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WORKING PAPER SERIES, PUBLIC LAW AND LEGAL THEORY
WORKING PAPER No. 00-01



BIAS CRIME IN A MULTI-CULTURAL SOCIETY

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University of Oregon
International Human Rights Conference
February 25-27, 2000

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“Bias Crime in a Multi-Cultural Society”

For the past several years, I have been involved in a study of racially-motivated violence in the United Kingdom and its treatment under U.K. law. A major component of this study is a comparison of U.K. bias crime law with United States bias crime law. I have observed an extraordinary development in this area of the law, a development that is particularly striking because it has taken place over so short a period of time. Typically, when one does comparative work and discovered a dramatic change, there are two possible explanations: (i) something has really changed and you are on to a dynamic topic at a liminal time; or (ii) you never understood it well enough the first time. It is my hope that the former is the correct explanation although I cannot deny that I still fear the latter may be the case.

In this paper, I would like to set out the a framework for understanding bias crimes, using the American context as a point of departure. I will then sketch the background of British bias crime law, along with the case for understanding recent developments as indeed an instance of dramatic legal change. Finally, I shall offer some tentative observations as to the reasons for these changes, or at least some of the reasons for these changes, and the implications of these observations for using bias crime law as a window into a society’s self-perception as a multi-cultural society.

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I. The Nature of Bias Crimes¹

Bias crimes may be distinguished from parallel crimes – crimes that are similar in all manner but for the absence of bias-motivation -- on the basis of their particular emotional and psychological impact on the victim. 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. Moreover, the bias crime victim cannot reasonably minimize the risks of future attacks because he is unable to change the characteristic that made him a victim.

Bias crimes thus attack the victim not only physically but at the very core of his identity. It is an attack from which there is no escape. It is one thing to avoid the park at night because it is not safe. It is quite another to avoid certain neighborhoods because of one's race. This heightened sense of vulnerability caused by bias crimes is beyond that normally found in crime victims. Bias crime victims have been compared to rape victims in that the physical harm associated with the crime, however great, is less significant than the powerful accompanying sense of violation.² The victims of bias crimes thus tend to experience psychological symptoms such as depression or withdrawal, as well as anxiety, feelings of helplessness and a profound sense of isolation.³ One study of violence in the work-place found that victims of bias-motivated violence reported a significantly greater level of negative psycho-physiological symptoms than did victims of non-bias motivated violence.⁴

¹ This section is drawn from chapter 2 of the author's Punishing Hate: Bias Crimes Under American Law (1999).

² Joan Weiss, "Ethnoviolence: Impact Upon the Response of Victims and the Community," in Bias Crime: American Law Enforcement and Legal Response, 174, 182 (1993).

³ See, e.g., Weiss, Bias Crime, 182-183; Melinda Henneberger, "For Bias Crimes, a Double Trauma," Newsday, 113 (Jan. 9, 1992); N. R. Kleinfeld, "Bias Crimes Hold Steady, But Leave Many Scars," New York Times, A1 (Jan. 27, 1992).

⁴ Joan C. Weiss, Howard J. Ehrlich, Barbara E. K. Larcom, "Ethnoviolence at Work," 18 The Journal of Intergroup Relations, 28-29 (Winter, 1991-92).

The marked increase in symptomatology among bias crime victims is true regardless of the race of the victim. The psychological trauma of being singled out because of one's race exists for white victims as well as members of minority groups.⁵ This is not to suggest, however, that there is no difference between bias crimes committed by white perpetrators against people of color and those bias crimes in which the victim is white, as in *Wisconsin v. Mitchell*. A difference exists between black and Hispanic victims and white victims concerning a second set of factors -- that is, defensive behavioral changes. Although bias crimes directed at minority victims do not produce a greater level of psychological damage than those aimed at white victims, they do cause minority bias crime victims to adopt a relatively more defensive behavioral posture than white bias crime victims typically adopt.⁶

The additional impact of a bias-motivated attack on a minority victim is not due solely to the fact that the victim was selected because of an immutable characteristic. This much is true for all victims of bias crimes. Rather, the very nature of the bias motivation, when directed against minority victims, triggers the history and social context of prejudice and prejudicial violence against the victim and his group. The bias component of crimes committed against minority group members is not merely prejudice per se but prejudice against a member of a historically oppressed group. In a similar vein, Charles Lawrence, in distinguishing racist speech from otherwise offensive words, described racist speech as words that "evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of

⁵ Ibid. The data collected for the study of bias-motivated violence at work was analyzed by ethnicity. There was no statistically significant difference among whites, blacks, and Hispanics in the average number of psychological symptoms experienced as a result of being the victim of bias-motivated violence. Ibid., 29. Moreover, the rates of "ethnoviolent victimization" among whites and blacks in the study were approximately the same. Ibid., 23.

⁶ Ibid., 29. The defensive behavior changes included such items as staying home at night more often, watching children more closely, trying to be "less visible," or moving to another neighborhood. Ibid., 27-28.

servitude and subservience for all the world to see."⁷ Minority victims of bias crimes therefore experience the attack as a form of violence that manifests racial stigmatization and its resulting harms.

Stigmatization has been shown to bring about humiliation, isolation and self-hatred.⁸ A individual who has been racially stigmatized will often be hypersensitive in anticipation of contact with other members of society whom he sees as "normal" and will even suffer a kind of self-doubt that negatively affects his relationships with members of his own group.⁹ The stigmatized individual may experience clinical symptoms such as high blood pressure¹⁰ or increased use of narcotics and alcohol.¹¹ In addition, stigmatization may present itself in such social symptoms as an approach to parenting which undercuts the child's self-esteem and perpetuates an expectation of social failure.¹² All of these symptoms may result from the stigmatization that results from non-violent prejudice. Non-violent prejudice carries with it the clear message that the target and his group are of marginal value and could be subjected to even greater indignities, such as violence that is motivated by the prejudice. An even more serious presentation of these harms results when the potential for physical harm is realized in the form of the violent prejudice represented by bias crimes.¹³

⁷ See Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 *Duke Law Journal*, 461 (1990).

⁸ See Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling," 17 *Harvard Civil Rights Civil Liberties Law Review*, 136-137 (1982).

⁹ See, e.g., Allport, *Nature of Prejudice*, 148-149; Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity*, 7-17, 130-135 (1963); Robert M. Page, *Stigma*, 1 (1984); Stevenson & Stewart, "A Developmental Study of Racial Awareness in Young Children," 9 *Child Development*, 399 (1958).

¹⁰ See, e.g., Harburg, Erfurt, Havenstein, Chape, Schull & Schork, "Socio-Ecological Stress, Suppressed Hostility, Skin Color, and Black-White Male Blood Pressure: Detroit," 35 *Psychosomatic Medicine*, 276, 292-294 (1973).

¹¹ See, e.g., Kenneth Clark, *Dark Ghetto: Dilemmas of Social Power*, 82-90 (1965).

¹² See, e.g., Irwin Katz, *Stigma: A Social Psychological Analysis*, (1981); Harry H. L. Kitano, *Race Relations*, 125-126 (1974); Kiev, "Psychiatric Disorders in Minority Groups," *Psychology and Race*, 416, 420-424 (P. Watson, ed., 1973).

¹³ Allport, *Nature of Prejudice*, 56-59 (discussing the degrees of prejudicial action from "antilocution," to discrimination, to violence).

The impact of bias crimes reaches beyond the harm done to the immediate victim or victims of the criminal behavior. There is a more wide-spread impact on the "target community" -- that is, the community that shares the race, religion or ethnicity of the victim -- and an even broader based harm to the general society. Members of the target community of a bias crime experience that crime in a manner that has no equivalent in the public response to a parallel crime. Not only does the reaction of the target community go beyond mere sympathy with the immediate bias crime victim, it exceeds empathy as well.¹⁴ Members of the target community of a bias crime perceive that crime as if it were an attack on themselves directly and individually. Consider the burning of a cross on the lawn of an African-American family or the spray-painting of swastikas and hateful graffiti on the home of a Jewish family. Others might associate themselves with the injuries done to these families, having feelings of anger or hurt, and thus sympathize with the victims. Still others might find that these crimes triggered within them feelings similar to the sense of victimization and attack felt by these families, and thus empathize with the victims. The reactions of members of the target community, however, will transcend both empathy and sympathy. The cross-burning and the swastika-scrawling will not just call up similar feelings on the part of other blacks and Jews respectively. Rather, members of these target communities may experience reactions of actual threat and attack from this very event. Bias crimes may spread fear and intimidation beyond the immediate victims and their friends and families to those who share only racial characteristics with the victims.¹⁵ This additional harm of a personalized threat felt by persons other than the immediate victims of the bias crime differentiates a bias crime from a parallel crime and makes the former more harmful to society.

¹⁴ See, e.g., Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law, 221 (1990) (stating the importance of empathy in combating discrimination in the United States).

¹⁵ See, e.g., Robert Elias, The Politics of Victimization, 116 (1986); A. Karmen, Crime Victims: An Introduction to Victimology, 262-263 (2d ed., 1990); Levin & McDevitt, Hate Crimes; Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 Michigan Law Review, 2330-2331 (1989).

This sense of victimization on the part of the target community leads to yet another social harm uniquely caused by bias crimes. Not only may the target community respond to the bias crime with fear, apprehension and anger, but this response may be directed at the group with which the immediate offenders are identified, either rightfully or, even more troubling, wrongfully, identified. Collective guilt always raises complicated questions of blaming the group for the acts of certain individuals. But it is one thing when groups are rightfully identified with the immediate offenders, for example, the association of a bias crime offender who is a member of a skin-head organization with other members of that organization. It is quite another when groups are wrongfully identified with the immediate offenders. Consider, for example, the association of those individuals who killed Yankel Rosenbaum with the Crown Heights black community generally, or of those who killed Yousef Hawkins with the Bensonhurst white community generally. In addition to generating the generalized concern and anger over lawlessness and the perceived ineffectuality of law enforcement that often follows a parallel crime, therefore, a single bias crime may ignite inter-community tensions that may be of high intensity and of long-standing duration.¹⁶

Finally, the impact of bias crimes may spread well beyond the immediate victims and the target community to the general society. This effect includes a large array of harms from the very concrete to the most abstract. On the most mundane level -- but by no means least damaging -- the isolation effects discussed above have a cumulative effect throughout a community. Consider a family, victimized by an act of bias-motivated vandalism, which then begins to withdraw from society generally; the family members

¹⁶ See Robert Kelly, Jess Maghan & Woodrow Tennant, "Hate Crimes: Victimized the Stigmatized," in Bias Crime: American Law Enforcement Responses, 26 (Robert Kelly, ed., 1993). The Crown Heights Riots exemplify how the mere perception of a bias crime can lead to violence between racial groups. See, e.g., Lynne Duke, "Racial Violence Flares for 3rd Day in Brooklyn," Washington Post, A04 (Aug. 22, 1991) (describing how racial tensions from the vehicular killing of a black child led to riots in Crown Heights between African-Americans and Jews); "Crown Heights the Voices of Hate Must Not Prevail," Detroit Free Press, 2F (Aug. 25, 1991) (stating that violence erupted between the African-American and Jewish community after the accidental killing of a black child by a Hasidic Jew).

seek safety from an unknown assailant who, having sought them out for identifiable reasons, might well do so again. Members of the community, even those who are sympathetic to the plight of the victim family and who have been supportive to them, may be reluctant to place themselves in harm's way and will shy away from socializing with these victims or having their children do so. The isolation of this family will not be solely their act of withdrawal; there is a societal act of isolation as well that injures both the family that is cut off and the community at large.

Bias crimes cause an even broader injury to the general community. Such crimes violate not only society's general concern for the security of its members and their property but also the shared value of equality among its citizens and racial and religious harmony in a heterogeneous society. A bias crime is therefore a profound violation of the egalitarian ideal and the anti-discrimination principle that have become fundamental not only to the American legal system but to American culture as well.¹⁷

These harm is, of course, highly contextual. We could imagine a society in which racial motivation for a crime would implicate no greater value in society than the values violated by a criminal act motivated solely by the perpetrator's dislike of the victim. It is not easy to imagine such a society, but it is possible. It is indicative of racism's pervasiveness that real-world examples are hard to come by and require us to look to another time and a distant place. In the 1930's anthropologist Ethel John Lindgren reported findings about the Tungus and the Cossacks who, although racially and culturally distinct, lived in close proximity without conflict. Although the Tungus were Mongolian nomads and the Cossacks were Caucasoid Christian village-dwellers, neither group believed itself to be racially superior and, although their cultural practices remained distinct, they maintained supplementary and complementary relations.¹⁸

¹⁷ See, e.g., Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling," 140-141. See generally Paul Brest, "The Supreme Court, 1975 Term - Forward: In Defense of the Antidiscrimination Principle," 90 *Harvard Law Review*, 1 (1976).

¹⁸ See Kitano, *Race Relations*, 100-101.

We may thus hypothesize that an assault committed by a Cossack against a Tungus out of bias against the Tungus race would cause no greater injury to the victim, the Tungus community generally, or the entire society, than a simple assault would cause. The animus against the Tungus held by this individual Cossack would represent only an individual abnormal psychological profile. It would not implicate the broad and deep fabric of racial and ethnic prejudice that such acts implicate in our society. It would be roughly akin to an assault in our culture committed against a victim with blue eyes because the perpetrator held a deep antagonism for all blue eyed people.

Whatever may be said of the Tungus' and Cossacks' society, it is very clear that its level of racial harmony and absence of racial tension is not present in our society with its legal and social history. Bias crimes implicate a social history of prejudice, discrimination, and even oppression. As such, they cause a greater harm than parallel crimes to the immediate victim of the crime, the target community of the crime, and to the general society.

This notion of contextuality in turn helps us understand which categories should and should not be included in a bias crime law. Put differently, it helps us understand how a society ought to go about deciding this issue. The characteristics that yield self-regarding groups which ought to be included in a bias crime law are those characteristics that implicate societal fissure lines, divisions that run deep in the social history of a culture. Here the strongest case is for race. Racial discrimination, the greatest American dilemma, has its roots in slavery, the greatest American tragedy. The depth of the racial divide in this country has been extensively documented.¹⁹ Strong cases can also be made for the other classic bias crime categories, color, ethnicity, religion and national origin, based on our complex history of commitment to equality and inclusiveness, mixed with a

¹⁹ Andrew Hacker, *Two Nations, Black And White, Separate, Hostile, Unequal*, 4-6 (1992); Jennifer L. Hochschild, *Facing Up to the American Dream: Race, Class and the Soul of the Nation* (1996).

painful reality of exclusions over time of such groups as Latinos, Jews, Catholics, Mexicans, Irish, Eastern Europeans, and, at some times, immigrants generally.

Race, color, ethnicity, religion and national origin are all examples of national social fissure lines. But bias crime laws need not be limited to national issues. A state legislature, or for that matter a city council, engaged in drafting a bias crime law or ordinance might well look beyond national fissure lines and include characteristics that, as a state-wide or local matter, implicate deep social divides. Consider, for example, the characteristic of union membership, in a strongly pro-union town. Such a context gave rise to a non-criminal, civil rights claim that reached the Supreme Court in the case of *United Brotherhood of Carpenters and Joiners of America v. Scott*.²⁰ Paul Scott and James Matthews, were employees of A. A. Cross Construction Company. Cross had a contract with the Department of the Army for a construction project near Port Arthur, Texas, well known as a "union town." Cross, however, had a practice of using non-union labor on its projects and the Port Arthur project was no exception. In Port Arthur, in 1975, bringing non-union labor to a construction project was a dangerous thing to do. Not only did this lead to violence, in which both Scott and Matthews were beaten, but it was the kind of violence against which the local authorities of Port Arthur had little interest in interfering, investigating, or prosecuting.²¹ Under these circumstances, the drafters of a bias crime statute for a jurisdiction such as Port Arthur might well conclude that union membership, or the absence thereof, is an appropriate characteristic for inclusion.

II. Bias Crimes in the United Kingdom

The framework set out in Part I may now be brought to bear on the British context. Bias-motivated violence is a problem of long-standing in the U.K. Only relatively recently, however, has U.K. law formally recognized this problem.

²⁰ *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U. S. 825 (1983).

²¹ 463 U.S. at 854-54 (dissenting opinion of Justice Blackmun).

Violence directed against the “other” in Britain may be traced back to the early stages of the millennium. After the coronation of Richard I in 1189, Jews were massacred in London and in York. Indeed in 1290, Jews were expelled from England altogether.²² People of color have lived – from African, Asia and the Middle East – have lived in Britain since at least the Sixteenth Century. Their experience too was one of separation from the main community, violence, and, in 1596, efforts of mass deportation.²³

It was only in the Twentieth Century that large number of members of ethnic minorities began to live in Great Britain. During World War I, the decades that followed, and particularly in the years immediately following World War II, people from colonies or former colonies came to Britain. The earlier portion of this stage saw both periods of racial violence – such as the race riots in Liverpool, Cardiff and Glasgow in 1919 – and periods of almost complete separation due to what was known as the “colour bar.”

Total separation became harder to maintain as the numbers of Blacks coming to Britain increased following World War II, especially those coming from Southwest Asia. Racial violence was a persistent problem, characterized by a series of racist riots in London and other urban areas where minority populations had begun to settle. The most notorious of these riots occurred in 1958, in Nottingham, and in the west London neighborhoods of Notting Hill and other parts of north Kensington. In the years that followed, racist violence continued throughout Britain but racial violence itself did not occupy a position of any prominence on the political landscape.²⁴

The British legal system did not begin to address the problem of racial violence until the mid-1960’s and even then, there was no recognition of bias crimes as being a particular social phenomenon. Rather that focus of legislative efforts was on incitement

²² Nicholson, *Strangers to England: Immigration to England 1100-1945* (1974).

²³ P. Fryer, *Staying Power: The History of Black People in Britain* (1984).

²⁴ See Benjamin Bowling, *Violent Racism: Victimisation, Policing and Social Context* (1998).

of racial violence. The violence itself, it was presumed, could be addressed by existing general criminal legislation.

The first substantive criminal civil rights sanctions under UK law were found in section 6 of the Race Relations Act 1965. This was a prohibition of incitement to racial hatred and was designed as a specific intent crime. Under the Race Relations Act 1965, it was a crime to publish or distribute written matter or to use in words in a public place or at a public meeting which are "threatening, abusive or insulting" if done "with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, ethnic or national origins." The law also required an object result element: that the words or matter actually be likely to "stir up hatred against that section on grounds of colour, race, or ethnic or national origins."

Section 70 of the Race Relations Act 1976 replaced the criminal provisions of the Race Relations Act 1965 and created a crime of Incitement to Racial Hatred. The most significant change brought about by section 70 concerned mens rea. Under the Race Relations Act 1965, racial incitement was a specific intent crime. Under the Race Relations Act 1976, the requisite mental state element for the crime was reduced to a level of criminal negligence. Once again, a person commits incitement to racial hatred if he publishes or distributes written matter or uses words in a public place or at a public meeting which are "threatening, abusive or insulting." Whereas the 1965 Act required that the offending act be done "with intent to stir up hatred," the 1976 Act required only that "having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question." This objective sounding standard is somewhat softened by the defense provided for an accused who can prove either that he did not know of the contents of material distributed or published and neither suspected nor had reasons to suspect that its content was threatening, abusive or insulting." This defense, however, applies only to the distribution of written materials. There is no similar defense provided for oral incitement to racial hatred.

Section 70 in turn was repealed and replaced by sections 17, 18, 19 and 23 of the Public Order Act 1986 which is the current law in Britain against incitement to racial hatred. "Racial hatred" is defined under section 17 as "hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins." This language tracks the language in section 3 of the Race Relations Act 1976 except for the addition of the parenthetical concerning citizenship. The Public Order Act 1986 proscribes the use of words -- oral or written -- to "stir up racial hatred." In addition, the Racial Hatred part of the Public Order Act 1986 criminalized possession of material that is considered to be racially inflammatory. Possession of written materials or recordings which are "threatening, abusive and insulting" with a view to its being displayed, published, distributed is an offense if the standard elements are met, that is:

" he intends racial hatred to be stirred up thereby , or having regard to all the circumstances racial hatred is likely to be stirred up thereby."

Section 23(1). It is defense to the charge of possession if the defendant did not intent to stir up racial hatred and was not aware of the content of the materials and "did not suspect and had not reason to suspect, that is was threatening, abusive or insulting." Section 23(3). The mental state that applies to each part of the crime of incitement to racial hatred appears to be purpose or knowledge, perhaps some kind of recklessness.²⁵

²⁵ The route that the law takes to get there is less than direct and therefore less than clear. Under section 18(1), a person has committed an offense if he "uses threatening, abusive or insulting words or behavior, or displays any written material which is threatening, abusive or insulting" and either "(a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby." Section 18(1)(a) is a purpose standard but section 18(1)(b) seem as if it creates only a negligence standard. A standard of only negligence, however, does not comport with the balance of the statute. Section 18(5) creates a defense for an accused who did not *intend* to stir up racial hatred and who "did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting." This is a purpose of knowing standard. "Not aware that it *might* be" perhaps is a kind of recklessness -- but awareness is closer to knowledge.

Two issues bear special mention with respect to the crime of racial incitement. First, even with the relative easing of the Crown's burden under the Public Order Act 1986, there has been reluctance on the part of prosecuting authorities in Britain to bring cases for incitement of racial hatred. Attorneys General, whose approval is required for charges to be brought under this law, have avoided bringing cases with a strong probability of losing for fear that unsuccessful cases of racial incitement may damage race relations more than they help.²⁶ Attorneys General have expressed a significant concern with respect to consistency. The concern is that a particular writing should not be deemed in violation of the law in one part of Britain while not in others. One may wonder why this should be a concern. It may very well be that the same writing could foreseeable have very different impact in different areas of the country and even in different communities within any single area. There is no obvious reason why these differences should not be taken into account, particularly if the defendant was aware of these factors. Law enforcement officials have also expressed a more concrete source of

Similar provisions apply to the distribution of written material (as opposed to the *display* of written material governed by section 18(1)). Under section 19(1), a person has committed an offense if he "publishes or distributes written material which is threatening, abusive or insulting" and either "(a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby."

Here too, a standard mere only negligence does not comport with the balance of the statute. A similar defense to that provided under section 18(5) for use of words or behavior and display of written material is provided under section 19(2) for publishing or distributing written material although it appears to present a significantly stronger case for a recklessness standard, and may even hint of a negligence standard. Here, the defense is for an accused who did not *intend* to stir up racial hatred if he can prove that he "was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting."

Here the defendant must prove not only the absence of knowledge but also that he had no reason to suspect that the material was threatening abusive or insulting. This suggests that, if he did have reason to so suspect, he would not have a defense. Therefore, so long as the material met the underlying element of the offense, that is, "having regard to all the circumstances racial hatred is likely to be stirred up thereby," the defendant may be convicted in the absence of purposeful or knowing conduct, and perhaps in the absence of recklessness -- he did not suspect but he *should* have suspected that the material was in fact threatening, abusive or insulting.

²⁶ See Joshua Rozenberg, The Case for the Crown, 138-39 (1987).

frustration in enforcing this law: distributors of hateful pamphlets and fliers, even in a pre-e-mail world, are virtually impossible to identify.

Second, as noted above, the provisions of the 1986 law, as was true of its 1976 and 1965 predecessors, did not reach bias crimes *per se* but rather incitement of racial violence. Perhaps the closest thing to a bias crime law that existed in Great Britain prior to 1998 was to be found in the Football (Offences) Act 1991. This statute proscribes such behavior as throwing objects toward the players or spectators and going onto the playing field. In addition to these more prosaic aspects of regulating conduct during football matches, the Football (Offences) Act 1991 makes it an offense to "take part ... in chanting of an indecent or racist nature." section 3(1). "Racist chanting is "threatening, abusive or insulting to a person by reason of his colour, race, nationality (including citizenship) or ethnic or national origins." section 3(2).

The Joint Committee Against Racism's 1981 report on racial violence to the Home Secretary may, in fact, marked the starting point of U.K. bias crime law. Thereafter, the Home Secretary ordered the first official study of racially-motivated violence, which was followed by various efforts to measure and to address the problem, culminating, over the past several years with a heightened awareness of the issue.²⁷ Continued study by the Home Office has demonstrated disturbing evidence of the persistence of the problem, but also encouraging evidence of increased understanding of its causes and dimensions.²⁸

Nonetheless, other than the incitement laws, there was no specific crime for racially-motivated violence. This omission was not due to oversight. As recently as 1994, a private members' bill was introduced in Parliament. The Racial Hatred and

²⁷ E.g., Racial Attacks and Harassment, House of Commons, Home Affairs Committee 3rd Report, Session 1993-94. See Benjamin Bowling, Racial Harassment and the Process of Victimization, Brit. J. Criminol. Vol. 33, No 2 at 234 (1993). See also Bowling, Violent Racism: Victimisation, Policing and Social Context.

²⁸ See Rae Sibbet, The perpetrators of racial harassment and racial violence, Home Office Research Study # 176 (London: Home Office, 1997)

Violence Bill would have expanded the reach of the Public Order Act 1986 to include racial violence itself.²⁹ The bill failed for lack of government support. The Government at the time preferred to treat bias crimes generally, using the provisions of the Public Order Act 1986 that proscribe verbal assaults.³⁰

The Labour Government that came to power in 1997 raised the issue of racial violence in its program and manifesto. This culminated with the Crime and Disorder Act 1998 provisions enacting prohibitions against racially motivated crimes Sections 28-32 provide for what we would call a “penalty enhancement statute” which increases the severity of a penal sanction for crimes that are “racially aggravated.” A crime is racially aggravated when “the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) or a racial group; or the offence is racially motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.” As of September 30, 1998, therefore, the United Kingdom, for the first time, has a bias crime law.

III. The Broader Framework from which to View Bias Crimes

Early scholarly reaction to the racial violence provisions of the Crime and Disorder Act 1998 has been mixed to critical.³¹ It is simply too early to gauge the enforcement of this provision. We may, however, begin to offer preliminary observations about what this change in the law signals about British society.

First, the change in the law occurred at an extraordinary time in the development of bias law in the U.K. On February 22, 1999, the “Macpherson Report,” the findings and recommendations of the commission looking into the police investigation of the murder of Stephen Lawrence, was issued. Lawrence, a Black teenager, was murdered in 1993,

²⁹ See [1994] *Crim. L. Rev.* at 313-14.

³⁰ Public Order Act 1986 section 4(1).

³¹ See, e.g., Fernne Brennan, “Racially Motivated Crime: the Response of the Criminal Justice System, [1999] *Crim. L. Rev.* 17.

purportedly by five white youths. No one was ever convicted of the crime. The Home Secretary, Jack Straw, appointed Sir William Macpherson, along with three others, to inquire “into the matters arising from the death of Stephen Lawrence, in order particularly to identify the lessons to be learned for the investigation and prosecution of racially motivated crimes.”³²

The recommendations of the Macpherson Report and their early implementation has raised the profile of racial issues in the British legal establishment dramatically. The Report saw the Lawrence case as implicating systemic problems of both racial violence in Britain and “institutionalized racism” in the British law enforcement system. Police services throughout Great Britain are charged with creating systems for the reporting and recording of racist crimes. The Metropolitan Police Service, more commonly known as “Scotland Yard,” has increased the size of its Racial and Violent Crime Task Force from one full-time member, to over a dozen officers, headed by Detective Chief Superintendent Jeffrey Brathwaite, the highest ranking person of color in British policing. Whereas race was until recently considered largely irrelevant to the criminal justice system, at least as an official matter, it is in the process of becoming an issue of significant import in British law enforcement.

The second observation draws upon theorists such as Emile Durkheim and, more recently, Joel Feinberg, to understand that punishment represents societal condemnation of certain behavior. Social cohesion thus emerges from the act of punishment. Denunciation must inform our decisions about the nature of criminal punishment within a society. It is impossible for a society's punishment choices *not* to express its societal values. Through its choices concerning punishment, a society reveals the content of its values.

³² The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William MacPherson of Cluny (1999).

Criminal punishment, unique among official sanctions imposed by an authority, carries with it social disapproval, resentment and indignation. Compare the social stigma involved in a conviction for criminal tax evasion as opposed to those triggered by a civil finding of under-payment of taxes. Criminal punishment inherently stigmatizes. Significantly, one of the strongest modern statements of this view of punishment is found in the report of the Royal Commission on Capital Punishment.

Punishment is the way in which society expresses its denunciation of wrong doing; and in order to maintain respect for law, it is essential that punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them . . . [T]he ultimate justification for any punishment is, not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime.³³

Regardless of one's view of capital punishment, this description of punishment is compelling. Henry Hart saw the expressive value of punishment as the key to the distinction between the criminal and the civil: "What distinguishes a criminal from a civil sanction, and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition."³⁴

What happens when a legislature enacts a bias crime law and it is signed into law? This act of law-making constitutes a societal condemnation of racism, religious intolerance, and other forms of bigotry that are covered by that law. Moreover, every act of condemnation is dialectically twinning with an act of expression of values, in Durkheim's terms social cohesion. Punishment not only signals the border between that which is permitted and that which is proscribed, it denounces that which is rejected and announces that which is embraced. As racial equality per se becomes a more prominent

³³ Royal Commission on Capital Punishment, Minutes of Evidence, Ninth Day, December 1, 1949, Memorandum submitted by the Rt. Hon. Lord Justice Denning (1950).

³⁴ Henry H. Hart, Jr., "The Aims of the Criminal Law," 23 Journal of Law and Contemporary Problems, 404 (1958).

and expressed values in a society, crimes that violate these values should must be described specifically as bias crimes and punished as such.

What happens if bias crimes are not expressly punished in a criminal justice system, or, if expressly punished, not punished more harshly than parallel crimes? Here, too, there is a message expressed by the legislation. The message is that racial harmony and equality are not among the highest values held by the community. Put differently, as noted above, it is impossible for the punishment choices made by the society *not* to express societal values. There is no neutral position, no middle ground. The only question is the content of that expression and the resulting statement of those values.

If a racially-motivated assault is punished identically to a parallel assault, the racial motivation of the bias crime is rendered largely irrelevant and thus not part of that which is condemned. The individual victim, the target community, and indeed the society at large thus suffers the twin insults akin to those suffered by the narrator of Ralph Ellison's *Invisible Man*.³⁵ Not only has the crime itself occurred, but the underlying hatred of the crime is invisible to the eyes of the legal system.

The treatment of bias crimes under U.K. law, both de facto and de jure, is a significant window into the place of racial harmony and equality among the values held by the U.K. polity. The recent legislation along with the widespread public attention to the Lawrence Inquiry and the Macpherson Report demonstrates that these issues are of central concern in the U.K. today, and are in a critical stage of evolution.

³⁵ Ralph Ellison, *Invisible Man* (1953).