator’s belief, the American public’s anathema to thought crime improperly causes it to look askance at punishing bias crime.³⁵ The public is somewhat fickle, though, with a cry going up for government remedial action when a particularly heinous or well-publicized bias crime is committed, such as the murder of Matthew Shepard in Wyoming.³⁶ Yet even there, less than a year after the brutal slaying, the Wyoming legislature defeated the bias crime bill introduced in reaction to the case.³⁷ If a state-by-state approach is so vulnerable to the vicissitudes of popular opinion, then Lawrence may correctly argue the necessity of federal uniformity³⁸ to combat the social evil.

¶12 The federalism question is one of the more problematic sticking points in the controversy over whether the federal government should legislate against bias crimes.³⁹ However, pragmatic considerations may moot the issue. The link between bias criminals and hate groups and, in turn, domestic terrorism inevitably leads to greater federal involvement in the law enforcement process. As Lawrence notes, “the growth of violence associated with so-called militias strongly suggests an increase in hate crimes that is far more than a matter of perception.”⁴⁰ The result of this nexus is greater involvement of the alphabet soup of federal law enforcement agencies—the FBI, ATF, CIA, NSA—in policing bias crimes and related investigatory organizations play an increasingly active role in monitoring

34. See Eric Fettmann, *Banning Hate Is Just Feelgood*, N.Y. POST, Jan. 24, 1999, at 55; Michael Kelly, *Hate-Crime Laws Eviscerate Fundamental Rights*, CINCINNATI POST, Oct. 16, 1998, at 21A. Lawrence earlier addresses the issue of hate speech, noting a similar desire to protect individual beliefs in that area as well. LAWRENCE, *supra* note 1, at 6.

35. See LAWRENCE, *supra* note 1, at 7.

36. This murder of a young gay man, allegedly committed because of the accused killers’ animus toward homosexuality, spurred a spate of public demands for legislation to punish and deter similar bias-based violence. See Robert W. Black, *First Trial Starts in Gay Student’s Death*, AUSTIN AMERICAN-STATESMAN, Mar. 21, 1999, at A13; Michelle Boorstein, *Lawmakers Call for Hate Crime Laws*, N.Y. TIMES, Oct. 16, 1998.

37. See Melanie Thernstrom, *The Crucifixion of Matthew Shepard*, VANITY FAIR, Mar. 1999, at 209.

38. LAWRENCE, *supra* note 1, at 2.

39. See *id.* at 110.

40. *Id.* at 4

bias crime activity, given its close relationship to the hate groups which so often provide the personnel for terrorist activity.

¶13 My own research, using the paradigm of Seattle, Washington,⁴¹ demonstrates the increasing interdependence between local and federal law enforcement officials. The Seattle city police force has both a division focusing on bias crimes⁴² and a separate one, rare among municipalities, for domestic terrorism.⁴³ These two governmental entities engage in their own internal “turf war” to monitor and apprehend the criminal whose actions had an additional element: bias toward a particular target group. When the bias-driven criminal is not the “lone crazy” (epitomized by the Unabomber) but rather a member of a “hate group” such as the Ku Klux Klan or the Aryan Brotherhood, characterization and jurisdiction even at the state level becomes less clear. In Seattle, I spoke also with members of the FBI⁴⁴ and the ATF⁴⁵ about their agencies’ roles. While the different law enforcement bodies do interact and cooperate, expanding federal jurisdiction over bias crimes has the potential to negatively affect an existing, if imperfect, sharing of authority.

¶14 Complicating the matter further, domestic terrorism sometimes appropriately falls within the exclusive realm of state authorities. The domestic terrorist may be the disgruntled exile from the unorganized militia group who decides to implement activities considered too extreme by the militia leaders attempting to mainstream. The hate criminal may be someone who identifies with the articulated bilious polemics of the group or organization engaged in or known for anti-government activities.⁴⁶ Shootings at the Los Angeles Jewish Community Center⁴⁷ offer one recent example of the “lone crazy”⁴⁸ hate criminal or domestic terrorist replacing the band of conspirators.

¶15 Lawrence notes one final problem with federal legislation. Bringing the federal government into the fray may actually increase the activity of some “hate groups,” given that anti-government activists attempt to authenticate their actions by citing the revived states’ rights slogan of “too much government is by defini-

41. The author of this review is presently writing a book about the link between bias crimes and domestic terrorism.

42. Interview with Lieutenant Allan Lorette, Head of Domestic Terrorism Unit, Seattle Police Department, in Seattle, Wash. (Oct. 21, 1998).

43. Interview with Detective Elias Leon, Bias Crime Coordinator of Violent Crime Section, Seattle Police Department, in Seattle, Wash. (Oct. 6, 1998).

44. Interview with Assistant Special Agent in Charge, Seattle Division, Federal Bureau of Investigation, in Seattle, Wash. (Oct. 1998).

45. Interview with Special Agent Jesse Chester, Seattle Division, Bureau of Alcohol, Tobacco, and Firearms, in Seattle, Wash. (June 23, 1999).

46. Interview with Bill Wassmuth, *supra* note 2.

47. See Steve Berry, *Furrow to Face Federal Charges First*, L.A. TIMES, Aug. 20, 1999, at B1; Peter Y. Hong, *Callers to 911 Differed Over Race of Gunman*, L.A. TIMES, Aug. 19, 1999, at B1.

48. See Timothy Egan, *Racist Shootings Test Limits of Health System, and Law*, N.Y. TIMES, Aug. 14, 1999, at A1; Andy Furillo, *Furrow’s Family Ponders Where Things Went Bad*, SACRAMENTO BEE, Aug. 13, 1999.

tion bad government.” Yet Lawrence downplays this possibility, substantiating his argument favoring federal legislation with an historical survey of federal legislation, which he offers as precedent for federal intervention in the face of a threat to public safety.⁴⁹

¶16 Lawrence concludes by addressing the questionable constitutionality of bias crime laws. He acknowledges two primary challenges: first, bias crimes tend to treat certain people more favorably than others and second, bias crimes negatively implicate the First Amendment right of free speech.⁵⁰ He distinguishes hate speech,⁵¹ which the Supreme Court held constitutionally protected in *R.A.V. v. City of St. Paul*,⁵² from bias crimes. Lawrence correctly argues that racist speech differs dramatically from racist hate crime, and the difference is fundamental to reconciling the need to protect content-based speech and punish bias-motivated action.⁵³ He rests his argument on the need for bias crime to result in criminal behavior, as opposed to hate speech, which produces no parallel crimes. “[T]he so-called paradox of seeking to punish the perpetrators of racially motivated violence while being committed to protecting the bigot’s right to express racism is a false paradox. We can, in fact, do both, and we should.”⁵⁴

¶17 Certainly, key to this ongoing, even escalating, debate is the issue of whether the notion of a bias crime, as offensive as hate speech, is similarly though odiously protected by the First Amendment.⁵⁵ Lawrence dismisses this argument as a “false paradox.”⁵⁶

Put simply, we are making this problem harder than it needs to be. We must focus on the basic distinction between “bias crimes,” criminal conduct that is motivated by the race or similar characteristic of the victim and deserves enhanced punishment, and “racist speech,” articulation of racist views, which, no matter how unpleasant, is protected. This distinction has been blurred (or denied) by commentators and courts alike, including, for example, the United States Supreme Court in *R.A.V. v. City of St. Paul*, in which the St. Paul, Minnesota, cross-burning ordinance was struck down, and again in *Wisconsin v. Mitchell* (1993), in which the Wisconsin bias crime law was upheld. Others have suggested either that both bias crimes and racist speech are protected, or that both may be punished. I reject these extremes and present a middle position.⁵⁷

¶18 Lawrence indeed offers a middle ground with his view that it is “imperative” that free speech be untrammelled and bias crimes be outlawed.⁵⁸ His argu-

49. LAWRENCE, *supra* note 1, at 110–149.

50. *Id.* at 80.

51. *Id.* at 80–82.

52. 505 U.S. 377 (1992).

53. LAWRENCE, *supra* note 1, at 81.

54. *Id.*

55. *See id.* at 6.

56. *Id.*

57. *Id.*

58. *Id.* at 6–7.

ments are well-considered and articulately, indeed persuasively, presented.⁵⁹ However, the problem encompasses more than the single issue of whether bias crimes should be punished, or punished more harshly, than their “parallels.” Other issues remain, including the role of the federal government in combating hate crime, as well as the theoretical underpinnings allowing such legislation to fit within the line of existing precedent. On these issues, there is still room for debate, and although Lawrence argues his case well, doubts still remain.

¶19 In the final analysis, though, Lawrence’s voice should be heard. His arguments, grounded in solid reason and authority, flow so well in this engagingly and fluidly written volume that it undoubtedly serves as a vital contribution to the research regarding this heightening public controversy.

59. Admittedly, Lawrence has found in this reviewer an easy audience, preaching to the already converted.

