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A Dangerous Mix: Mandatory Sentence Enhancements and the Use of Motive

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Abstract

The comment begins with a story about an attack that took place against a homosexual where the attacker was then charged with a hate crime because he attacked a homosexual and seemingly was motivated by the victims sexual preference. The resulting strict punishment was based on motive and the comment discusses whether it is a good idea to mandate stricter punishment for crimes based on different kinds of motives. The comment then explores the differences between intent and motive, examines motive in the view of conspiracies based on Pinkerton liability and such, and looks at motive in the context of hate-crime laws. Next, the comment discusses hate-crime statutes and whether the use of these it taking the effects of motive too far. The comes to the conclusion that while motive must be seen as an element of how crimes are punished, caution must be used so that it should only have an effect where it is justified by a real threat to society.

KEYWORDS: sentence enhancement, mandatory, motive

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A DANGEROUS MIX: MANDATORY SENTENCE ENHANCEMENTS AND THE USE OF MOTIVE

Joshua S. Geller∗

Introduction

"It all happened so fast. One minute Peter Malamoutsis was laughing with friends in front of a restaurant early Saturday morning. The next he was on the pavement gasping for breath as three men kicked him repeatedly in the head."[1]

According to news reports, this attack was preceded by an exchange in which John Himonetos made a disparaging remark about homosexuals, and Malamoutsis, himself a homosexual, took offense.[2] Himonetos and two others allegedly proceeded to beat Malamoutsis, and police believe that the attack was motivated by the victim's sexual preference.[3] Himonetos has been charged with a hate crime and faces the possibility of an extended sentence of up to thirty years, double the maximum allowed for aggravated battery.[4]

Himonetos's case is not unique. Over forty states have adopted hate-crime laws that increase the punishment for offenses in which the defendant was motivated by hatred of the victim's race, gender, or sexual preference.[5] What would have been considered an ordinary bar fight just a few years ago is now recognized as gay bashing and is subject to harsh

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1. Candace Rondeaux, *Ugly Words Later Led to Beating*, ST. PETERSBURG TIMES, Nov. 25, 2003, at 1B.

2. *See id.*

3. *See id.*

4. *See id.*

5. New York became the forty-forth state to enact hate crime legislation with its passing of the Hate Crimes Act of 2000. *See* Brian S. MacNamara, *New York's Hate Crime Act of 2000: Problematic and Redundant Legislation Aimed at Subjective Motivation*, 66 ALB. L. REV. 519, 519 (2003).

penalties that are meant to deter bigoted behavior.[6]

The significance of this story lies not in the existence of the crime but in the severity of the punishment. This Comment will address the following issue: Given that the punishment increase is based solely on the accused's motive, should we be more concerned about the accuracy of the verdict in cases like John Himonetos's than we are in non-motive-based crimes? Himonetos may be a horrible bigot whose hatred of homosexuals constitutes an immediate threat to a significant percentage of the population. He may instead, however, just be a man who is prone to violence and who decided to take out his aggression on the nearest target; in this case, a gay man. The jury's determination of this very fact is the crucial element that will determine how much of his life Himonetos spends in jail.

It is beyond question that one who is convicted of assault should be punished. It is only when a statute increases that punishment because the crime was triggered by the victim's membership in a minority group that we must wonder whether our possible understanding of the criminal mind truly validates the imposition of a harsher sentence. Can the assailant's psyche be determined beyond a reasonable doubt, and is the law correct in mandating that a jury do so in the course of a trial that potentially affects the next thirty years of this man's life?

The following discussion focuses on whether the American criminal justice system has gone too far in its use of motive as a basis for mandating stricter sentences.[7] The radical changes to the federal and state sentencing guidelines brought about by *Blakely v. Washington*[8] and *United States v. Booker*[9] will force legislatures to take a closer look at our system of punishment. In no area is such introspection more important than with regard to those crimes that use motive as their essential element.

This Comment will address the problems presented by criminal statutes that mandate sentence enhancements specifically for the motive element of

6. *See, e.g.*, Bill Jacket to 2000 N.Y. Laws 107, 2000 A.B. 30002 (stating the New York legislature's reasoning behind the state's Hate Crime Act of 2000).

7. *See* William J. Stuntz, *Pathological Politics*, 100 MICH L. REV. 505, 525-26 (2001) (stating that politicians view harsher punishments as a cheaper means of being tough on crime rather than increasing police forces).

8. 124 S. Ct. 2531, 2537 (2004) (finding the Washington State Sentencing Reform Act to be unconstitutional in that it permitted a judge to consider factors at sentencing that had not been found by the jury or admitted to by the defendant).

9. 125 S. Ct. 738, 756 (2005) (finding the United States Sentencing Guidelines to be unconstitutional when functioning as a mandatory obligation upon judges and holding that the Guidelines should be used only in an advisory capacity). It should be noted that the majority found that by making the Guidelines advisory, power would be shifted away from the judge to the jury to determine the defendant's actual sentence. *See id.* at 752.

a crime. Conspiracy law, hate-crime statutes, and unlawful purpose statutes will be presented individually as examples of motive-based crimes and collectively as an illustration of a progression in criminal law of the increasingly greater use of motive. Part I provides an introduction to the use of motive in criminal law and contains a brief overview of the motive-intent dichotomy. In addition, Part I includes a discussion of conspiracy law as the forebear of motive-based crimes.

Part II focuses on hate crime law as the primary example of a crime that uses motive to suggest a sentence enhancement. This Part includes a detailed discussion of the arguments in favor of and in opposition to hate crime laws, specifically as those critiques pertain to the difficulty of determining if a defendant acted out of bias.

Part III is a discussion of a law that further pushes the frontier in the use of motive in sentencing, the proscription of possession of a weapon for an unlawful purpose. Finally, this comment concludes by suggesting two options to address the problem of the increasing use of motive: legislatures should either reform the law to limit the use of sentence enhancements in motive-based offenses, or the application of sentence enhancements should be left to the discretion of the judge.

I. MOTIVE AND INTENT: A COMPARISON

The first step in discussing motive-based crimes is to examine how motive differs from intent, both from a definitional standpoint and through practical application. This section will analyze a selection of areas within criminal law in which motive plays an integral role in the definition of an offense, followed by a detailed discussion of the difficulties in properly parsing motive from an overall finding of intent.

A. THE MOTIVE-INTENT DICHOTOMY

A fundamental precept of criminal law is that to obtain a conviction there has to be a finding of criminal intent.[10] The prosecution must not only prove that the defendant committed the act charged, but also that the defendant acted with some culpable mental state, either "purposely," "knowingly," or "recklessly."[11] Intent is a fundamental part of the

10. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 250 (1952); MODEL PENAL CODE § 2.02 (1962).

11. See MODEL PENAL CODE § 2.02 which states that

> [a] person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the

adjudicatory process, and its inclusion reflects the notion that guilt is not based on action alone; for a person to receive a punishment it must be proven that there was a certain *mens rea*, a mental state that establishes culpability.[12]

Just as intent is essential, the motivation of the defendant is generally not an element in the determination of guilt.[13] Juries are instructed to determine whether the defendant intended to commit the crime and that the crime was actually committed; the defendant's reasons for committing it should not be a consideration in the finding of fact.[14] The basic reason for the irrelevance of motive is that the American criminal justice system is based on a utilitarian model that seeks to create exact specifications of crimes. To achieve "effective and optimal deterrence require[s] that proscribed conduct be defined precisely, prospectively, and publicly."[15] Within this framework, the requirement to determine why the criminal acted is diminished, as it is sufficient that the defendant was aware of his actions and of their consequences.[16]

> existence of such circumstances or he believes or hopes that they exist . . . . A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result . . . . A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

12. *See id.*

13. *See* Guyora Binder, *The New Culpability: Motive, Character, and Emotion in Criminal Law*, 6 BUFF. CRIM. L. REV. 1, 1-2 (2002) (citing JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 153 (1947)). This concept has been termed "the irrelevance of motive doctrine." *Id.* Note also that there are some criminal statutes that have motive requirements, for instance murder for hire. *See* 18 U.S.C. § 1958 (2003). This type of crime does not, however, actually function to punish motive. Murder for hire is not intended "to punish or deter the motive of profit-seeking, but the medial end of creating contracts to kill." 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, 365 (1991).

14. *See, e.g.*, Missouri v. Woodworth, 941 S.W.2d 679 (Mo. Ct. App. 1997) (stating that "[p]roof of motive is not essential to a conviction, however, and thus the lack of proof of motive does not affect the validity of the verdict").

15. Binder, *supra* note 13, at 28.

16. Regarding hate crimes, it may be particularly difficult to precisely describe "hate." Note that the New York hate-crime statute avoids this problem by focusing on the minority status of the victim and not on the animus present in the defendant. N.Y. PENAL LAW § 485.05 (McKinney 2003).

1. Differentiating Between Motive and Intent

To properly understand how motive is being used in various criminal statutes, it is important at the least to attempt to comprehend the distinction between motive and intent. At a very basic level, motive can be defined as "something, especially willful desire, that leads one to act."[17] Intent refers to "the state of mind accompanying an act, especially a forbidden act."[18] These definitions imply that motive is the inducement to act while intent is the willingness to act.[19]

Numerous difficulties afflict the motive-intent relationship and cast doubt on whether motive really is excluded from criminal law.[20] Given the above definitions, it can be argued that a finding of intent will essentially incorporate a decision on motive.[21] By defining motive as the desire for the end result, a finding that the defendant intended the illegal conduct leads to the presumption that the result was desired and even expected; in other words, motive might be found concurrently with intent, which can be problematic in a system in which the two are purposefully kept apart.[22]

A means of addressing the conceptual problem of the distinction between motive and intent may be to acknowledge that the "distinction simply mirrors the way in which we choose to describe them."[23] Motive complicates the utilitarian nature of criminal law[24] when it is defined as anything and everything that is extrinsic to the defendant's intent.[25] By embracing the expansion of intent and specifically including motivation within the broader finding of intent, we no longer have a problem with

17. BLACKS LAW DICTIONARY 461 (2d Pocket ed. 2001) (motive).

18. *Id.* at 360 (intent). The phrase "I intend to rob the store tomorrow" appears to be a non-technical use of the term intent; by referring to a state of mind that does not immediately accompany the action but actually leads up to the action, under the *Blacks Law* definitions it appears to be more of a statement of motive than of intent. In fact, however, the intent expressed in this phrase refers to the plan to commit an act and not the desire to do so. Because it is not a reflection of what led the robber to act, it should not be considered a reflection of the robber's motivation.

19. *See id.*

20. *See* Binder, *supra* note 13, at 46-49.

21. *See id.* at 46.

22. *See id.* The author discusses the work of John Salmond, who "reasoned that the intent to harm was never an offender's ultimate purpose: people harmed others only to benefit or gratify themselves in some way." *Id.* (discussing JOHN SALMOND, JURISPRUDENCE: OR, THE THEORY OF THE LAW 417-19 (1902)).

23. Frederick M. Lawrence, *The Case for a Federal Bias Crime Law*, 16 NAT'L BLACK L.J. 144, 157 (1999-2000).

24. *See supra* notes 15-16 and accompanying text.

25. *See* Lawrence, *supra* note 23, at 156.

inadvertently criminalizing motive.[26] Under this approach, finding intent in the hate-crime context requires a decision on both the intent to assault and the animus-driven intent that drove the selection of the victim.[27]

It has also been argued that the irrelevance of motive doctrine is wrong.[28] Rather than not playing a role in criminal law, motive should instead be used for specific functions.[29] For example, motive can be a means of justification or the explication of an otherwise criminal action.[30] While not an element that would have to be established by the prosecution, it can instead be a tool available to the defense to present the facts in a way that would justify the defendant's behavior.[31] Professor Wayne LaFave states that there is no use for motive other than establishing the elements of the defense.[32] "When an individual finds himself in a position where the law grants him the right to kill another in his own defense, it makes no difference whether his dominant motive is other than self-preservation."[33] This is not to say that motive has never had a place in the prosecutorial side of criminal law. As demonstrated in the following section, however, the prior usage offers little value as precedent for motive's current applications.

2. Precedent for the Use of Motive in Criminal Law

In general, a prosecutor has no legal obligation to establish why the defendant committed, or wanted to commit, the crime charged.[34] Similarly, judges may use motive as a factor in sentencing, at least within the range permitted to them by the legal sentencing regime, but doing so is not mandated by law and the weight given to motive will be tempered by the judge's experience and knowledge.[35]

There are some long-standing criminal laws that incorporate motive. One example is 18 U.S.C. § 242, which states:

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26. *See id.* at 157.

27. *See id.*

28. *See* Binder, *supra* note 13, at 48.

29. *See id.*

30. *See id.*

31. *Id.* There are inculpatory uses of motive that can be utilized by the prosecution, specifically with regard to inchoate crimes and conspiracy.

32. *See* WAYNE LAFAVE & AUSTIN SCOTT JR., CRIMINAL LAW 229-30 (2d ed. 1986).

33. *Id.* at 230.

34. *See, e.g.*, Moore v. Indiana, 653 N.E.2d 1010, 1016 (Ind. Ct. App. 1995). Motive can, however, be raised during the course of a trial as it may play an important role in the proof of the prosecution, the defense, or both. To this end, the Federal Rules of Evidence Section 404(b) allows for the admission of prior crimes and wrongful acts as proof of the defendant's motive. U.S.C. FED. R. EVID. 404(b) (2005).

35. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 558 (2000) (Breyer, J., dissenting); Wisconsin v. Mitchell, 508 U.S. 476, 485 (1993).

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person. . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race. . . . shall be fined under this title or imprisoned not more than one year, or both . . . .[36]

This statute prohibits state actors from depriving a person of any right on the basis of race, and if injury results from that deprivation, for an extended sentence to be imposed.[37] By taking the victim's race into consideration, section 242 appears to have set the stage for current laws that look beyond the underlying crime and inquire into the defendant's motivation.

Indeed, the elements of section 242 seem similar to common hate crime legislation,[38] but there is a key difference. Section 242 involves the conduct of state actors or those acting under color of state law.[39] When an individual is acting on behalf of the state and commits a crime that appears racist in nature, the motivation behind that action is of the utmost importance given the Fourteenth Amendment's Equal Protection Clause.[40] The government cannot act in a discriminatory manner based on race;[41] to this end, the motivation of the state should not be beyond the reach of the prosecution and must be fully examined by the court. Private citizens, on the other hand, are not subject to the requirements of the Fourteenth Amendment.[42] Therefore, while section 242 may have provided the standard for examining motive when the actions of the state are in question, it has not established a basis for doing so when private individuals are on trial.[43]

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36. 18 U.S.C. § 242 (2003).

37. *See id.*

38. *See infra* Part II.A.

39. *See* 18 U.S.C. § 242.

40. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . . . .deny to any person within its jurisdiction the equal protection of the laws.").

41. *See id.*

42. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 621 (2000).

43. The Thirteenth Amendment does reach to private actions as it is applied to 18 U.S.C. § 245. *See* United States v. Nelson, 277 F.3d 164, 175 (2d Cir. 2002). The difference between section 242 and section 245 is that the latter serves to "determine what are the badges and incidents of slavery" (the focal point of the Thirteenth Amendment). *Id.* at 190-91 (quoting Jones v. Alfred H. Meyer Co., 392 U.S. 409, 440 (1968)). Section 245(b) represents the statutory declaration that no person can be subjugated based on race, religion, etc. While not as easily distinguishable from state hate crime law as § 242, it should be recognized that section 245 prohibits slavery-related distinctions, not hate. *See Nelson*, 277 F.3d at 190-91.

Other arguments can be made for precedent to criminalize motive.[44] The bifurcated findings of intent in specific intent crimes are one example. For instance, in Ohio it is a third-degree felony to forcibly move someone from one place to another and a first-degree felony to do so with the purpose of holding the victim for ransom.[45] Under this statute, in a trial for kidnapping the jury would be required to examine the intent of the abductor – not to find why he committed the act, but rather to determine what he intended to do with the victim.[46] This requirement appears to fall in the trap in which a finding of intent encapsulates a decision on motive.[47] The reason for the increased sentence, however, is not to criminalize the defendant's motive but to distinguish the two crimes of kidnapping and kidnapping with a ransom demand.[48]

Similarly, discrimination suits brought under Title VII, specifically 18 U.S.C. § 246,, seem to fit the class of cases that punish a person's motivation, as they penalize ordinary actions that are done to the detriment of the victim and that are motivated by the victim's status as a minority.[49] Such actions are relatively similar to motive-based crimes, but have one key difference. Title VII prohibits otherwise legal actions when done to a member of a minority group: "[i]t is the discriminatory action, and not the racial motive, that Congress intended to prohibit in those statutes."[50] Motive-based statutes such as hate crimes penalize the underlying action and then provide an extra punishment for the motivation behind that action.[51]

Following the Supreme Court's decision in *United States v. Booker*, the United States Sentencing Guidelines, as well as many of its state counterparts, which had previously limited judges to a tight range within which convicted defendants could be sentenced, are no longer mandatory

44. *See* Gellman, *supra* note 13, at 366.

45. *See id.* at 366 (citing OHIO REV. CODE ANN. §§ 2905.01-.02 (Baldwin 1990)).

46. *See id.*

47. *See supra* notes 21-22 and accompanying text.

48. *See* Gellman, *supra* note 13, at 366 (finding the ransom demand, and not motive, to be the determinative factor for the greater sentence).

49. See 18 U.S.C. § 246 (2003) stating that

> [w]hoever directly or indirectly deprives, attempts to deprive, or threatens to deprive any person of any employment, position, work, compensation, or other benefit provided for or made possible in whole or in part by any Act of Congress appropriating funds for work relief or relief purposes, on account of political affiliation, race, color, sex, religion, or national origin, shall be fined under this title, or imprisoned not more than one year, or both.

50. *See* Gellman, *supra* note 13, at 368.

51. For a discussion of this issue see *infra* Part II.A.

but now serve only in an advisory capacity.[52] In the post-*Booker* era, with sentencing law in a state of flux, statutes that mandate sentence enhancements are likely to be reevaluated by legislatures and judiciaries to ensure that they meet this new, stricter Sixth Amendment interpretation.[53] There is no indication in *Booker*, however, that motive-based laws are unconstitutional, so long as *every* element of the crime is determined by a jury beyond a reasonable doubt.[54] To that end, this Comment will address motive-based crimes with the presumption that these laws are capable of satisfying Sixth Amendment challenges while maintaining the integrity of their current characteristics.

This Comment argues that the practical and legal issues raised by incorporating motive into criminal statutes are not absolute: they become more of an issue only as more weight is placed on the motive element. The three crimes to be discussed in detail represent a continuum in which the determination of guilt is increasingly based on a finding of motive.[55] Along this spectrum there is a balance between the weight placed by the law on the motive element and the social value of prosecuting each of these crimes.[56] This Comment will demonstrate that though the use of motive in conspiracy is valid, its function in hate crime law reaches the limit of acceptable practice, and its role in unlawful purpose crimes is unacceptable.

B. Conspiracy: A Basis for the Use of Motive in Criminal Law

The focus of this analysis now shifts to examine how the law functions when an offense requires proving more than the defendant's mere intentions and necessitates a deeper examination of her mental state. Conspiracy is one such offense.[57] The overview presented below details how the law has evolved to accommodate conspiracy and presents some of the debates that have ensued over this crime's usefulness. This analysis sets up the framework for current motive-based crimes.

1. Elements of a Conspiracy

Conspiracy is defined as "an unlawful agreement between two or more

52. 125 S. Ct. 738, 756 (2005).

53. *See id.*

54. *See id.* at 748.

55. *See infra* Parts II-III.

56. *See infra* Part III.

57. For a general discussion and short history of the crime of conspiracy, see generally George E. Burns, Jr., *The First Conspiracy Trial?*, 36 MD. B.J. 50 (2003).

persons[;] [i]t may be an agreement to accomplish an unlawful purpose or an agreement to accomplish a lawful purpose by unlawful means."[58] It is a unique crime. Unlike the murderer, the rapist, or the robber, the conspirator need not have done something to directly harm another individual. The crime of conspiracy only requires that two or more parties agree to commit an illegal act. In fact, if a defendant is convicted of both a crime and the conspiracy to commit it, the offenses do not merge and the defendant can be sentenced separately for each without triggering double-jeopardy protection.[59]

There are four elements to a conspiracy under federal law, each of which can be proven through circumstantial evidence:[60] a) an agreement between parties; b) a common goal; c) knowledge and participation in the conspiracy; and d) that at least one conspirator have committed an overt act in furtherance of the conspiracy.[61] Note that while there is a requirement for some action to be taken,[62] the remaining aspects of the crime are intangible in nature. This raises an obvious question: how can it be proven to the jury beyond a reasonable doubt that the defendants really intended to be part of the conspiracy?

A conspiracy is by definition secret—the nascent criminals want to hide their plans from the public and from the police to ensure maximum success.[63] Because of the inherent secrecy, successfully bringing a conspiracy charge to trial is an especially difficult task.[64] To compensate for this difficulty, courts merely require the prosecutor to show "'the

58. *See id.* at 50.

59. *Id.* That the act of conspiring is considered a crime in itself is an indication of the gravity attached to conspiracy by the justice system:

> [F]or two or more to . . . combine together to commit . . . a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

Pinkerton v. United States, 328 U.S. 640, 644 (1946).

60. *See* Carrie Casey & Lisa Marino, 40 AM. CRIM. L. REV. 577, 580 (2003).

61. *See* 18 U.S.C. § 371 (2005).

62. *See id.* Courts have held that some conspiracies do not have the overt act requirement. *See, e.g.*, United States v. Shabani, 513 U.S. 10, 11 (1994) (holding that drug conspiracy statutes do not require proof of an overt act); United States v. Hayter Oil Co., Inc., 51 F.3d 1265, 1270 (6th Cir. 1995) (holding that an overt act is not needed for a violation of Section 1 of the Sherman Act).

63. *See* United States v. Ortega, 203 F.3d 675, 683 (9th Cir. 2000) (discussing the importance of maintaining secrecy in the criminal plot).

64. *See* Casey & Marino, *supra* note 60, at 579.

essential nature of the plan and [the conspirators'] connections with it," a lighter burden for showing knowledge of the conspiracy.[65]

In *Blumenthal v. United States*, the Supreme Court stated that the law does not require the government to show that the defendant had complete knowledge of the plot and of every participant.[66] Rather, a conviction can be obtained by proving the nature of the plan and the defendant's connection to it.[67] This relaxed standard indicates that the law acknowledges the difficulties of discerning a person's thoughts. Note, however, that federal conspiracy law generally requires that at least one of the participants have taken some action in furtherance of the illegal goal.[68] This element functions to prove that "the conspiracy was operative, rather than a mere scheme in the minds of the actors."[69]

2. Pinkerton *Liability*[70]

The lower evidentiary standard for the prosecution is similar to the concept of *Pinkerton* liability, in which one member of a conspiracy is liable for all planned acts of the criminal organization.[71] The practical purpose of this doctrine is to reduce the need to distinguish between members of a conspiracy and each of their roles; a person who makes the conscious decision to join an illegal syndicate faces liability for any action

65. *See id.* (quoting Blumenthal v. United States, 332 U.S. 539, 557 (1947)) (alteration in original).

66. 332 U.S. at 557.

67. *See id.* Importantly, however, "a defendant's mere presence at the scene of a criminal act or association with conspirators does not constitute intentional participation in the conspiracy, even if the defendant has knowledge of the conspiracy." United States v. Samaria, 239 F.3d 228, 235-36 (2d Cir. 2001) (holding that a cab driver who took conspirators to the scene of their crime is not considered to have taken part in the conspiracy).

68. *See* 18 U.S.C. § 371 (2003). *But see supra* note 63 and accompanying text.

69. Casey & Marino, *supra* note 60, at 589 (citing Yates v. United States, 354 U.S. 298, 334 (1957)). It is in this way that conspiracy is different than hate crime. While an accusation of a hate crime includes the underlying crime, i.e. the assault of the victim, the assault actually does little to prove the defendant's bias; it merely establishes that the defendant had a problem with the victim and used violence as means of resolving that problem. Proving that bias motivated the assault requires an in-depth evaluation of the defendant that goes beyond the basic fact that the assault occurred.

70. The term "Pinkerton liability" comes from *Pinkerton v. United States*, in which the Supreme Court said that "conspiracy is a partnership in crime." 328 U.S. 640, 643 (1946). *Pinkerton* involved two brothers who were engaged in a tax fraud conspiracy, with one brother having performed the bulk of the criminal actions. *See id.* at 641-45. The Court held one brother liable for the actions of the other, stating that "so long as the partnership in crime continues, the partners act for each other in carrying it forward." *Id.* at 646.

71. *See* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1372-73 (2003).

that that group might take.[72] From a defense attorney's perspective, the application of *Pinkerton* liability is difficult to repel. People associate with others for a variety of reasons, and at times it is necessary, but not illegal, to be involved with criminals.[73] The defendant may have a valid argument that he was neither aware of nor involved in each one of the conspiracy's crimes, but the concept of *Pinkerton* liability permits the jury to find that his association with the other conspirators is sufficient to punish him for their actions.[74]

3. Punishment for Conspiracies

Conspiracies are punished independently from the contemplated crime.[75] That there is a separate punishment demonstrates how conspiracy is a crime in and of itself and that is not reliant on the planned criminal action.[76] This idea was expressed in *United States v. Felix*, in which the Supreme Court held that, with respect to double jeopardy, "conspiracy to commit a crime is a separate offense from the crime itself."[77]

Conspiracy law has been criticized for penalizing those who merely omit information, as it punishes people "not only on the basis of what they did, but also on the basis of what they knew and did not reveal."[78] Both retributive and utilitarian justifications are given for punishing conspiracy.[79] The retributivist approach focuses on the contemplated act and the possibility for social harm, where "[i]n the same way that someone who drives drunk deserves punishment, the conspirator should be culpable

72. *See id.* Note that "the Federal Sentencing Commission eliminated many of the traditional features of conspiracy doctrine, so that, for example, it is not generally possible to punish someone for conspiring to commit a crime and for committing it." *Id.* at 1309. It is unclear if this policy will change in the wake of the impact of *Booker*. Katyal argues that the weakening of the conspiracy doctrine has led to the increase in mandatory minimums for certain types of crimes. *Id.* at 1313.

73. In the context of hate crimes, association with known bigots could be used as an indicator of a defendant's personal predilections.

74. There are limitations to *Pinkerton* liability. Liability is only extended to actions that were foreseeable within the scope of the agreement. Katyal, *supra* note 71, at 1374. The United States Sentencing Guidelines provide reductions for minor participants in a crime, and defendants can claim that they withdrew from the conspiracy. *See id.* at 1374.

75. *See* 18 U.S.C. § 371 (2003) (giving a mandatory five year maximum for a conspiracy conviction). Some statutes provide for more severe punishment, depending on the type of conspiracy.

76. For a discussion of merger in conspiracy law see *supra*, notes 59-60 and accompanying text.

77. 503 U.S. 378, 391 (1992).

78. Katyal, *supra* note 71, at 1338.

79. *See id.* at 1369.

for the dangerous inchoate agreement."[80] The utilitarian approach functions somewhat differently; by allowing for a sentence that is separate from the planned crime, the threat of imprisonment can be used to convince one member of the conspiracy to turn against the others and cooperate with prosecutors.[81]

4. Hearsay Exception

A further aspect of conspiracy law that deviates from normal prosecutorial practice and lays the groundwork from motive-based offenses is the conspiracy exception to the hearsay rule.[82] In a conspiracy trial, "any statement made by a co-conspirator in furtherance of the conspiracy is admissible against every co-conspirator."[83] The theory behind this exception is that conspirators function as agents of each other.[84] Just as any act by one conspirator in furtherance of the illegal goal is considered an act of all parties involved, so too "[a] statement of co-conspirators in furtherance of their illegal scheme is thus a verbal act admissible against each conspirator as if it had been his own."[85] Under the agency theory, the prosecution is permitted to introduce evidence about the parties without the actual speaker's testimony, as the conspirator "bear[s] the risk of what his agents say as well as the risk of what they do."[86] This rule can be applied even where the conspirators chose to keep information secret from each other.[87]

Finding a defendant guilty of conspiring to commit a substantive crime should not be an easy task as the primary elements of the crime exist solely

80. *Id.*

81. *See id.* at 1337-38.

82. There are some limitations on the use of the hearsay rule. The court must determine that: "(i) a conspiracy existed; (ii) the defendant and the declarant were involved in the conspiracy; and (iii) the statement was made during the course and in furtherance of the conspiracy." Casey & Marino, *supra* note 60, at 600 (citing Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

83. Burns, *supra* note 57, at 50; *see also* FED. R. EVID. 801(d)(2)(E) (stating that a statement is not hearsay if made by a co-conspirator of a party "during the course and in furtherance of the conspiracy").

84. *See* United States v. Inadi, 475 U.S. 387, 405 (1986) (Marshall, J., dissenting).

85. *Id.* at 405-06. It is interesting to note that Justice Marshall recognizes that the agency theory is "at best a fiction," and that it does little to provide for reliable fact-finding. *See id.*

86. Katyal, *supra* note 71, at 1329 (quoting Philip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1183 (1973)).

87. Katyal explains that conspirators often compartmentalize information to diminish the danger of a member who has turned state's witness and who is receiving a lower sentence for assisting the prosecution. *See id.* at 1353-54.

in the mind of the person on trial.[88] As shown above, the law has adapted to make conspiracy a convictable crime. While safeguards have been put into place to ensure that the testimony of co-conspirators is relevant to the instant prosecution,[89] the very notion that evidentiary standards can be changed given the nature of the crime is a significant watershed in criminal law.

These accommodations are acceptable only because they are outweighed by the societal necessity to prosecute conspirators.[90] The problem addressed by this Comment is that many of the unique facets of conspiracy law point to the start of a trend in which relaxed procedures are being used in other motive-based crimes, some of which do not appropriately balance the use of motive with the gravity of the societal harm.

II. THE USE OF MOTIVE IN HATE-CRIME LAW

A. Basis for Hate-Crime Legislation

Following conspiracy, the continuum of motive-based crimes continues with a prominent and often controversial cause of social harm: hate crime. Racial intolerance has caused deep divides in our society, as evidenced by hundreds of years of American history including the Civil War and the civil rights movement of the 1960's. Prejudice and bigotry have a deep psychological impact on their victims:

> Racial stigma . . . injures the dignity and self-regard of the person to whom it is addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood. Not only does the listener learn and internalize the messages contained in racial insults, these messages color our society's institutions and are transmitted to succeeding generations.[91]

In recent years, lawmakers have responded to the problem of crimes directed against specific members of society.[92] In New York, for instance, the following statute has been enacted:

> 1. A person commits a hate crime when he or she commits a specified

88. *See supra* note 61 and accompanying text.

89. *See* FED. R. EVID. 801(d)(2)(E).

90. *See supra* note 59 and accompanying text.

91. Gellman, *supra* note 13, at 340 (citing Richard Delgado, *Words that Wound, A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L.REV. 133, 135-37 (1982)). Gellman also notes that by establishing protection for certain groups of people and not others, the law is sending the message that those protected are in some way weaker than other people and less able to fend for themselves. *Id.* at 386.

92. *See supra* note 5 and accompanying text.

> offense and either:
>
> (a) intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct, or
>
> (b) intentionally commits the act or acts constituting the offense in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct.[93]

Under the New York law, the commission of a class C, D, or E felony or a misdemeanor that was motivated by one of the aforementioned factors is "deemed to be one category higher than the specified offense."[94] Once the prosecution has proven that the defendant's crime was motivated by bias against the victim,[95] the underlying offense becomes a higher class felony and the subsequent punishment is raised by a proportional amount.[96]

93. N.Y. PENAL LAW § 485.05 (McKinney 2003). The language of this statute, and similar ones in other states, is noteworthy in that it raises the question of how to address the following situation: a mugger purposely chooses to attack people of Asian descent because he feels that Asians are less likely to report the crime to the police. In this hypothetical, the victims are being selected because of their race, but the mugger has no animus toward Asians; he merely believes that they present his best chance for avoiding arrest. Based on the language of the statute, this act is a hate crime, even though no hate was involved. It would be interesting to see how a jury would respond in such a situation. It seems that jury members would be less inclined to convict when there is the potential for a sentence enhancement. *Cf.* Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507, 508 (1999). Harel and Parchmovsky discuss a hypothetical of Professor Anthony Dillof in which the attacker chooses a black victim because he believes that the police are less likely to investigate assaults against blacks. *Id.* Harel and Parchomovsky use Dillof's example to illustrate the theory that the increased vulnerability of the victim, and not the hatred of that victim's minority group, provides the basis for the increased punishment of the attacker. *Id.*

94. *See* N.Y. PENAL LAW § 485.10(2).

95. There are generally two types of hate crime laws: those that "criminalize violent offenses committed because of animus toward some population group . . . . [and those that cover] all violent offenses in which the victim was selected because of his or her race, sex, religion, and the like." Stuntz, *supra* note 7, at 553.

96. It is interesting to note that hate crimes place an emphasis on the actions and mental state of the actor and not on the status of the victim. *See* Harel & Parchomovsky, *supra* note 93, at 508 (challenging the notion that hate crime laws should be so limited).

B. The Chilling Effect of Hate Crimes: Practical and Constitutional Issues

Like conspiracy, hate crime laws raise issues of practical application. As conspiracy is proven via action,[97] it would seem that other motive-based crimes should follow this paradigm and establish motive through actions taken and not merely through words spoken.[98] Hate crimes do not do so, and the motive element of a hate crime can be established merely on the basis of the defendant's statements.[99] Additionally, in some cases the prosecution can establish that the defendant intended to commit a crime based solely on the circumstances surrounding the arrest.[100]

The lack of a concrete action demonstrates the difficulty in properly framing hate crime from a constitutional perspective:

> Statutes that enhance penalties for offenses which are already criminalized on the basis of motive must steer a treacherous course between the Fourteenth and First Amendments. If a statute . . . .is read as doing nothing more than enhancing the penalty for an existing non-vague crime because of the actor's motive, it may survive a vagueness challenge, *but it then criminalizes pure thought*. On the other hand, it can be argued that the presence of the bias motive changes the qualitative character of the underlying crime so drastically that it becomes an entirely different act. In that case, however, the statute may be held void for vagueness, because we can no longer rely upon the understood meaning of the predicate offense for notice of proscribed behavior. In other words, if the statute does not criminalize pure motive, because the sum of the act

97. *See supra* Part I.B.

98. Note that "intent" in conspiracy law is different from "motive" as used in motive-based crimes. The relationship between them, and the reason that they are juxtaposed in this Comment, is that determining intent to conspire requires a different type of inquisition into the defendant's thought process than is normally done when finding culpability in other crimes and that has been accepted in classic criminal law. The need to delve into the defendant's very thought process is the characteristic linking conspiracy to motive-based crimes.

99. *See, e.g.*, Gellman, *supra* note 13, at 360. Gellman states that, in extreme cases,

> [i]n addition to any words that a person may speak during, just prior to, or in association with the commission of one of the underlying offenses, all of his or her remarks upon earlier occasions, any books ever read, speakers ever listened to, or associations ever held could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense. Anyone charged with one of the underlying offenses could be charged with ethnic intimidation as well, and face the possibility of public scrutiny of a lifetime of everything from ethnic jokes to serious intellectual inquiry.

Id.

100. See New Jersey v. Brims, 774 A.2d 441 (N.J. 2001), to be discussed at length in Part III.

> plus the motive is greater than its parts, that "sum" is not defined by the statute, and the statute is unconstitutionally vague.[101]

This constitutional criticism parallels vagueness arguments made against the Racketeer Influenced and Corrupt Practices Act ("RICO").[102] RICO has been found to satisfy vagueness tests. In *Fort Wayne Books, Inc. v. Indiana*,[103] the Supreme Court held that if the underlying crime was not vague then neither would a RICO statute based on that crime. The RICO holding does not satisfy the problem with hate crime laws, as the crimes are inherently different. RICO prohibits the patterned and repeated commission of one defined crime.[104] Hate crimes, on the other hand, involve a defined crime plus an added mental element, the totality of which is different from the original crime.[105]

The Supreme Court ruled on the primary constitutional issues related to hate crime laws in *Wisconsin v. Mitchell*.[106] In *Mitchell*, the Supreme Court overturned the decision of the Wisconsin Supreme Court, which had found that the state hate crime statute violated the First Amendment[107] and was overbroad, leading to a chilling effect on speech.[108] *Mitchell* involved a group of young black males who, after watching the film *Mississippi Burning*[109] became incensed and assaulted a white male as he was walking down the street.[110] Mitchell, the leader of the group, encouraged the assault and selected the victim because of his race.[111] At the time, the maximum sentence in Wisconsin for aggravated battery was two years imprisonment, and this maximum was increased to seven years when the hate crime statute was applicable.[112] Mitchell was sentenced to four years in prison.[113]

The Supreme Court distinguished between the motives for committing a

101. *See* Gellman, *supra* note 13, at 357 (emphasis added, citations omitted).

102. 18 U.S.C. §§ 1961-68 (2003).

103. 489 U.S. 46, 58 (1989).

104. *See* 18 U.S.C. §§ 1961-68.

105. *See* Gellman, *supra* note 13, at 357. RICO has also been challenged as a sentence enhancer. Courts have disagreed with this contention, arguing that "RICO was not enacted as an automatic sentence enhancement device. If Congress wants [to increase the maximum penalty], it may so provide." United States v. Biaggi, 909 F.2d 662, 686 (2d Cir. 1990).

106. 508 U.S. 476 (1993).

107. *See id.* at 481-82.

108. *See id.*

109. A film that includes a scene in which a group of white men are depicted beating a black man as he is praying. *Id.* at 480.

110. *Mitchell*, 508 U.S. at 480.

111. *Id.*

112. *Id.*

113. *Id.*

hate crime and the abstract beliefs of the defendant.[114] Writing for the unanimous Court, Chief Justice Rehnquist noted that while motive can be used as a factor in sentencing,[115] the defendant's beliefs must not be taken into consideration when determining guilt.[116] The opinion went on to discuss the harms posed to society by hate crimes, and concluded that "[t]he State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."[117]

In effect, the Supreme Court made its decision by dismissing the constitutional arguments despite its insistence that the First Amendment does not place a per se barrier on the admission of evidence regarding the defendant's associations or beliefs.[118] The problem, though, is not with the introduction of evidence regarding the defendant's beliefs, it is the use of those beliefs as evidence of the crime.

> The distinction between the use of the actor's words as the sole—and perhaps the only possible—evidence of an element of an offense, and their use as an actual element of the offense, is so fine as to be often nonexistent. With respect to pure thought, the distinction reaches the vanishing point: motive is an element of the offense.[119]

The result of this slight distinction is that a person could feel forced to engage in self-censorship for fear that an off-handed, off-color comment may one day be used against him in court if he is involved in an altercation with a member of the offended minority group.[120]

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114. *See id.* at 485-86.

115. *Id.* (citing W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW 324 (1986)). The judge's discretion to adjust the sentence based on her perception of the defendant's motive is especially noteworthy in the post-*Booker* era.

116. *Id.* (citing Dawson v. Delaware, 503 U.S. 159 (1992)).

117. *Id.* at 488.

118. *Id.* at 486.

119. Gellman, *supra* note 13, at 359. Gellman points out that the introduction of a defendant's speech as evidence in a robbery trial would not produce a chilling effect, while the admission of bigoted beliefs in a hate crime trial does in effect chill the existence of those beliefs. *See id.* at 359-60; *see also id.* at 375 (noting that all beliefs, no matter how insidious, are constitutionally protected). This chilling effect is not, however, an unintended negative consequence given that one purpose of hate crime law is to deter hate. *See, e.g.*, Bill Jacket to 2000 N.Y. Laws 107 (citing the New York legislature's reasoning behind the state's Hate Crime Act of 2000).

120. *See* Gellman, *supra* note 13, at 376. It could be argued that this complaint is invalid as similar issues are not raised regarding anti-terrorism laws: no one fears that terrorists will refrain from making statements for fear that they might be used in a criminal proceeding. The failure of this argument is that it does not recognize that the focus of a terrorism trial will be on the attempted crime and not the particulars of the defendant's anarchist views; in a hate crime proceeding, the act often takes second place to the defendant's motivation.

Although the reduction of prejudice may be a goal of hate crime law, its restriction on thoughts and ideas because of a fear of imprisonment is problematic in both a practical and constitutional sense, and *Mitchell* does not resolve these concerns.[121] People are allowed to express opinions; indeed the First Amendment protection of the freedom of speech is held sacrosanct.[122] While the Supreme Court has stated numerous times that there are classes of speech that are not protected,[123] unprotected speech may be prohibited by the government only when there is a basis for doing so.[124]

The ability to prohibit speech in some contexts does not necessarily permit the blanket punishment of anyone who says it.[125] The phrase "I hate Muslims," while repugnant, is not a crime; it may lead to a prison term, however, if made contemporaneously with the speaker's assault of a person of Middle Eastern descent and found by a jury to be the motivation for that attack.[126] It has been said that

> [i]n enacting ethnic intimidation laws that enhance penalties for bigoted motivation, a state is not regulating conduct despite its expressive elements, but is actually penalizing already proscribed conduct more severely because of its expressive elements, whenever that expression indicates that the actor is a racial or ethnic bigot. This penalizing of expression is precisely what the First Amendment forbids.[127]

C. Risk-Benefit Analysis of Hate Crime Laws

The existence of hate-crime law dictates that illegal acts motivated by bias are inherently worse than the same acts done without such motivation. The difference between a hate crime and a regular offense may be

121. *See* Wisconsin v. Mitchell, 508 U.S. 476, 486 (1993).

122. *See, e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 501 (1949) (stating "we are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press").

123. *See, e.g.*, Virginia v. Black, 538 U.S. 343 (2003); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

124. *See generally* Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001) (balancing a professor's right to free speech against a university's interest in protecting its students from harassment).

125. *See* City of Houston v. Hill, 482 U.S. 451, 466-67 (1987) (finding that a city ordinance prohibiting speech that in any manner annoyed or bothered a police officer during the course of her duties was unconstitutionally overbroad).

126. *See In re* Joshua H., 17 Cal. Rptr. 2d 291 (1993) (finding sufficient evidence for a hate crime where the defendant repeatedly referred to the victim as a "faggot" while assaulting him).

127. Gellman, *supra* note 13, at 376.

predicated on the inclusion of motive in the definition of the offense.[128] This would suggest that the prosecution's assessment of motive should follow the same path as the already-existing inquiry into *mens rea* culpability, in which purposeful behavior is more culpable than reckless behavior.[129]

Commentators note, however, that "[t]he weakness of this justification is that it depends on the premise that prejudice is more morally reprehensible than all other criminal motives."[130] It may be acceptable to state that bias is disgusting, but it is not as clear to say that bias is any worse than "greed, spite, or pure sadism."[131] Moreover, the analysis of motive is entirely different than the determination of the defendant's intent. It makes a difference if a person is murdered purposely or negligently, and when assigning blame the jury is obligated to decide the appropriate level of mens rea.[132]

Motive differs from intent in that any number of different motivations can drive the commission of an act, a number of which are not clearly more or less "wrong" than any other.[133] Therefore, while it is accepted as fair that the purposeful, premeditating murderer should be punished more severely than the reckless, accidental murderer, it is not axiomatic that the sadistic criminal is more or less blameworthy than the racially-biased one.[134] Different types of motive do not have such stark distinctions and it is rather arbitrary to base the stringency of the punishment on one type over another.[135]

It can also be argued that hate crime laws are justified because some members of society are more vulnerable to attack than others and therefore are deserving of more protection by the state under general equal protection principles.[136] This theory would infer that vulnerability warrants determining the bias of the attacker.[137] "[A] crime directed toward such an individual is more wrongful than a crime against a less vulnerable

128. *See* Harel & Parchomovsky, *supra* note 93, at 512.

129. *See, e.g.*, Lawrence Crocker, *Hate Crime Statutes: Just? Constitutional? Wise?*, ANN. SURV. AM. L. 485, 491-94 (1992-93).

130. Harel & Parchomovsky, *supra* note 93, at 513.

131. *Id.*

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.* at 511. The authors argue that penalty enhancement provisions should be employed based on the victim's vulnerability to attack (unless that would be unfair, for instance if the victim knowingly and voluntarily assumed a position of vulnerability).

137. *See id.* at 521-22.

individual."[138] This "wrong" is what necessitates the use of motive and then permits the imposition of an increased punishment.[139] Note that section 3A1.1(b) of the United States Sentencing Guidelines, which adopts a vulnerability theory, is an adaptation of this approach: "If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels."[140]

The problem with this theory is that any assault of another person is wrong. If the victim is a member of a racial minority, a religious minority, or has a certain sexual preference, the prosecution should not be led to the assumption that the reason for the assault was hatred of the victim's minority status, yet hate-crime law seems to do just that.[141] The approach of the vulnerability theory is simplistic in that even if an attack is not racially motivated, the punishment is still enhanced because of the victim's inherent vulnerability.[142] The end result could then run contrary to the law's intent: for instance, if one Jew assaulted another, a prosecutor could jump to the conclusion that it was a hate crime, even if the attack had nothing to do with anti-Semitism. The defendant would then be faced with the prospect of an extended jail term, with only a jury's finding of motive providing a safety net.[143]

To counter such arguments, it may be necessary to take the vulnerability theory even further. Hate crime laws can be justified specifically because of their use of motive; rather than being inflexible and punishing equally all assailants of minorities, by inquiring into motive the law to punishes only those who act out of hate while still providing protection to vulnerable

138. *Id.* at 521.

139. *See id.*

140. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (2005). While adhering to the Guidelines is no longer required as per *Booker*, there is no reason to believe that judges will no longer continue to apply the concept of an increased punishment due to victim vulnerability, especially since the Guidelines are still advisory.

141. *Cf.* Nora Zamichow & Stuart Silverstein, *As Hate-Crime Concerns Rise, So Does the Threat of Hoaxes*, L.A. TIMES, Apr. 20, 2004, at B1 (citing examples of fraudulent claims of hate crimes that were at first believed by the authorities).

142. *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b). The Guidelines fail to distinguish between a high-risk victim and an extra-sensitive victim. *See* Harel & Parchomovsky, *supra* note 93, at 521. The high-risk victim does not suffer any additional harm when attacked, whereas the extra-sensitive one does. *See id.* Hate crime laws, however, focus on the high-risk victim. *See id.* Assigning an extra penalty for such an attack, and basing that penalty on the additional harm caused, seems faulty. *See id.*

143. *See infra*, Part II.D.

victims.[144] The premise of this notion is that the victim of a hate-based crime has a protectable interest in the perpetrator's thoughts.[145] By virtue of being selected as a target because of his identity, the hate crime victim is entitled to a greater interest in the defendant's motivation than would be available to the ordinary victim.[146]

While an ordinary assault would not warrant such an intrusion, the extra wrong of selecting the victim because of bias provides the justification.[147] These arguments force legislatures to pit the vulnerability of the victim against the difficulty of discerning the defendant's thoughts. The balance is delicate, and yet rather than safeguarding against bad decisions, statutory sentence enhancements function with the subtlety of a wrecking ball.

D. Jury Determination of Bias

The imprecision of determining motive is compounded by the danger inherent in leaving the decision to the jury. Juries are not perfect, and in hate crime trials there is a concern that assumptions will be made about the defendant either because of the crime charged or due to the evidence introduced at trial.[148] "Indeed, because of our societal consensus that bigots are ignorant, boorish, and even dangerous, it may well be that prosecutors would anticipate an easier time persuading a jury to convict on the more serious charge of ethnic intimidation than they would on the conduct-oriented underlying offense."[149] At the same time, the jury could be sympathetic to the defendant, or not be willing to punish the bias element of the crime.[150]

To find a defendant guilty of a hate crime, juries must believe the defendant's motivation beyond a reasonable doubt.[151] Compared to other crimes, even to conspiracy, this presents a very difficult dilemma.[152] Physical evidence can conclusively establish that a defendant was at the

144. *See* Harel & Parchomovsky, *supra* note 93, at 535-36.

145. *See id.* at 515-16 (citing Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015, 1036-49 (1997)).

146. *See id.*

147. *See id.*

148. *See* Gellman, *supra* note 13, at 378.

149. *Id.* at 362.

150. *See* Stuntz, *supra* note 7, at 548. The risk of a jury's bias in favor of a defendant is mitigated by prosecutorial discretion to only bring charges against a defendant whom a jury is likely to convict. *Id.*

151. *See* United States v. Booker, 125 S. Ct. 738, 748 (2005).

152. Stuntz, *supra* note 7, at 552 (stating that broad liability is an effective way of getting defendants to plead guilty). Therefore, while *Apprendi* does set a higher burden, its effect is blunted by the very threat of punishment.

scene of the crime.[153] Reliable statements by witnesses can connect a defendant to a conspiracy to commit a crime.[154] Establishing a hate crime, however, is limited to loose connections between circumstantial evidence, such as the defendant's tattoos, statements made by the defendant in anger or induced by drugs and alcohol, and prior associations with bigoted groups.[155] These are the means by which juries are supposed to be convinced that the crime was fueled by hate.[156]

There are valid concerns that juries may be over-eager to punish, under-eager to do so, or may employ jury nullification.[157] Despite this concern, however, courts have no choice but to allow the jury to play a major role following the Supreme Court's rulings in *Apprendi v. New Jersey*,[158] *United States v. Blakely*,[159] and *United States v. Booker*.[160] In *Apprendi*, the Court addressed New Jersey's hate crime law and recognized that given the exponential increase in sentences for biased offenders, the state should be required to prove the defendant's racial motivation to the jury beyond a reasonable doubt, not to the judge by a preponderance of the evidence as had been prescribed by the New Jersey legislature.[161]

Blakely and *Booker* soon affirmed the holding in *Apprendi* that other than a prior conviction, any statutorily mandated element of an offense that leads to an increased punishment must be proven to a jury and cannot be left to a judge.[162] The Court said that an element of an offense is considered essential if it presents increased punishment exposure; once there is the potential for a sentence greater than the statutorily prescribed maximum, the jury must make a determination beyond a reasonable doubt.[163] These decisions have sought to ensure that a jury will be involved in determining every aspect of a defendant's guilt to guarantee the

153. *See, e.g.*, FED. R. EVID. 401.

154. *See id.*

155. *See, e.g.*, MacNamara, *supra* note 5, at 540-42 (citing Barclay v. Florida, 463 U.S. 939, 948-49 (1983) (allowing evidence of membership in associations to prove racial motive).

156. *See, e.g.*, New Jersey v. Crumb, 649 A.2d 879, 881-84 (N.J. Super. Ct. App. Div. 1994) (stating that letters, verse, and drawings including phrases such as "White Power" are admissible and not barred by the hearsay rule); MacNamara, *supra* note 5, at 540-42.

157. *See* Stuntz, *supra* note 7, at 596 (stating "[j]uries are allowed to acquit in the teeth of overwhelming evidence of guilt, for no better reason than because they think the defendant does not deserve punishment, and the acquittals are final").

158. 530 U.S. 466 (2000).

159. 124 S. Ct. 2531 (2004).

160. 125 S. Ct. 738 (2005).

161. *See Apprendi*, 530 U.S. at 478.

162. *See Booker*, 125 S. Ct. at 748.

163. *See Apprendi*, 530 U.S. at 494.

constitutional protection of the accused's rights.[164] The jury's ability to assess the mind of a defendant charged with a motive-based crime has been affirmed as the major determinant of that person's fate and freedom.

The conclusion of this discussion should not be, as some have argued, that the enactment of hate crime statutes is a mistake; their societal good is of extraordinary importance. Offsetting this benefit, however, are the risks associated with making motive an element of the offense, the imposition of mandatory sentence enhancements, and the Sixth Amendment requirements of *Booker*. Hate crime laws are acceptable because this balance is even. It is only as the continuum progresses, and the motive element becomes a greater factor in the offense, that any balance between the benefits to society and the risks to the defendant turns in favor of the accused.

III. UNLAWFUL PURPOSE STATUTES: A STEP TOO FAR IN THE USE OF MOTIVE?

Conspiracy law and hate crime law incorporate motive to prevent crimes that harm society.[165] These two examples are not the only criminal laws to use motive, but they are the only ones to do so for the prevention of major societal ills. Other crimes that have a motive element tend to focus on basic crime prevention. Examples of such laws include negligent endangerment[166] and criminal possession of burglary tools,[167] both of which criminalize legal behavior due to the potential for criminality.

This category of law also includes a New Jersey statute that proscribes the possession of a weapon for an unlawful purpose (the "unlawful purpose statute").[168] While preventing the armed commission of unlawful acts is certainly important, the validity of the law's use of motive is suspect.[169] It

164. *See Booker*, 125 S. Ct. at 748.

165. *See supra* notes 59, 91 and accompanying text.

166. *See, e.g.*, MONT. CODE ANN. § 45-5-208 (2000).

167. *See, e.g.*, CAL. PENAL CODE § 466 (West 2000). Stuntz, *supra* note 7, at 550-51, argues that criminalizing the preparatory aspect of the crime is a cheaper method of prosecution and therefore preferred by legislators. A corollary to this observation is that while preparatory crimes are cheaper for the state, the expense is actually borne by the defendant who faces punishment without having actually committed, or even attempted to commit, a harmful action.

168. 2003 N.J. Sess. Law Serv. 2C:39-4 (West). The specific provisions of this statute are unique to New Jersey, though many states prohibit the use weapons in the commission of a crime. Section 2C:39-4(a) makes it a crime in the second degree for a person to possess a weapon for an unlawful purpose, even if the ownership of the weapon is legal; the purpose of the statute is to punish someone for having a weapon and contemplating using it in the commission of a crime.

169. Undoubtedly, the public does not want people to possess weapons with intent to use them for unlawful purposes. Therefore, it is not surprising that this law exists. *See* Stuntz,

should be noted that this law is a prime example of an offense that allows prosecutors to engage in "charge stacking," a process of threatening a defendant with so many punishments for one offense that she will often opt to accept a plea rather than face the prospect of a massive sentence.[170]

A recent case involving the limits of the unlawful purpose statute is *State v. Brims*.[171] In *Brims*, the New Jersey Supreme Court upheld Edward Brims's conviction for possession of a weapon for an unlawful purpose, where he was given an extended sentence pursuant to the second degree felony.[172] Brims had been arrested, along with another individual, after having been approached in a parking lot in Leonia, N.J., by a police officer who suspected that Brims was robbing a car.[173] During the stop a shotgun was seen in plain view, and following the arrest cocaine was found during a search of the car.[174] At trial,[175] the prosecution posited that Brims intended to commit a robbery with the shotgun given his proximity both to stores and to a residential area and because he was wearing multiple layers of clothing.[176] Brims was sentenced to fifteen-years imprisonment for possession of a weapon for an unlawful purpose.[177]

The conviction was challenged on the grounds that the state had failed to meet its burden in proving the defendant's unlawful purpose, as the

supra note 7, at 537-38. But that the law exists does not mean that it is justified, particularly when the behavior is already criminalized by other laws. *See* State v. Brims, 774 A.2d 441, 445 (N.J. 2001).

170. *See* Stuntz, *supra* note 7, at 519-20. Note that "over 95% of all federal criminal prosecutions are terminated by a plea bargain." United States v. Booker, 125 S. Ct. 738, 772 (2005).

171. 774 A.2d 441 (N.J. 2001).

172. *Id.* at 443.

173. *Id.* The car was actually a rental car of which Brims was legally in possession; he claims that his purpose for being in the parking lot was to clean out the car, though there were no trash receptacles in the immediate vicinity. *See id.*

174. *Id.*

175. Brims was tried twice; the first conviction was reversed because the prosecution was too vague as to the "unlawful purpose" associated with the weapon. *See id.*

176. *See id.* at 445.

> At the time of his arrest, defendant was wearing a warm-up suit with two T-shirts underneath. Defendant was also wearing white sweat socks with black nylon-type socks over them. Brownlee [the co-defendant] had white gloves and one pair of nylons in his back pocket. One of the nylons found on the back seat of the car was stretched out and had a hole in it. At trial, one of the responding police officers testified that his experience has shown that people who commit crimes use gloves to disguise their hands and to prevent fingerprints, and place nylons over their heads to distort their faces. That officer also testified that people saw off the stocks of guns to make them easier to conceal under clothing.

Id. at 443.

177. *Id.* at 449 (Stein, J., dissenting). The defendant received additional sentences for the possession of an unlicensed weapon and for illegal narcotics found in the car. *Id.*

circumstances of the arrest did not warrant the conclusion that Brims intended to commit a crime with the weapon.[178] This argument was found to be without merit.[179] Even though no crime had ever been attempted, the Court distinguished the unlawful purpose statute from an attempted crime.[180] It stated that the purpose of the law

> is to punish someone for possessing a firearm for an unlawful purpose before the conduct escalates to the stage of an attempt. Accordingly, the focus is on a defendant's purpose for possessing a weapon, not the possession itself or the actual use, and 'a conviction based on the use of the weapon is not a required precondition to a conviction for the possessory offense.'[181]

The Court held that the evidence presented at trial was sufficient to establish the unlawful purpose.[182] While there had not been any incriminating statements by the defendant, or any indication that a particular store or home had been selected as a target,[183] the presence of the gun and the extra clothing were sufficient to support the conviction and fifteen year sentence.[184] The state's presumption both that Brims would commit a crime and of the type of crime is questionable, especially since the prosecutor in the first trial did not present any theory as to the defendant's unlawful purpose.[185] Only once the Appellate Division required that the state pick a crime did the prosecution settle on burglary and robbery.[186]

In an impassioned dissent to the Supreme Court's decision, Justice Stein set forth the reasons why Brims's conviction should have been overturned,[187] many of which are grounded in the points discussed in this Comment. Saying that the "defendant's predicate criminal purpose was a matter of rank speculation,"[188] the dissent details the weakness of the prosecution's case, noting that "[n]o reported decision has sustained a conviction under New Jersey Statutes Annotated Section 2C:39-4 on proofs as weak as these."[189] The state did not offer any proof as to the target of

178. *See id.* at 444.
179. *Id.* at 447 (Stein, J., dissenting).
180. *See id.* at 444-45.
181. *Id.* at 445 (quoting New Jersey v. Diaz, 677 A.2d 1120 (1996)).
182. *Id.*
183. *Id.* at 449 (Stein, J., dissenting).
184. *Id.* at 445.
185. *Id.* at 447 (Stein, J., dissenting).
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*

the robbery and left it to the jury to presume that anyone in a parking lot with a shotgun in his car is a criminal.[190]

Consider *State v. Latimore*, another unlawful purpose case in which the defendants did not commit any predicate offense. [191] In that case, police officers observed four youths scurrying from a car with its lights on at 3:00 a.m. and found numerous guns in nearby bushes.[192] Based on this evidence, the court found that there was enough evidence to support an inference that the weapons would be used to commit a crime.[193]

The crucial difference between *Latimore* and *Brims* is the sufficiency of the evidence of preparation for the commission of the crime. In *Latimore*, the factors led to a reasonable indication of the defendants' nefarious purpose: the guns had been stashed, the getaway car had been specifically placed, and it was the middle of the night.[194] In contrast, there is no evidence that Brims took any such action.[195] Justice Stein clarified this point:

> For attempt and conspiracy, proof of either a substantial step toward the offense, or an agreement to commit the offense, requires proof of the intended offense with sufficient specificity to link the substantial step or the agreement to the offense. No less specificity should be required to prove the unlawful purpose in a prosecution for possession of a weapon for an unlawful purpose. That proof must be sufficiently precise to identify the criminal objective with some specificity and to connect the defendant's conduct, beyond mere possession of the weapon in question, to that criminal objective. To allow a jury to guess at the criminal objective, to speculate about when the crime was to be committed (or whether it already had been committed), and to rely on evidence equally susceptible to both benign or criminal purposes would subvert the role of the possession for a unlawful purpose charge from that intended by the drafters of our Code.[196]

190. *Id.* at 449-50; *see also id.* at 448 (stating that the witness who first reported Brims to the police was alarmed when he saw two black men rummaging around in a car in the parking lot).

191. 484 A.2d 702, 706-08 (N.J. App. Div. 1984).

192. *Id.*

193. *Id.* at 708-09.

194. *See id.* at 706-09.

195. It is possible to say that *Brims* was wrongly decided, as the system is not perfect. The problem with letting it slip by as just another bad decision is that as an opinion of the New Jersey Supreme Court, it now functions as valid precedent for future cases. Taken in the context of other laws that incorporate motive, and noting the trend of recent criminal statutes to do so, this opinion could be a step forward that exceeds the point at which the utility of the law exceeds the risk of an incorrect finding of fact.

196. State v. Brims, 774 A.2d 441 (N.J. 2001).

The purpose of the unlawful possession statute is to punish the intent to use a weapon to commit a crime.[197] Courts have tried to define it as a preparatory crime,[198] but that definition begs the question of what preparations need to be made for the offense to set in. The holding in *Brims* suggests that possession of a gun is sufficient when considered with the time of day and the defendant's clothing.

Conceptually, the reasoning behind the unlawful purpose statute is good. The law is a valuable tool when coupled with an attempted or committed crime, as in such cases the motivation of the defendant is relatively clear.[199] The difficulty is with its application, especially as presented in *Brims*, in which without almost clear proof of intent to use the weapon to commit a crime, the prosecution is forced to rely on weak circumstantial evidence or persuasive arguments to convince the jury.[200]

Motive has morphed from a mere element of the crime to being considered by the judge during sentencing, and finally to a crime of its own that can lead to fifteen years in prison. The boundaries of using motive were developed in conspiracy law, pushed in hate crime law, and exceeded by the unlawful purpose statute. Given the exceedingly greater sentences for each of these crimes, this progression cannot be ignored.

CONCLUSION

There is a delicate balance between effective crime prevention and over-zealous prosecution.[201] A person brought into court on the charge of participating in a conspiracy, of committing a hate crime, or of possessing a weapon for an unlawful purpose is likely to have some criminal intentions;

197. *See* New Jersey v. Harmon, 518 A.2d 1047, 1052 (N.J. 1986).

198. *See* New Jersey v. Mello, 688 A.2d 622, 629 (N.J. Super. Ct. App. Div. 1997).

199. *See* New Jersey v. Jenkins, 560 A.2d 1240, 1241 (N.J. Super. Ct. App. Div. 1989) (overturning a conviction of possession for an unlawful purpose when it was clear that the jury did not have a clear basis as to the defendant's intention).

200. Compare the circumstances in *Brims* to those in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where the defendant was also convicted of using a weapon for an unlawful purpose as he fired a machine gun into the home of an African-American family. Apprendi obviously intended to use his weapon to commit a crime; it is less clear what intention Brims had.

201. *See* Stuntz, *supra* note 7, at 549.

> The imbalance of legislative incentives does not only mean that criminal legislation will tend to be tilted in the government's favor. That would hardly be surprising; the public often demands criminal legislation tilted in the government's favor. The imbalance means that criminal legislation will tend to be more tilted than the public would demand.

Id.

prosecutors generally try guilty people.[202] Yet some measure of guilt does not necessarily mean that the motive of the defendant is as developed or as prominent as juries are led to believe. The assailants described in the introduction to this Comment may be violent homophobes, but there is a possibility that they were just riled up, drunken men who were looking for a fight. The dangerous conspirators might be planning a crime, or they could have been fantasizing about how they would do it but were never actually serious. And Brims might really have just been cleaning out his car.

How should the law approach this dilemma? There needs to be a balance between the societal interest in prosecuting the crime and the weight placed on its motive element. Conspiracy law serves a clear societal interest.[203] Hate crime law deters bigoted criminals from selecting victims based on race, religion, or sexual preference.[204] It is also important to punish the use of weapons during the course of a crime, but perhaps only when the crime is clearly evidenced by the circumstances. Our courts function on the presumption of innocence, and when it comes to motive, proving guilt is largely a matter of guesswork. Yet, it is the legislatures' job to perform the risk-benefit analysis to find the correct balance, and the enactment of these statutes evidences the government's view that the benefits outweigh the risks. With regard to those crimes that fall at the end of the continuum, such as the unlawful purpose statute, the government has it wrong.

The onus of reforming the law to limit motive-based criminal statutes falls at first with the legislatures. Lawmakers should scrutinize those statutes that rely heavily on motive to mandate sentence enhancements and determine if the societal interest in prosecuting each crime truly validates the extended punishment. Unfortunately, legislatures may be hesitant to undertake such a review given the political importance of appearing tough on crime.

A secondary solution is to give greater latitude to the judiciary to decide when and to what extent a sentence enhancement should be imposed following a determination of guilt by the jury. The judge can be effective in this role as one who is familiar with the parameters of the crime, the effectiveness of jail as a deterrent, and the circumstances of the individual

202. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, at 546 (Kathleen Maguire & Ann L. Pastore eds., 1994) (stating that the government wins five-sixths of felony trials).

203. *See supra* note 59 and accompanying text.

204. *See, e.g.*, *supra* notes 94-95 and accompanying text.

case.[205] As William Stuntz suggests:

> Suppose judges had the power—under the Eighth Amendment, the Due Process Clause, or both—to decline to impose any sentence that seemed unduly harsh. Prosecutors could still charge five or six offenses for a single criminal incident, but the added charges would not necessarily yield a higher sentence. If, in the judge's eyes, a given fact pattern merited no more than five years, the defendant would receive no more than five years, regardless of how the charges were packaged. Of course, he still might receive less. Statutory maxima would still apply, and prosecutors and defense lawyers could still strike bargains for less than the judicially favored sentence. But not for more. Judges, deciding case-by-case, would define maximum sentences; within these maxima legislatures and prosecutors would be free to determine the actual sentence.[206]

Legislators would be able to maintain their tough stance on crime and enact motive-based criminal statutes, but "[c]ourts' lawmaking tendencies are more balanced [and] less tilted in favor of broader liability,"[207] and as such they can be left to care for the defendant. This solution echoes the majority in *Booker* that "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."[208]

The criminal justice regime increasingly relies on motive to validate harsher punishments, a trend that threatens the American tradition of protecting the accused from unfair prosecution. Upholding the spirit of our legal system requires that motive should be used as an element of an offense only where it is justified by a real and valid threat to our society.

205. *See* Apprendi v. New Jersey, 530 U.S. 466, 565-66 (2000) (Breyer, J., dissenting) (stating that the majority's rule in *Apprendi* is not mandated by the Constitution and may not actually provide additional protection to the defendant).

206. Stuntz, *supra* note 7, at 594-95.

207. *Id.* at 576.

208. 125 S. Ct. 738, 750 (2005); *see also id.* at 753 (stating "there are many situations in which the district judge might find that the enhancement is warranted, yet still sentence the defendant within the range authorized by the jury").