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Enhanced Punishment under the Texas Hate Crimes Act: Politics, Panacea, or Pathway to Hell.

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ENHANCED PUNISHMENT UNDER THE TEXAS HATE CRIMES ACT: POLITICS, PANACEA, OR PATHWAY TO HELL?

DAVID TODD SMITH

Hell is paved with good intentions, not with bad ones. All men mean well.[1]

I. INTRODUCTION

In the early hours of June 7, 1991, William George Roberts III, Joshua Everette Hendry, and Christopher William Brosky, all members of a white supremacist "skinhead" group, cruised the suburban streets of Arlington, Texas for a single ill purpose—to find a victim.[2] While driving

1. BERNARD SHAW, *Man and Superman: The Revolutionist's Handbook: Maxims for Revolutionists*, *in* 3 SELECTED PLAYS OF BERNARD SHAW 483, 740 (1948).

2. *See* Melinda Smith, *A Lesson of Hate*, 56 TEX. B.J. 1142, 1142 (1993) (describing Roberts, Hendry, and Brosky's "skinhead" affiliation and documenting events leading to incident of racial violence). Feeling the effects of an evening of "heavy partying," the

through a residential area, the trio encountered Donald Thomas, an African-American, sitting on the back of a flatbed truck along with two Anglo men.[3] As the car containing Roberts, Hendry, and Brosky passed Thomas and his companions, Roberts fired a single shotgun blast at Thomas from point-blank range.[4] Mortally wounded, Thomas died at the scene.[5]

Tarrant County prosecutors charged Brosky with Thomas's murder.[6] In March 1993, a jury convicted Brosky as charged, rendering him eligible for the maximum sentence of life imprisonment.[7] Despite the prosecu-

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threesome specifically set out to conduct a drive-by shooting on an African-American person. *Id.* Hendry drove his car, with Roberts and Brosky as his passengers. *Id.*

3. *Id.* Thomas, a 32-year-old beverage warehouse employee, had joined some friends to unwind after completing his shift. *Id.*

4. *See, e.g.*, Selwyn Crawford, *Judge OK's Plea Deal in Skinhead's Case: Civic Leaders Sought Jury Trial*, DALLAS MORNING NEWS, Apr. 1, 1993, at A1 (reporting facts of shooting); *Jury Error Spares Skinhead From Jail in Fatal Shooting*, BOSTON GLOBE, Mar. 25, 1993, at 10 (relating that Roberts admitted he had fired gun); Kevin Moran, *Skinhead Receives 40 Years*, HOUS. CHRON., Nov. 12, 1993, at A29 (noting that one actor fired shotgun at point-blank range).

5. Melinda Smith, *A Lesson of Hate*, 56 TEX. B.J. 1142, 1142 (1993).

6. *See Ex parte* Brosky, 863 S.W.2d 783, 783 (Tex. App.—Fort Worth 1993, no pet.) (*Brosky II*) (acknowledging Brosky's October 1991 indictment for murder of Donald Thomas). Because they were each under 17 years of age at the time of Thomas's murder, Roberts, Hendry, and Brosky were initially treated as juveniles as required by Texas law. *See Killer's Probation Outrages Texans*, CHI. TRIB., Mar. 25, 1993, at 3 (noting that each member of trio was 15 years old at time of shooting); *see also* TEX. FAM. CODE ANN. §§ 51.02(1)(A), 51.04(a) (Vernon 1986) (defining "child" as person "ten years of age or older and under 17 years of age" and granting juvenile court exclusive original jurisdiction over proceedings when offense is committed by person meeting that definition). The State brought murder charges against Hendry in juvenile court, but utilized a special procedure to certify Roberts and Brosky to stand trial as adults. *See Ex parte* Brosky, 863 S.W.2d 775, 777 (Tex. App.—Fort Worth 1993, no pet.) (*Brosky I*) (noting that juvenile court waived jurisdiction over Brosky); Melinda Smith, *A Lesson of Hate*, 56 TEX. B.J. 1142, 1142–43 (1993) (reporting that while Hendry's case remained in juvenile court, Roberts and Brosky were certified as adults); *see also* TEX. FAM. CODE ANN. § 54.02 (Vernon 1986 & Supp. 1994) (providing procedure whereby juvenile court may waive exclusive original jurisdiction and transfer case to criminal court).

7. *See Brosky II*, 863 S.W.2d at 783 (acknowledging Brosky's murder conviction); State's Brief at 1, *Ex Parte* Brosky, 863 S.W.2d 783 (Tex. App.—Fort Worth 1993) (No. 02-93-0308-CR) (*Brosky II*) (noting that jury convicted Brosky of murder in prior case); *see also* TEX. PENAL CODE ANN. § 12.32(a) (Vernon 1994) (authorizing "imprisonment . . . for life or for any term of not more than 99 years or less than 5 years" upon conviction for first-degree felony); *White's Probation in Murder Trial Angers Fort Worth Blacks*, CHI. TRIB., Mar. 24, 1993, at 2 (reporting that Brosky could have been sentenced to life in prison). Brosky maintained that, prior to the shooting, he passed out in the back seat of Hendry's car as a result of his consumption of 19 cans of beer over the course of the evening. Melinda Smith, *A Lesson of Hate*, 56 TEX. B.J. 1142, 1142 (1993). Although Roberts admitted that it was he who had shot and killed Thomas, the prosecution tried

tion's plea for the maximum penalty, the all-white jury sentenced Brosky to ten years probation.[8] News of the sentence sparked a firestorm of public controversy,[9] which led to a series of local demonstrations,[10] a federal

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Brosky for murder under a complicity theory, alleging that Brosky participated in planning the crime. *See Brosky II*, 863 S.W.2d at 783 (noting that court's charge included instruction on law of complicity); *Jury Error Spares Skinhead from Jail in Fatal Shooting*, BOSTON GLOBE, Mar. 25, 1993, at 10 (reporting that Roberts confessed to shooting Thomas and describing evidence which indicated that Brosky helped plan attack); *see also* TEX. PENAL CODE ANN. § 7.02(a) (Vernon 1994) (providing that "[a] person is criminally responsible for an offense committed by the conduct of another if: . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense").

8. *See Brosky II*, 863 S.W.2d at 783 (acknowledging Brosky's conviction and sentence); State's Brief at 1-2, *Brosky II* (No. 02-93-0308-CR) (noting jury's decision); *see also* Selwyn Crawford, *Judge OK's Plea Deal in Skinhead's Case: Civic Leaders Sought Jury Trial*, DALLAS MORNING NEWS, Apr. 1, 1993, at A1 (describing racial composition of jury); *Killer's Probation Outrages Texans*, CHI. TRIB., Mar. 25, 1993, at 3 (noting that prosecutors had sought life sentence in case). Roberts and Hendry each plea bargained with prosecutors in exchange for their testimony against Brosky. Selwyn Crawford, *Judge OK's Plea Deal in Skinhead's Case: Civic Leaders Sought Jury Trial*, DALLAS MORNING NEWS, Apr. 1, 1993, at A1. Roberts agreed to a forty-year sentence, rendering him eligible for parole within eight years. *Id.* Hendry pleaded guilty in juvenile court, accepting a fifteen-year sentence under a Texas determinate sentencing law. *Id.* Hendry served the first two years of his sentence in the custody of state juvenile authorities and, by order of the presiding court, was transferred to the state penitentiary shortly after his eighteenth birthday. Selwyn Crawford, *Fighting Hate*, DALLAS MORNING NEWS, June 10, 1993, at A25.

9. *See* Selwyn Crawford, *Judge OK's Plea Deal in Skinhead's Case: Civic Leaders Sought Jury Trial*, DALLAS MORNING NEWS, Apr. 1, 1993, at A1 (describing controversy that erupted following announcement of Brosky's sentence). The jury's decision vaulted Texas's stand on hate crime into the national spotlight. *See* Judy Wiessler, *Harsher Penalties Upheld for Hate Crimes Suspects*, HOUS. CHRON., June 12, 1993, at A1 (noting nationwide attention resulting from Brosky's sentence). The area news media decried the sentence, describing it as "unjust." *Skinhead Case: Fort Worth Verdict Is Unjust*, DALLAS MORNING NEWS, Mar. 25, 1993, at A28. Speaking for the local African-American community, Dallas County Commissioner John Wiley Price agreed, stating that the sentence indicated that "'[b]lack folks' lives still ain't worth a damn in Texas.'" *White's Probation in Murder Trial Angers Fort Worth Blacks*, CHI. TRIB., Mar. 24, 1993, at 2. Reports that the jury intended to give Brosky prison time in addition to probation, but Texas law prevented it from doing so, further fueled the controversy. *See Brosky II*, 863 S.W.2d at 783 (noting that jury actually sentenced Brosky to "five years confinement, probated for ten years"); *Killer's Probation Outrages Texans*, CHI. TRIB., Mar. 25, 1993, at 3 (reporting that Texas law requires trial judge to impose only probation when jury recommends both probation and prison sentence for crime carrying punishment range of five years to life confinement).

10. *See* Selwyn Crawford, *Judge OK's Plea Deal in Skinhead's Case: Civic Leaders Sought Jury Trial*, DALLAS MORNING NEWS, Apr. 1, 1993, at A1 (noting public response to news of verdict). The day after Brosky's sentence was announced, a racially mixed crowd consisting of approximately 500 citizens peacefully protested outside the Tarrant County Justice Center. *See Jury Error Spares Skinhead from Jail in Fatal Shooting*, BOSTON GLOBE, Mar. 25, 1993, at 10 (describing protest and noting number and racial composition

civil rights investigation,[11] and Brosky's second trial on related state charges also arising from the facts of Thomas's murder.[12]

Less than one month later, in partial reaction to the controversy surrounding Brosky's seemingly unjust sentence, the Texas Senate passed a bill that would authorize enhanced punishment in cases in which the crime was motivated by the offender's bias or prejudice against a specific strata of persons.[13] The Texas House of Representatives later adopted a

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of participants). A few days later, several thousand people participated in a "death march" organized by a coalition of local African-American ministers to signify the group's "mourning for justice." *See 6,000 Protest White's Probation*, BOSTON GLOBE, Mar. 29, 1993, at 5 (quoting Reverend Michael Bell of Coalition of African-American Ministers concerning purpose of march); *see also* Kevin Moran, *Skinhead Receives 40 Years*, HOUS. CHRON., Nov. 12, 1993, at A29 (describing march and estimating number of participants). The crowd chanted "Justice! Justice! Justice!" as it paraded through the streets of downtown Fort Worth. Melinda Smith, *A Lesson of Hate*, 56 TEX. B.J. 1142, 1143 (1993).

11. *See Attorney General to Investigate Fort Worth Skinhead Sentencing*, HOUS. CHRON., Mar. 27, 1993, at A30 (noting that United States Attorney General Janet Reno had referred case to Justice Department to determine whether federal civil rights charges would be brought against Brosky); *see also U.S. Will Probe Texas Hate Slaying*, CHI. TRIB., Mar. 28, 1993, at 3 (reporting that Reno had agreed to investigate matter at insistence of area members of United States Congress).

12. Soon after the first trial ended, prosecutors charged Brosky with criminal conspiracy and organized criminal activity under the state's organized crime statutes. *See Brosky II*, 863 S.W.2d at 783–84 (documenting Brosky's April 1993 indictment for additional offenses stemming from circumstances of Thomas's death); State's Brief at 2, *Brosky II* (No. 02-93-0308-CR) (describing charges contained in Brosky's second indictment); *see also* TEX. PENAL CODE ANN. § 15.02 (Vernon 1994) (outlining offense of criminal conspiracy); *id.* § 71.02 (describing and providing elements of offense of organized criminal activity). In a habeas corpus proceeding, Brosky challenged the state's authority to try him for this second pair of offenses, alleging that such a retrial was barred by the Double Jeopardy Clause of the United States Constitution. *Brosky II*, 863 S.W.2d at 784; State's Brief at 2, *Brosky II* (No. 02-93-0308-CR). The Second Court of Appeals rejected Brosky's argument, holding that the new charges were distinct from the prior murder charge for double jeopardy purposes. *See Brosky II*, 863 S.W.2d at 788 (drawing distinction between conspiracy offenses and murder in context of double jeopardy analysis). Following a change of venue, a racially mixed Galveston, Texas jury convicted Brosky of the organized crime charge and sentenced him to 40 years in prison. Kevin Moran, *Skinhead Receives 40 Years*, HOUS. CHRON., Nov. 12, 1993, at A29.

13. *See, e.g.*, Tex. S.B. 456, 73d Leg., R.S. (1993) (submitted Mar. 31, 1993) (proposing enhanced punishment of offenses in which defendant exhibited discriminatory motive); Clay Robison, *Senate Passes Tougher Law on Hate Crimes*, HOUS. CHRON., Apr. 8, 1993, at A25 (reporting that senate had passed bill and asserting that measure was "put on the fast track" after Brosky's sentencing); *Senate Passes Hate Crimes Bill*, UPI, Apr. 7, 1993, *available in* LEXIS, Nexis Library, UPI File (noting that senate action, which came within one month of Brosky's sentencing, was "spurred by the probated sentence given a 'skinhead' white supremacist"). In its original form, the bill sought to enhance punishment for a certain range of offenses "if the defendant was motivated to commit the offense because of the race, color, ethnicity, religion, national origin, or sexual orientation of the victim." Tex. S.B. 456, 73d Leg., R.S. (1993) (submitted Mar. 31, 1993); *see Senate Passes Hate Crimes*

similar measure, and after a conference committee made the final revisions, the bill was presented to Governor Ann Richards for approval.[14] On June 19, 1993, Governor Richards signed the Texas Hate Crimes Act (the Act) into law.[15]

Part II of this Comment examines the nationwide trend toward recognition of "hate crime" as a social phenomenon demanding the attention of American legal institutions. Part III analyzes the Act as part of this trend, considering its legislative history and applying its provisions to the facts of *State v. Brosky*[16] to illustrate its impact on the individual defendant. Assuming for purposes of analysis that Brosky was sentenced under the new legislation, Part IV anticipates the grounds upon which Brosky might challenge the Act's constitutionality and evaluates the merits of each specific contention. Finally, Part V assesses the constitutional issues raised by Brosky's hypothetical claim and suggests courses of action the legislature should consider in light of these constitutional concerns.

Bill, UPI, Apr. 7, 1993, *available in* LEXIS, Nexis Library, UPI File (describing scope of first bill passed by senate).

14. *See* Tex. S.B. 456, 73d Leg., R.S. (1993) (version of June 19, 1993) (noting that Texas House of Representatives adopted conference committee's report and submitting final version of bill to Governor Richards for approval); *Penal Code Reform, Hate Crime Bills Sent to the Governor*, UPI, May 29, 1993, *available in* LEXIS, Nexis Library, UPI File (reporting on presentation of final version of bill to Governor Richards for ultimate action); *see also* Christy Hoppe, *House Approves Bill to Reform Crime Penalties*, DALLAS MORNING NEWS, May 30, 1993, at A1 (estimating probability that Governor Richards would approve legislation).

15. Clay Robison, *Richards Signs Hate Crimes Bill Into Law*, HOUS. CHRON., June 20, 1993, at 3. Symbolically, Governor Richards signed the legislation on the day known as "Juneteenth," the anniversary of the announcement of the Emancipation Proclamation in Texas. *Id.* The Act was subsequently codified in portions of the Texas Penal Code and the Texas Code of Criminal Procedure and became effective on September 1, 1993. *See* TEX. PENAL CODE ANN. § 12.47 (Vernon 1994) (codifying enhanced punishment provision of enacted bill and noting effective date of provision); TEX. CODE CRIM. PROC. ANN. art. 42.01, § 6, art. 42.014, art. 42.12, §§ 13A, 16(e), art. 42.18, § 8(o) (Vernon Supp. 1994) (codifying remainder of enacted bill).

16. Although the appellate court opinions concerning Brosky's state habeas corpus actions, *Ex parte* Brosky, 863 S.W.2d 775 (Tex. App.—Fort Worth 1993, no pet.) (*Brosky I*) and *Ex parte* Brosky, 863 S.W.2d 783 (Tex. App.—Fort Worth 1993, no pet.) (*Brosky II*), are published in the South Western Reporter, the original *State v. Brosky* case is unreported. This Comment uses the style *State v. Brosky* strictly to refer to the facts surrounding Brosky's original prosecution for the murder of Donald Thomas, as distinguished from the related post-conviction proceedings.

II. BACKGROUND

A. *The Hidden Impact of Hate*

The manifestation of intolerance, in the form of overt acts directed against members of discrete social groups, permeates the history of humankind.[17] Although the United States serves as the premier world advocate of personal freedom and egalitarianism, history teaches that America is not immune from the legacy of hate.[18] Despite the social advancements of the modern era, the blemish of bigotry and hatred, which appears to lie at the base of human instinct, remains a prevalent part of America's social framework.[19]

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17. *See* Stephen E. Rendahl, *The Hate Connection: A Book Review Essay*, 69 N.D. L. REV. 361, 361 (1993) (noting long history of ethnic violence and anti-Semitism throughout civilized world); *see, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 n.13 (1943) (noting persecution of early Christians who refused to recognize symbols of imperial authority); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 799 (D.C. Cir. 1984) (Bork, J., concurring) (describing retaliatory attack on Israeli civilians by Palestine Liberation Organization that resulted in death of more than 30 individuals), *cert. denied*, 470 U.S. 1003 (1985); Avramovski v. McElroy, No. 93 Civ. 8926 (MGC), 1993 U.S. Dist. LEXIS 18252, at *7 (S.D.N.Y. Dec. 29, 1993) (recognizing atrocities that have resulted from Serbian policy of "ethnic cleansing" of Muslims who reside in Bosnia); Horace Mann League v. Board of Pub. Works, 220 A.2d 51, 56–57 (Md.) (documenting religious violence that occurred in early Rome and during Spanish Inquisition), *cert. denied and appeal dismissed*, 385 U.S. 97 (1966); H.R. Rep. No. 1347, 96th Cong., 2d Sess. 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3343, 3344 (documenting "the systematic act of extermination of nearly 6 million Jews in Europe before and during World War II. . . . at the hands of those who embraced the Nazi philosophy"); *Psalm* 119:157 (intimating that author had not turned away from divine law despite persecution by various secular-minded enemies).

18. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 278 n.5 (1986) (recognizing history of race-based discrimination in United States); Jonathan D. Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crimes Statutes After* R.A.V., 72 OR. L. REV. 157, 160–61 (1993) (noting pervasive history in United States of violence "motivated by issues of race, gender, ethnicity, and sexual preference"); *see, e.g.*, Keating v. Carey, 706 F.2d 377, 389 (2d Cir. 1983) (noting that lynchings and racial violence were legion during post-Civil War Reconstruction era); Cox v. State, 585 So. 2d 182, 185 (Ala. Crim. App. 1991) (describing Ku Klux Klan's 1981 lynching of African-American in retaliation for declaration of mistrial in case in which another African-American was accused of murdering Birmingham, Alabama police officer), *cert. denied*, 112 S. Ct. 1676 (1992); State v. Mitchell, 485 N.W.2d 807, 817 (Wis. 1992) (characterizing African-American rioters' brutal assault of Anglo truck driver Reginald Denney during Los Angeles riots as example of hate crime), *rev'd*, 113 S. Ct. 2194 (1993); *see also* 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, 341 (1991) (stating that "[t]he continued existence of bigotry is evidence that our society has failed to live up to its professed ideal of egalitarianism").

19. *See* Collin v. Smith, 578 F.2d 1197, 1210 (7th Cir.) (describing civilization's failed attempt "to hide brutal animal-like instincts" in humankind and lamenting existence of "those who would resort to hatred and vilification of fellow human beings because of their

The term "hate crime" describes criminal conduct that is motivated by the offender's bias or prejudice against another cognizable group.[20] Data collected by both law enforcement agencies and private interest groups indicates that in Texas, as well as the rest of the country, the incidence of bias-related crime has risen significantly in recent years.[21] This increase

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racial background or their religious beliefs, or for that matter, because of any reason at all"), *cert. denied*, 439 U.S. 916 (1978); State v. McKnight, 511 N.W.2d 389, 389 (Iowa) (declaring that "[b]igotry is again rearing its ugly head in this country"), *cert. denied*, 114 S. Ct. 2116 (1994); *Mitchell*, 485 N.W.2d at 817 (noting continued persistence of racial antagonism and violence in America); Walter Bagehot, *The Metaphysical Basis of Toleration*, *in* 6 THE WORKS AND LIFE OF WALTER BAGEHOT 220 (Mrs. Russell Barrington ed., 1915) (describing persecution as "congenial to human nature" and recognizing its persistence throughout human history); Robin D. Barnes, *Standing Guard for the P.C. Militia, or, Fighting Hatred and Indifference: Some Thoughts on Expressive Hate-Conduct and Political Correctness*, 1992 U. ILL. L. REV. 979, 990 (contending that racism "is the living consequence of the history that has produced us" and asserting that failure to punish hate crime offenders "threatens the quality of public discourse and transforms First Amendment principles into a shield for injustice").

20. *See* H.R. 1152, 103d Cong., 1st Sess. (1993) (defining hate crime as "a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property which is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of any person"); S. 1522, 103d Cong., 1st Sess. (1993) (adopting same definition); Michael S. Degan, Comment, *"Adding the First Amendment to the Fire": Cross Burning and Hate Crime Laws*, 26 CREIGHTON L. REV. 1109, 1109–10 (1993) (defining hate crimes as "criminal acts committed against particular victims because of the assailant's perceptions of the victims' race, national origin, religion, or other bias-related classification").

21. *See Mitchell*, 485 N.W.2d at 810 (noting that statistical sources indicate increase in all types of bias-related crime); ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIMES STATUTES: A 1991 STATUS REPORT 1 (1991) (documenting report of 1685 anti-Semitic incidents in United States in 1990, which was highest total recorded during history of ADL audit); Joseph M. Fernandez, Recent Development, *Bringing Hate Crime Into Focus—The Hate Crimes Statistics Act of 1990*, 26 HARV. C.R.-C.L. L. REV. 261, 261 (1991) (providing statistics gathered by private agencies, as well as by state and local governments, which indicate that hate crime activity has increased); Carol J. Castaneda, *Hate Crimes and Killings Are on the Rise*, U.S.A. TODAY, Sept. 6, 1991, at A3 (reporting claim of "watchdog" groups that "they're seeing more violence aimed at Jews, gays, and minorities"); *Hate Crimes Legislation Does Not Protect Gays and Lesbians*, LARRY KING LIVE, Jan. 7, 1994, *available in* LEXIS, Nexis Library, Transcript File, Transcript No. 1012 (statement of Texas Senator Rodney Ellis) (noting increased recognition of hate crime as social problem in Texas and throughout nation). Three thousand bias-related incidents were documented nationwide between 1980 and 1986. Tanya K. Hernández, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence,"* 99 YALE L.J. 845, 845–46 (1990). According to the Federal Bureau of Investigation (FBI), however, more than 4,500 bias-motivated incidents were documented in 1991 alone. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2198 n.4 (1993); Selwyn Crawford, *Can Hate Be Outlawed?*, DALLAS MORNING NEWS, May 30, 1993, at J1. The FBI concedes that the 1991 figure was based on incomplete data, and that it does not represent the actual number of hate crime incidents for that year. Angelo N. Ancheta, *Fighting Hate Violence*, 29 TRIAL 16 (July 1993); *see*

has attracted the attention of the media, the public, and lawmakers throughout the nation.[22]

Although the reprehensible nature of hate crime is often apparent from the facts of any given case, the repercussions of these offenses exceed the ignoble character of any one specific act. Hate crimes entail consequences that extend well beyond the physical or psychological damage suffered by the immediate victim, causing greater harm to society

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Stefanie Asin, *Hate Crime Tally For '92*, HOUS. CHRON., Jan. 8, 1992, at A19 (noting that in 1992 only 2,771 law enforcement agencies participated in statistical tracking pursuant to Federal Hate Crimes Statistics Act and comparing figure to 16,000 agencies that provide statistical information to FBI regarding other crimes). Texas Department of Public Safety statistics gathered in 1992, the first year the state kept such figures, indicate that 480 hate crime incidents were reported statewide during that year. Freddie Baird, *Hate Crimes Conference: Should Hate Be Criminalized?*, 56 TEX. B.J. 1148, 1148 (1993). Senator Rodney Ellis, the original author of the Texas hate crime legislation, claims that this figure represents a 400% increase from 1991. Rodney Ellis, *Texas Cannot Let Hate Crimes Go Unpunished*, HOUS. CHRON., May 28, 1993, at B15. Although hate crimes have historically been committed by Anglo perpetrators against minority victims, this too may be changing. *See* Terry Box, *Hate Crimes Against Whites Increase*, DALLAS MORNING NEWS, Apr. 28, 1993, at A1 (relating assertion by civil rights group that greater number of incidents have involved Anglo victims). Klanwatch, a respected civil rights organization that has tracked the victimization of African-Americans by white supremacists for more than 14 years, reported a "significant increase" in the number of black-on-white bias crimes in 1992. *Id.* Ironically, the first case to reach the United States Supreme Court on the issue of whether statutorily enhanced penalties for hate crimes are constitutionally permissible involved a black-on-white incident. *See Mitchell*, 113 S. Ct. at 2196–97 (describing racial composition of perpetrators and victim in that case).

22. *See* Virginia N. Lee, *Legislative Responses to Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 HARV. C.R.-C.L. L. REV. 287, 287 (1990) (linking number of highly publicized incidents to heightened public awareness of hate-motivated violence); Tanya K. Hernández, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence,"* 99 YALE L.J. 845, 845 (1990) (asserting that "a perceived surge of 'bias crimes' has seized the nation's attention"); Thomas H. Moore, Note, R.A.V. v. City of St. Paul: *A Curious Way to Protect Free Speech*, 71 N.C. L. REV. 1252, 1252–55 (1993) (acknowledging efforts of states, municipalities, and universities to combat increasing hate crime problem); *see also* Selwyn Crawford, *Can Hate Be Outlawed?*, DALLAS MORNING NEWS, May 30, 1993, at J1 (discussing causal link between perceived increase in bias-related incidents and legislative attempts to counteract hate crime). In response to this apparent surge in bias crime incidents, Congress passed the Hate Crime Statistics Act of 1990, which instructs the United States Attorney General to "acquire data . . . about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity." Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990). Texas passed similar legislation in 1991. *See* TEX. GOV'T CODE ANN. § 411.046 (Vernon Supp. 1994) (requiring "collection and analysis of information relating to crimes that are motivated by prejudice, hatred, or advocacy of violence, including, but not limited to, incidents for which statistics are or were kept under Public Law No. 101-275" (codifying Acts 1991, 72d Leg., 2d C.S., ch. 10, § 21A.01)).

than offenses committed without a bias motive.[23] Criminal acts motivated by the offender's bias against a particular social group encourage the stigmatization of that class of people and induce intragroup feelings of humiliation, isolation, and self-hatred.[24] By perpetuating fear, misunderstanding, and misconception between social groups, hate crimes have

23. *See, e.g., Mitchell*, 485 N.W.2d at 818 (Abrahamson, J., dissenting) (noting that victimization based on status causes greater harm than injurious conduct alone); State v. Plowman, 838 P.2d 558, 564 (Or. 1992) (stating that hate crimes "invite imitation, retaliation, and insecurity on the part of persons in the group to which the victim was perceived by the assailants to belong"), *cert. denied*, 113 S. Ct. 2967 (1993); State v. Beebe, 680 P.2d 11, 13 (Or. Ct. App. 1984) (asserting that hate crimes often "escalate from individual conflicts to mass disturbances"); 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, 340–42 (1991) (describing social costs associated with hate crime that extend beyond harm to immediate victim); Tanya K. Hernández, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence,"* 99 YALE L.J. 845, 848 (1990) (distinguishing harm that results from hate crimes in that, whenever individual is victimized because of immutable trait, act assaults entire disfavored and discrete group); *see also* Kevin Moran, *Skinhead Receives 40 Years*, HOUS. CHRON., Nov. 12, 1993, at A29 (quoting *Brosky* prosecutor's statement that hate crimes constitute "'attack[s] not just on individuals, but on a system of government and on society'"); *cf.* Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (stating that bias-motivated educational policy of "separate but equal" harmed African-American children by "generat[ing] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone").

24. 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, 341 (1991); *see, e.g.*, State v. Vanatter, 869 S.W.2d 754, 755 (Mo. 1994) (noting significant emotional harms suffered by individual hate crime victims as well as society in general); State v. Talley, 858 P.2d 217, 226 (Wash. 1993) (en banc) (accepting scholarly agreement that hate crimes have harmful secondary effects on disadvantaged groups); *Mitchell*, 485 N.W.2d at 818 (Abrahamson, J., dissenting) (recognizing that, in addition to immediate injury, hate crime victims "may suffer feelings of fear, shame, isolation, and inability to enjoy the rights and opportunities that should be available to all persons"); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1541–42 (1989) (noting that "[b]ias crimes are more socially invidious than crimes not motivated by group hatred because of their tendency to perpetuate prejudice and victimize an entire class of persons"); Abby Mueller, Note, *Can Motive Matter? A Constitutional and Criminal Law Analysis of Motive in Hate Crime Legislation*, 61 UMKC L. REV. 619, 632 (1993) (distinguishing bias-related crimes from other criminal acts on basis that hate crimes encompass special form of intimidation directed against victim's social group); *cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (noting that race-based classifications carry risk of stigmatic harm). *See generally* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135–47 (1982) (detailing harms that result from chronic stigmatization of disempowered social classes).

a particularly pervasive impact—one that stratifies society in a way that threatens the very fabric of its being.[25]

B. *Hate Crime Legislation: The Institutional Response to a Perceived Social Evil*

As the principal mechanism of social control and progressive change, the American legal system has traditionally responded to challenges to the legal, social, or moral order by establishing laws that prescribe or prohibit certain types of conduct.[26] Civil rights legislation, which promotes

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25. ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, ADL LAW REPORT, HATE CRIMES STATUTES: A RESPONSE TO ANTI-SEMITISM, VANDALISM, AND VIOLENT BIGOTRY 1 (1988); *see Vanatter*, 869 S.W.2d at 755 (recognizing tendency of hate-motivated crimes "to ignite further violence by provoking retaliatory crimes and inciting community unrest"); *In re* M.S., 22 Cal. Rptr. 2d 560, 563 (Cal. Ct. App. 1993) (acknowledging pervasive harms hate crimes inflict upon society); State v. Wyant, 597 N.E.2d 450, 452 (Ohio 1992) (expressing abhorrence for hate crimes and noting "that bigotry, whether expressed merely in words or by violence, does harm to its victims and to society as a whole"), *vacated*, 113 S. Ct. 2954 (1993); *Mitchell*, 485 N.W.2d at 830 (Bablitch, J., dissenting) (noting consensus that hate crimes threaten society in general); *see also* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 140 (1982) (contending that bigotry inflicts indirect harms on person holding prejudicial views); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2338 (1989) (asserting that legal system's failure to adequately respond to bigotry threatens victims' sense of membership in society).

26. *See* Donald E. Lively, *Reformist Myopia and the Imperative of Progress: Lessons for the Post-Brown Era*, 46 VAND. L. REV. 865, 865 n.3 (1993) (illustrating how legal system has responded to "innumerable conflicts of law and morality that have arisen, been resolved, and exist now primarily as historical reference points"); *see also* Minnesota *ex rel.* Whipple v. Martinson, 256 U.S. 41, 45 (1921) (concluding that states, in accordance with police powers, may enact regulations which benefit public health and welfare); State v. Stalder, 630 So. 2d 1072, 1078–79 (Fla. 1994) (Kogan, J., concurring) (arguing that, in keeping with common goal of maintaining law, order, life, and liberty, society has authority to combat intolerance through enactment of laws); State v. Wyant, 597 N.E.2d 450, 457 (Ohio 1992) (recognizing that, within constitutional limits, legislatures determine what constitutes criminal conduct), *vacated*, 112 S. Ct. 2954 (1993); State v. Mitchell, 485 N.W.2d 807, 818 (Wis. 1992) (Abrahamson, J., dissenting) (noting that law reflects societal recognition of harms caused by invidious classification and discrimination), *rev'd*, 113 S. Ct. 2194 (1993). Some commentators, however, have questioned whether the legal system is the appropriate forum to address such social concerns. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 670–71 (1943) (Frankfurter, J., dissenting) (asserting that "[r]eliance for the most precious interests of civilization . . . must be found outside of their vindication in courts of law" and that "[o]nly a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit"); Robin D. Barnes, *Standing Guard for the P.C. Militia, or, Fighting Hatred and Indifference: Some Thoughts on Expressive Hate-Conduct and Political Correctness*, 1992 U. ILL. L. REV. 979, 979 (describing law as "the mechanism for legitimizing the existing hierarchy of social relations and, hence, for crystallizing existing patterns of domination" (citing Gerald Torres, *Local Knowledge, Lo-*

the equitable treatment of historically disfavored groups, exemplifies the means employed by legal institutions to counteract discriminatory practices that obstruct the promise of liberty.[27] Much like their denouncement of discrimination through the enactment of civil rights laws, legislatures have responded to the hate crime phenomenon by implementing measures designed to curtail the effects of this growing social menace.[28]

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cal Color: Critical Legal Studies and the Law of Race Relations, 25 SAN DIEGO L. REV. 1043, 1051 (1988))); Selwyn Crawford, *Can Hate Be Outlawed?*, DALLAS MORNING NEWS, May 30, 1993, at J1 (citing view of Anti-Defamation League of B'nai B'rith that "'public officials cannot legislate or regulate hatred out of existence. . . . The long-term solution to prejudice, discrimination, bigotry, and anti-Semitism . . . is education and experience'").

27. *See, e.g.*, 42 U.S.C. § 1982 (1981) (providing all citizens with "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property"); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. §§ 2000a-2000h (1970)) (requiring equal treatment of all citizens in areas of voting, public accommodation, public facilities, public education, and employment); United Steelworkers v. Weber, 443 U.S. 193, 202 (1979) (finding that Congress's "primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy'" (quoting 110 CONG. REC. 6548 (1964))); Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (describing objective of Title VII "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees"); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 412–13 n.6 (1968) (holding that 42 U.S.C. § 1982 bars both public and private discrimination, and noting that Civil Rights Act of 1968 prohibits discrimination based on religion or national origin); *see also* James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 635 (1983) (relating view that prohibition of racial discrimination through civil rights legislation has served as legal system's means to achieve substantive end of overcoming historical disadvantages suffered by African-Americans). *But see* Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1344–45 (1991) (contending that United States Supreme Court has eroded effect of civil rights legislation designed to remedy disparate treatment of disadvantaged groups).

28. *See, e.g.*, *In re* M.S., 22 Cal. Rptr. 2d 560, 563 (Cal. Ct. App. 1993) (describing express purpose of California statutes as prevention of hate violence and deterrence of such conduct through establishment of serious criminal penalties); *Stalder*, 630 So. 2d at 1076 (identifying discouragement of criminal acts that victimize historically subjugated groups as Florida Legislature's intent in enacting hate crime law); State v. McKnight, 511 N.W.2d 389, 389 (Iowa) (noting that "[v]iolent or harassing crimes motivated by racism, anti-Semitism, sexism, and other forms of bias have caused legislatures to pass statutes criminalizing such conduct"), *cert. denied*, 1994 U.S. LEXIS 899 (U.S. May 23, 1994); State v. Talley, 858 P.2d 217, 226 (Wash. 1993) (en banc) (citing legislative history of Washington statute, which acknowledged need for legislative response to racial and ethnic violence and for protection of civil rights of all citizens); *see also* Virginia N. Lee, *Legislative Responses to Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 HARV. C.R.-C.L. L. REV. 287, 333 (1990) (advocating widespread state adoption of hate crime legislation); Rodney Ellis, *Texas Cannot Let Hate Crimes Go Unpunished*, HOUS. CHRON., May 28, 1993, at B15 (describing hate crime legislation as "justified social response" when in-

Hate crime statutes implemented among the states have assumed two general forms. The first strategy, which is based on model legislation drafted by the Anti-Defamation League of B'nai B'rith (ADL), increases the penalty available when the defendant has committed an enumerated criminal offense in conjunction with a bias motive.[29] Such statutes allow states to prosecute defendants for conduct punishable under ordinary criminal laws, but expand the severity of procurable sanctions through an enhancement feature designed to punish the offender's discriminatory motive for selecting the particular victim.[30]

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herent evil of crime is compounded by social evil of bigotry). *But see* Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 393 n.237 (1991) (contending that although enactment of hate crime laws provides sense of legislative activism, such measures also "present a wonderful grandstanding opportunity for legislators: how can they lose by 'standing up against bigotry?'"); Selwyn Crawford, *Can Hate Be Outlawed?*, DALLAS MORNING NEWS, May 30, 1993, at J1 (quoting Wisconsin legislator's statement that purpose of hate crime laws is to allow state legislators "'to pose for a bunch of holy pictures saying that they're tough on bigotry'").

29. Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 343 (1991); *see Talley*, 858 P.2d at 219 (acknowledging that some states have adopted enhancement provisions addressing bias-motivated crimes); Jonathan D. Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crimes Statutes After* R.A.V., 72 OR. L. REV. 157, 163–64 (1993) (describing various penalty enhancement laws); Abby Mueller, Note, *Can Motive Matter? A Constitutional and Criminal Law Analysis of Motive in Hate Crime Legislation*, 61 UMKC L. REV. 619, 625 (1993) (describing effect of ADL-type statutes). Approximately 30 states have adopted this form of hate crime legislation. *Hate Crimes Legislation Does Not Protect Gays and Lesbians*, LARRY KING LIVE, Jan. 7, 1994, *available in* LEXIS, Nexis Library, Transcript File, Transcript No. 1012 (statement of Texas Senator Rodney Ellis); *see* ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIMES STATUTES: A 1991 STATUS REPORT 21 (1992) (identifying states which have based hate crime statutes on ADL model).

30. Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 343 (1991); *see* Michael S. Degan, Comment, *"Adding the First Amendment to the Fire": Cross Burning and Hate Crime Laws*, 26 CREIGHTON L. REV. 1109, 1116 (1993) (describing effect of penalty enhancement statutes that specifically address hate crimes); Abby Mueller, Note, *Can Motive Matter? A Constitutional and Criminal Law Analysis of Motive in Hate Crime Legislation*, 61 UMKC L. REV. 619, 628 (1993) (noting result reached under statutes following ADL approach); Note, *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314, 1315–16 (1993) (discussing various forms of penalty enhancement statutes). The triggering mechanism of these statutes is usually clear from the statutory language. *See, e.g.*, CAL. PENAL CODE § 422.7 (Deering Supp. 1993) (expanding punishment range in felony cases when offense was committed because of "race, color, religion, ancestry, national origin, disability, gender, or sexual orientation"); FLA. STAT. ANN. § 775.085 (West 1989 & Supp. 1993) (reclassifying any felony or misdemeanor for punishment purposes "if the commission of such felony or misdemeanor evidences prejudice based on the race, color,

Although the second form of hate crime legislation may also utilize enhancement provisions, it differs substantially from the first approach. While ADL-type statutes merely increase the allowable punishment for conduct already considered to be criminal, this second technique reflects the view that a bias motive changes the qualitative nature of the conduct itself.[31] Thus, "see[ing] the combined effect of the criminal conduct and bias motive as greater than the sum of its parts," this "revisionist" form departs from the ADL approach by proscribing specific conduct fundamentally distinct from that which criminal laws have traditionally sought to regulate.[32]

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ancestry, ethnicity, religion, national origin, or sexual orientation of the victim"); IOWA CODE ANN. § 729A.2 (West 1993) (defining hate crimes for purposes of Code and enumerating previously existing offenses for which punishment may be enhanced under provision); MONT. CODE ANN. § 45-5-222 (1989) (enhancing punishment for "any offense . . . that was committed because of the victim's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities"); VT. STAT. ANN. tit. 13, § 1455 (Supp. 1993) (assigning enhanced penalties to any crime "maliciously motivated by the victim's actual or perceived race, color, religion, national origin, sex, . . . or sexual orientation"); *see also Wyant*, 597 N.E.2d at 453, 457 (noting that Ohio statute functions to increase penalties for acts already punishable under criminal statutes).

31. *See* Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 343–44 (1991) (describing differences between "revisionist" and "enhancement" approaches and noting that revisionist statutes may also include enhancement features); Jonathan D. Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crimes Statutes After* R.A.V., 72 OR. L. REV. 157, 163–64 (1993) (distinguishing enhancement model from other forms of hate crime legislation); *see also Talley*, 858 P.2d at 219 (noting distinction between enhancement statutes and other forms of hate crime laws).

32. Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 343–44 (1991); *see* Michael S. Degan, Comment, *"Adding the First Amendment to the Fire": Cross Burning and Hate Crime Laws*, 26 CREIGHTON L. REV. 1109, 1117 (1993) (describing form of hate crime law that "creates a separate substantive criminal category for bias-motivated activity which may be punished regardless of whether the underlying conduct is a punishable offense"). *Compare* D.C. CODE ANN. §§ 22-3112.2, 22-3112.4 (1989) (prohibiting desecration of religious symbols and interference with personal civil rights, and categorizing offense under statute as misdemeanor punishable by fine or imprisonment or both) *with* WASH. REV. CODE ANN. § 9A.36.080 (West Supp. 1994) (creating offense of "malicious harassment" and classifying that offense as class C felony). A 1992 United States Supreme Court decision, *R.A.V. v. City of St. Paul*, called into question the validity of revisionist-type statutes. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2358, 2547–50 (1992) (holding St. Paul, Minnesota ordinance, which regulated otherwise protected expression based on its content, to violate First Amendment); *see also* Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. REV. 333, 353 (1991) (characterizing St. Paul ordinance as example of revisionist measure). However, state courts applying *R.A.V.* have generally upheld hate crime measures found to regulate criminal conduct rather than individual expression. *See, e.g., Talley*, 858 P.2d at

Legislative responses to the phenomenon of hate crime have occurred on a national scale. Virtually all states have enacted statutes which address the problem of bias-related crime, and more than half of these jurisdictions have based their legislation upon the ADL model.[33] In addition to the state legislatures, the United States Congress has implemented a revisionist measure and recently enacted an ADL-type provision as part of the Violent Crime Control and Law Enforcement Act of 1994.[34]

216, 221–22 (distinguishing Washington statute from law struck down in *R.A.V.* on basis that Washington statute punishes conduct rather than expression, and describing any hindrance of expression caused by statute as merely "incidental"); State v. Plowman, 838 P.2d 558, 562–63 (Or. 1992) (finding that, unlike St. Paul ordinance, Oregon law proscribes conduct alone and therefore does not violate *R.A.V.* rule), *cert. denied*, 113 S. Ct. 2967 (1993). In only two decisions did state high courts invalidate enhancement statutes under the *R.A.V.* rationale, both of which the Supreme Court later vacated or reversed outright. *Talley*, 858 P.2d at 224; *see* State v. Mitchell, 485 N.W.2d 807, 815 (Wis. 1992) (holding that *R.A.V.* supports conclusion that Wisconsin statute violates First Amendment), *rev'd*, 113 S. Ct. 2194 (1993); State v. Wyant, 597 N.E.2d 450, 458–59 (Ohio 1992) (applying rationale of *R.A.V.* and concluding that Ohio statute infringes First Amendment rights), *vacated,* 113 S. Ct. 2954 (1993).

33. *See, e.g.*, *Talley*, 858 P.2d at 219 (recognizing that almost all states have adopted some form of hate crime law); *Mitchell*, 485 N.W.2d at 811 (noting that nearly every state has enacted some type of hate crime legislation); ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIMES STATUTES: A 1991 STATUS REPORT 1, 24–26 (1991) (asserting that majority of states which have adopted hate crime legislation based their statutes on ADL model, and providing text of hate crime legislation from 46 states and District of Columbia); 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, 335 (1991) (noting that ADL approach is most common form of hate crime legislation). *See generally* Abby Mueller, Note, *Can Motive Matter? A Constitutional and Criminal Law Analysis of Motive in Hate Crime Legislation*, 61 UMKC L. REV. 619, 620–21 (1993) (discussing number of states that have enacted various forms of hate crime laws).

34. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796 (1994) (directing United States Sentencing Commission to adopt guidelines enhancing penalties "for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes"); *see also* Federal Religious Vandalism Act, 18 U.S.C. § 247 (Supp. V 1993) (creating and assigning punishment for federal offenses of "damage to religious property" and "obstruction of persons in the free exercise of religious beliefs"). One commentator has suggested, however, that the hate crime problem is more appropriately addressed at the state level. *See* Tanya K. Hernández, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence,"* 99 YALE L.J. 845, 848 (1990) (contending that solution to problem "lies in state statutes specifically drafted to redress this harm").

III. THE TEXAS HATE CRIMES ACT

A. *Legislative History*

Texas has not been immune from bias-related criminal episodes.[35] Nevertheless, the Texas Legislature initially hesitated to follow the national trend toward the establishment of extensive hate crime laws.[36] Until 1993, the Texas Penal Code contained only a limited revisionist statute applicable to a specific class of property crimes.[37] Reacting to a number of highly publicized bias crime incidents, however, the Texas Legislature recently initiated a comprehensive approach to the punishment of bias-

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35. *See, e.g.*, Hilla v. State, 832 S.W.2d 773, 774–75 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (recounting events that led to beating death of Asian-American youth by group of self-professed skinheads); Bennett v. State, 831 S.W.2d 20, 21–23 (Tex. App.—El Paso 1992, no pet.) (describing defendant's brutal murder of victim, after victim allegedly made homosexual advances toward defendant, as offense classified as hate crime); Frank Trejo, *Family Grief Intensified by Gay Bias Seen in Killing*, DALLAS MORNING NEWS, Dec. 18, 1993, at A1 (depicting murder of Tyler man, whom assailants targeted because he was homosexual, as example of hate crime incident); Judy Wiessler, *Harsher Penalties Upheld for Hate Crimes Suspects*, HOUS. CHRON., June 12, 1993, at A1 (characterizing stabbing death of homosexual Houston banker as bias-related crime).

36. *See, e.g.*, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIMES STATUTES: A 1991 STATUS REPORT 8 (1991) (explaining that comprehensive hate crimes bill introduced in 1989 did not survive committee debates); Stefanie Asin, *Hate Crime Tally For '92*, HOUS. CHRON., Jan. 8, 1993, at A19 (reporting that previously proposed hate crime legislation was permitted to die in state legislature); *Gay Rights Group Files Complaint Against Lobbyists*, UPI, May 10, 1989, *available in* LEXIS, Nexis Library, UPI File (noting that Texas House of Representatives failed to pass 1989 hate crime proposal); Judy Wiessler, *Court Rules "Hate Crime" Law Illegal*, HOUS. CHRON., June 23, 1992, at A1 (commenting that at that time, Texas had no comprehensive hate crime law in place despite popularity of such measures); *cf. Skinhead Case: Fort Worth Verdict is Unjust*, DALLAS MORNING NEWS, Mar. 25, 1993, at A28 (urging state legislature to "move quickly to pass hate-crimes legislation that has been on hold for more than a year").

37. *See* Act of May 24, 1973, 63d Leg., R.S., ch. 399, 1973 Tex. Gen. Laws 883, 957 (promulgating Penal Code § 42.09 and criminalizing intentional or knowing desecration of public monument, place of worship, or burial site as "desecration of a venerated object"), *repealed by* Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3679; *see also* Judy Wiessler, *Court Rules "Hate Crime" Law Illegal*, HOUS. CHRON., June 23, 1992, at A1 (describing scope of limited property crimes provision). *See generally* Texas v. Johnson, 491 U.S. 397, 400–20 (1989) (analyzing conviction under former Penal Code § 42.09 following flag burning incident and holding that statute violated defendant's First Amendment rights). The statute defined "desecrate" to mean "defac[ing], damag[ing], or otherwise physically mistreating in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." Act of May 24, 1973, 63d Leg., R.S., ch. 399, 1973 Tex. Gen. Laws 883, 957 (repealed 1993). Four years after the United States Supreme Court's *Johnson* decision, the Texas Legislature deleted this provision from the Penal Code. Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3679.

motivated criminal offenses by modifying or amending the Penal Code and several related Code of Criminal Procedure provisions.[38]

The original Hate Crimes Bill (the Bill), introduced by Houston Senator Rodney Ellis, followed a modified revisionist approach.[39] By amending the Penal Code, the Bill sought to create the newly classified offenses of "hate crime" and "institutional vandalism."[40] In addition to its act-proscriptive character, the Bill provided for enhanced punishment of the underlying offense when the defendant committed that act "because of some characteristic that the victim possesses or is perceived by the actor to possess as a member of a disfavored group."[41]

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38. *See, e.g.*, TEX. PENAL CODE ANN. § 12.47 (Vernon 1994) (authorizing heightened punishment of hate crime defendants convicted of offenses other than first-degree felonies); TEX. CODE CRIM. PROC. ANN. art. 42.01, § 6 (Vernon Supp. 1994) (providing for inclusion in final judgment of necessary finding under article 42.014); *id.* at art. 42.014 (directing trial court to make finding of discriminatory motive if court determines such motive existed, and commanding court to enter finding reflecting that determination in final judgment); *id.* at art. 42.12, § 13A (governing community supervision in enhancement cases); *id.* at art. 42.12, § 16(e) (authorizing trial court, when court makes necessary finding and then sentences defendant to community supervision, to order defendant to perform community service as probation condition); *id.* at art. 42.18, § 8(o) (as added by Acts 1993, 73d Leg., R.S., ch. 987, § 6) (mandating that defendants sentenced to confinement under enhancement provision perform community service as condition of parole); *see also* Judy Wiessler, *Harsher Penalties Upheld for Hate Crimes Suspects*, HOUS. CHRON., June 12, 1993, at A1 (noting that Texas received nationwide attention as result of hate crime incidents which occurred prior to statute's enactment).

39. *See* Tex. S.B. 456, 73d Leg., R.S., § 1 (1993) (submitted Feb. 24, 1993) (proposing classification of criminal acts not previously contained in Penal Code); *see also* Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 343–44 (1991) (noting that revisionist statutes may incorporate penalty enhancement features as well as proscribe very specific behaviors).

40. *See* Tex. S.B. 456, 73d Leg., R.S., § 1 (1993) (version of Feb. 24, 1993) (proposing addition of § 42.15, which would create new offense of "hate crime," and § 42.16, which would criminalize "institutional vandalism," to existing Penal Code provisions). Senator Ellis suggested that these new Penal Code offenses encompass several specific acts which were already punishable under the existing Code. *See* Tex. S.B. 456, 73d Leg., R.S., § 1 (1993) (submitted Feb. 24, 1993) (limiting application of proposed hate crime provision to offenses committed under §§ 19.02, 20.02, 20.03, 22.01, and 22.011 of Penal Code, and defining scope of institutional vandalism provision according to Penal Code §§ 28.03, 30.05, and 42.09); *see also* TEX. PENAL CODE ANN. § 19.02 (Vernon 1994) (defining offense of first-degree murder); *id.* § 20.02 (proscribing false imprisonment of another person); *id.* § 20.03 (authorizing prosecution for kidnapping); *id.* § 22.01 (containing provisions regarding assault); *id.* § 22.011 (defining offense of sexual assault); *id.* § 28.03 (proscribing damage to tangible property of another as criminal mischief); *id.* § 30.05 (creating offense of criminal trespass); *supra* note 37.

41. Tex. S.B. 456, 73d Leg., R.S., § 1 (1993) (submitted Feb. 24, 1993). The Bill incorporated by reference the definition of "disfavored group" that it separately proposed as an addition to the Civil Practice and Remedies Code. *See id.* §§ 1(A)(2), 1(B)(2) (adopting

Prior to the senate's vote on this measure, the Senate Committee on Criminal Justice significantly modified the text of the Bill. The committee's substitute Bill removed the act-proscriptive Penal Code revisions that Senator Ellis had submitted, proposing instead to amend the Penal Code and the Code of Criminal Procedure to incorporate a pure ADL-type enhancement feature.[42] Rather than creating a new category of offenses, however, this version provided that the defendant's conviction for the underlying crime, when the prosecution showed that crime to have been motivated by "the race, color, ethnicity, religion, national origin, or sexual orientation of the victim," would subject the defendant to the same level of penalty enhancement that Senator Ellis proposed in the original Bill.[43]

Although further revisions were made, the final version of the Bill, which Governor Richards signed into law, also followed the enhancement approach.[44] In its enacted form, the Bill added a single section to the Penal Code and incorporated several new or amended Code of Criminal Procedure provisions.[45] While the final version more explicitly described

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suggested Civil Practice and Remedies Code definition of "disfavored group" in both hate crime and institutional vandalism provisions). That definition read: "a distinct group against which a history of violence exists and about which pervasive and well-known stereotypes exist." *Id.* § 2.

42. *See* Tex. S.B. 456, 73d Leg., R.S. (1993) (senate committee substitute of Mar. 31, 1993) (proposing blanket provision, to be codified at § 12.48 of Penal Code, that would enhance punishment upon defendant's conviction for one among list of specifically enumerated Penal Code offenses).

43. *Compare* Tex. S.B. 456, 73d Leg., R.S. (1993) (Mar. 31, 1993 senate committee substitute) (conditioning applicability of provision upon defendant's conviction for enumerated underlying offense, specifically identifying classes of persons toward whom defendant's discriminatory animus must have been directed, and increasing punishment range by one offense level upon showing at trial of bias motive) *with* Tex. S.B. 456, 73d Leg., R.S. (1993) (submitted Feb. 24, 1993) (creating new Penal Code offenses punishable as hate crimes, broadly defining category of persons against whom discriminatory animus in victim selection is prohibited, and proposing penalty one level higher than normal upon conviction under corresponding provisions).

44. *See* Tex. S.B. 456, 73d Leg., R.S. (1993) (version of June 19, 1993) (proposing punishment enhancement upon conviction for any existing Penal Code offense when defendant exhibits discriminatory motive); *see also* 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, 344–45 (1991) (noting ADL model statute's emphasis on penalty enhancement); *Hate Crimes Legislation Does Not Protect Gays and Lesbians*, LARRY KING LIVE, Jan. 7, 1994, *available in* LEXIS, Nexis Library, Transcript File, Transcript No. 1012 (statement of Texas Senator Rodney Ellis) (recognizing that Texas hate crime law was patterned after ADL model).

45. *See* Tex. S.B. 456, 73d Leg., R.S. (1993) (version of June 19, 1993) (adding § 12.47 to Texas Penal Code and amending or adding multiple provisions within Chapter 42 of Texas Code of Criminal Procedure).

the procedural phase at which evidence of motive would be considered than did its predecessors, it retained the previously proposed enhancement feature in virtually unaltered form.[46] The enacted Bill significantly departed from prior versions, however, in that it did not include language setting out the specific categories of persons against whom the defendant's bias must have been directed.[47] The triggering language specified by the Act, which is more fully explored in subpart IV(B) below, is much less precise than the "race, color, ethnicity, religion, national origin, or sexual orientation" phrasing of the prior, unenacted versions.[48] The vague language employed in the statute apparently resulted from the Texas Legislature's reluctance to remove the Penal Code's prohibition against deviate sexual conduct or to extend positive legal protections to persons whose sexual orientations differ from the norm.[49]

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46. *Compare* Tex. S.B. 456, 73d Leg., R.S., § 1 (1993) (version of June 19, 1993) (requiring trial court to make affirmative finding of discriminatory animus at punishment phase of trial and, if court so finds, increasing punishment range for underlying offense to next higher level) *with* Tex. S.B. 456, 73d Leg., R.S. (1993) (submitted Mar. 31, 1993) (requiring only that bias motive be "shown at the trial" and authorizing increase of one penalty level upon such showing).

47. *Compare* Tex. S.B. 456, 73d Leg., R.S., § 5 (1993) (version of June 19, 1993) (requiring only court determination that "the defendant selected the victim primarily because of the defendant's bias or prejudice against a person or group" to authorize enhanced punishment) *with* Tex. S.B. 456, 73d Leg., R.S., § 1 (1993) (submitted Mar. 31, 1993) (mandating trial showing that "the defendant was motivated to commit the offense because of the race, color, ethnicity, religion, national origin, or sexual orientation of the victim" before penalty enhancement feature is effectuated).

48. *See* Tex. S.B. 456, 73d Leg., R.S., § 5 (1993) (version of June 19, 1993) (conditioning penalty enhancement only upon court's finding of "bias or prejudice against a person or a group"); *see also* TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION, PENAL LAWS OF TEXAS 17 (1993) (noting that Texas Legislature "consciously decided *not* to list protected classes of individuals or protected conduct").

49. *See, e.g., Gay Rights Group Files Complaint Against Lobbyists*, UPI, May 10, 1989, *available in* LEXIS, Nexis Library, UPI File (reporting alleged reluctance of Texas Legislature to pass laws which protect homosexuals); *Hate Crimes Legislation Does Not Protect Gays and Lesbians*, LARRY KING LIVE, Jan. 7, 1994, *available in* LEXIS, Nexis Library, Transcript File, Transcript No. 1012 (statement of Texas Senator Rodney Ellis) (describing uncooperative response by senate regarding inclusion of phrase "sexual orientation" in proposed hate crime legislation); Lisa Teachey, *Lawyers, Lawmakers, Activists Debate State's Hate-Crimes Law*, HOUS. CHRON., Oct. 16, 1993, at A40 (noting Senator Ellis's claim that legislature intentionally adopted broad language in hate crime statute to avoid specific reference to gender or sexual orientation); *see also* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1483 (1992) (asserting that "the overwhelming majority of state legislatures have refused to define homophobic violence as a species of 'hate crime'"). The Texas Legislature passed the Act as part of a sweeping package of criminal justice reform. *See Penal Code Reform, Hate Crime Bills Sent to the Governor*, UPI, May 29, 1993, *available in* LEXIS, Nexis Library, UPI File (describing extensive changes in Texas penal policy to be implemented through comprehensive revision of Penal

B. *Scope and Effect of the Texas Approach*

The new Texas hate crimes legislation contains several provisions differentiating between ordinary criminal penalties and those penalties authorized when the defendant selected the victim because of the offender's biased beliefs.[50] Two effects of the Act are especially relevant to the focus of this Comment.

Code). Ironically, the state's sodomy law, which has never been enforced against private conduct between consenting adults, was a major point of contention during legislative consideration of various reform proposals. *See* State v. Morales, 869 S.W.2d 941, 943 (Tex. 1994) (noting absence of prosecutions under sodomy statute); Christy Hoppe, *Senate OK's Rewritten Criminal Justice Code: Bill Would Stiffen Penalty for Hate Crimes*, DALLAS MORNING NEWS, May 28, 1993, at A18 (describing role of sodomy law in legislative discussion of criminal justice reform); *see also* TEX. PENAL CODE ANN. § 21.01 (Vernon 1994) (defining "deviate sexual intercourse" for purpose of statute); *id.* § 21.06 (criminalizing deviate sexual intercourse as class C misdemeanor). Prior to this legislative debate, the Third Court of Appeals enjoined the sodomy statute's enforcement after that court held the law to violate the right of personal privacy guaranteed by the Texas Constitution. *See* State v. Morales, 826 S.W.2d 201, 202–03 (Tex. App.—Austin 1992) (striking down statute on state constitutional grounds), *rev'd*, 869 S.W.2d 941 (Tex. 1994). Although the senate sought to repeal the statute as part of the reform package, members of the Texas House threatened to kill the entire reform measure over this issue. *See* Christy Hoppe, *Senate OK's Rewritten Criminal Justice Code: Bill Would Stiffen Penalty for Hate Crime*, DALLAS MORNING NEWS, May 28, 1993, at A18 (noting house's hostility to senate proposal that sodomy statute be repealed). Because of this conflict, the house-senate conference committee severed the hate crimes bill from the remainder of the reform package, and the sodomy law remained intact. *See Penal Code Reform, Hate Crime Bills Sent to the Governor*, UPI, May 29, 1993, *available in* LEXIS, Nexis Library, UPI File (reporting removal of hate crimes bill from remainder of reform package). Despite her opposition to retention of the sodomy law, Governor Ann Richards approved the legislation because of the broader subject matter it addressed. *See* Clay Robison, *Senate Passes Tougher Law on Hate Crimes*, HOUS. CHRON., Apr. 8, 1993, at A25 (describing Governor Richards's rationale for approving new legislation). The Texas Supreme Court recently reversed the *Morales* court of appeals decision, holding that the plaintiffs had shown no injury warranting equitable relief. *See Morales*, 869 S.W.2d at 946–47 (finding that court of appeals should not have reached merits of suit because plaintiffs lacked standing to raise equitable claim); *cf.* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (rejecting substantive due process challenge to Georgia's sodomy law under United States Constitution).

50. *See, e.g.*, TEX. PENAL CODE ANN. § 12.47 (Vernon 1994) (authorizing enhanced punishment subject to finding of bias or prejudice under article 42.014 of Texas Code of Criminal Procedure); TEX. CODE CRIM. PROC. ANN. art. 42.01, § 6 (Vernon Supp. 1994) (enabling incorporation of requisite article 42.014 finding into final judgment); *id.* at art. 42.014 (requiring trial court to make affirmative finding of discriminatory animus and enter such finding in final judgment); *id.* at art. 42.12, § 13A (providing community supervision guidelines pertaining to enhancement statute); *id.* § 16(e) (authorizing court that makes finding of bias or prejudice under article 42.014 to order community service as condition of probation); *id.* at art. 42.18, § 8(o) (as added by Acts 1993, 73d Leg., R.S., ch. 987, § 6) (requiring community service as condition of parole if trial court found defendant to have acted upon bias motive in commission of offense). The legislature incorporated the Act's

First, this legislation subjects a defendant who is convicted of any Penal Code offense to a statutorily enhanced penalty if, during the punishment phase of the trial, the presiding court finds that the defendant "intentionally selected the victim primarily because of the defendant's bias or prejudice against a person or a group."[51] If the trial court makes this requisite finding, the statute increases the allowable punishment for any criminal act other than a first-degree felony to the range available under the next higher offense classification.[52]

A second relevant area the new Penal Code and Code of Criminal Procedure provisions address involves the availability of community supervision as a sentencing option upon the defendant's conviction for a bias-motivated crime.[53] The amended Code of Criminal Procedure prohibits the trial court from granting probation to a defendant if the court convicted the defendant of first-degree murder, or if any court, pursuant to a

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triggering mechanism by adding the following provisions to the existing state criminal codes:

> Penalty if Offense Committed Because of Bias or Prejudice
>
> If the court makes an affirmative finding under Article 42.014, Code of Criminal Procedure, in the punishment phase of the trial of an offense other than a first degree felony, the punishment for the offense is increased to the punishment prescribed for the next highest category of offense.

TEX. PENAL CODE ANN. § 12.47 (Vernon 1994).

> Finding That Offense was Committed Because of Bias or Prejudice
>
> In the punishment phase of the trial of an offense under the Penal Code, if the court determines that the defendant intentionally selected the victim primarily because of the defendant's bias of prejudice against a person or a group, the court shall make an affirmative finding of that fact and enter the affirmative finding in the judgment of that case.

TEX. CODE CRIM. PROC. ANN. art. 42.014 (Vernon Supp. 1994).

51. *See* TEX. CODE CRIM. PROC. ANN. art. 42.014 (Vernon Supp. 1994) (requiring finding of bias or prejudice by trial court); TEX. PENAL CODE ANN. § 12.47 (Vernon 1994) (providing penalty enhancement mechanism upon such finding); *see also* TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION, PENAL LAWS OF TEXAS 17 (1993) (construing Texas Penal Code § 12.47 enhancement provision); Rodney Ellis, *Texas Cannot Let Hate Crimes Go Unpunished*, HOUS. CHRON., May 28, 1993, at B15 (describing requirement that prosecution prove bias or prejudice at punishment stage of trial).

52. TEX. PENAL CODE ANN. § 12.47 (Vernon 1994); *see* Rodney Ellis, *Texas Cannot Let Hate Crimes Go Unpunished*, HOUS. CHRON., May 28, 1993, at B15 (describing penalty enhancement authorized by statute upon proof at punishment stage of trial of defendant's bias or prejudice).

53. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 13A (Vernon Supp. 1994) (requiring term of incarceration as additional condition of court-ordered probation and limiting circumstances under which court may grant community supervision to defendants sentenced under enhancement statute); *see also* Rodney Ellis, *Texas Must Not Let Hate Crimes Go Unpunished*, 56 TEX. B.J. 1146, 1146–47 (1993) (describing statute's prospective effect upon community supervision sentences).

prior conviction, found that the defendant exhibited a "bias or prejudice" motive in the commission of that offense.[54]

Assuming *arguendo* that the State tried and convicted Christopher Brosky under the Act's provisions, the facts of *State v. Brosky* illustrate the net effect this legislation will have on some offenders sentenced under its mandates. Recall that Brosky was convicted of first-degree murder, an offense that normally carries a punishment range of five to ninety-nine years or life in prison, but for which Brosky received a probated sentence.[55] Assume that at the punishment stage of the trial, the trial court found that Brosky and his accomplices selected Donald Thomas as their victim primarily because of their bias or prejudice against African-Americans. Finally, assume that as evidence of bias, the prosecution introduced statements made by Brosky and his cohorts which proved their skinhead affiliation, their hatred of African-Americans, and their motivation for selecting Thomas as their target.

Under these facts, the new statutory provisions would prevent the trial court from sentencing Brosky to probation.[56] Because the court convicted Brosky of first-degree murder and then found Brosky's motive in committing that offense to fall within the statute's scope, the Act would remove community supervision from the range of possible sanctions.[57]

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54. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 13A(b) (Vernon Supp. 1994) (prohibiting probated sentence in certain circumstances when defendant is subject to statutorily enhanced penalty); *see also* Rodney Ellis, *Texas Must Not Let Hate Crimes Go Unpunished*, 56 TEX. B.J. 1146, 1147 (1993) (noting that statute precludes community supervision sentence in some cases). Article 42.12, § 13A incorporates by reference the Code of Criminal Procedure provision regarding the requisite finding of bias or prejudice as well as the Penal Code section concerning first-degree murder. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 13A(b) (Vernon Supp. 1994) (referring to these provisions only by assigned article or section number in respective Code); *see also id.* at art. 42.014 (requiring trial court to reflect finding of bias or prejudice in judgment); TEX. PENAL CODE ANN. § 19.02 (Vernon 1994) (defining offense of first-degree murder).

55. *See, e.g.*, TEX. PENAL CODE ANN. § 12.32(a) (Vernon 1994) (providing punishment range available upon conviction for first-degree felony); *Ex parte* Brosky, 863 S.W.2d 783, 783 (Tex. App.—Fort Worth 1993, no pet.) (describing Brosky's murder conviction and subsequent probated sentence).

56. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 13A (Vernon Supp. 1994) (precluding sentence of community supervision in first-degree murder case in which court has found discriminatory animus according to new Code provisions); *see also id.* at art. 42.014 (providing for affirmative finding of bias or prejudice in judgment); TEX. PENAL CODE ANN. § 19.02 (Vernon 1994) (outlining elements of first-degree murder); Rodney Ellis, *Texas Must Not Let Hate Crimes Go Unpunished*, 56 TEX. B.J. 1146, 1147 (1993) (noting that "[h]ad the Hate Crimes Act been in effect, and [Brosky] prosecuted and found guilty under it, the option of probation would have been unavailable").

57. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 13A (Vernon Supp. 1994) (prohibiting probated sentence when defendant who is subject to statutorily enhanced penalty is convicted of first-degree murder). This article provides in relevant part:

Therefore, the statute's plain language would require the court to sentence Brosky to a term of confinement within legally prescribed guidelines.[58] Upon Brosky's release from prison, state corrections officials would require as a condition of parole that Brosky perform a minimum of 300 hours of community service benefitting African-Americans.[59]

The *Brosky* case, however, is very fact specific. Because the court convicted Brosky of first-degree murder, the major enhancement feature of the Act would not come into play in the above scenario.[60] For example, had Thomas survived the attack and Brosky then been convicted of attempted murder, the result would vary. Attempted murder, a second-degree felony, is punishable by a term of between two and twenty years of incarceration.[61] In this hypothetical situation, the court's finding of a

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Community Supervision for Offense Committed Because of Bias or Prejudice
Sec. 13A.

. . . .

(b) The court may not grant community supervision on its own motion or on the recommendation of the jury to a defendant convicted of an offense for which the court has made an affirmative finding under Article 42.014 of this code if:

(1) the offense is murder under Section 19.02, Penal Code; or

(2) the defendant has been previously convicted of an offense for which the court made an affirmative finding under Article 42.014 of this code.

Id. § 13A(b).

58. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 13A (Vernon Supp. 1994) (precluding sentence of community supervision under hate crime statute upon defendant's conviction for first-degree murder); TEX. PENAL CODE ANN. § 12.32(a) (Vernon 1994) (providing that "an individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the institutional division for life or for any term of not more than 99 years or less than 5 years").

59. *See* TEX. CODE CRIM. PROC. ANN. art. 42.18 § 8(o) (Vernon Supp. 1994) (as added by Acts 1993, 73d Leg., R.S., ch. 987, § 6) (promulgating community service condition of release from state custody); *see also* Rodney Ellis, *Texas Must Not Let Hate Crimes Go Unpunished*, 56 TEX. B.J. 1146, 1147 (1993) (describing mandatory community service requirement imposed on parolees sentenced under Act). Section 8(o) provides:

(o) In addition to other conditions imposed by a parole panel under this article, the parole panel shall require as a condition of parole or release to mandatory supervision that a prisoner for whom the court has made an affirmative finding under Article 42.014 of this code perform not less than 300 hours of community service at a project designated by the parole panel that primarily serves the person or group who was the target of the defendant.

TEX. CODE CRIM. PROC. ANN. art. 42.18, § 8(o) (Vernon Supp. 1994) (as added by Acts 1993, 73d Leg., R.S., ch. 937, § 6).

60. *See* TEX. PENAL CODE ANN. § 12.47 (Vernon 1994) (excluding first-degree felonies from category of offenses which may be enhanced under Texas hate crime legislation); *see also id.* § 19.02 (classifying intentional or knowing murder of another as first-degree felony).

61. *See, e.g.*, TEX. PENAL CODE ANN. § 15.01 (Vernon 1994) (describing mens rea requirement for inchoate crimes and setting penalty level for criminal attempt at "one category lower than the offense attempted"); *id.* § 19.02 (classifying murder as first degree

bias motive would automatically extend the punishment range to that of a first-degree felony.[62] While community supervision would remain a sentencing option in this instance, the statute would operate to expand the possible period of incarceration to either life or a term between five and ninety-nine years.[63] Depending upon whether the court sentences Brosky to probation or confinement in prison, state officials may also require him to perform community service as a condition of his release from custody.[64]

III. Future Legal Challenges to the Act's Constitutionality: The Anticipated Grounds

Because of the novelty of the Texas hate crime legislation, the issue of the Act's constitutionality has not yet reached the Texas appellate courts.[65] However, defendants sentenced under ADL-type statutes in other states have litigated the validity of penalty-enhancing hate crime laws by advancing four general constitutional challenges to these provisions.[66] These cases, in conjunction with the United States Supreme

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felony); *id.* § 12.33(a) (providing that "[a]n individual adjudged guilty of a felony of the second degree shall be punished by imprisonment . . . for any term of not more than 20 years or less than 2 years").

62. *See id.* § 12.47 (increasing punishment range one level upon finding of bias or prejudice according to article 42.014 of Code of Criminal Procedure).

63. *See id.* § 12.32(a) (assessing first-degree felony punishment at "imprisonment in the institutional division for life or for any term of not more than 99 years or less than 5 years"); *see also* Tex. Code Crim. Proc. Ann. art 42.12, § 3 (Vernon Supp. 1994) (providing statutory authority for community supervision sentences). If the jury were to sentence Brosky to more than 10 years in prison, however, the trial court would have no discretion to probate his sentence. *See id.* (prohibiting grant of community supervision to defendants "sentenced to a term of imprisonment that exceeds 10 years"); Roberson v. State, 852 S.W.2d 508, 512 (Tex. Crim. App. 1993) (noting circumstances under which court may assess probated sentence).

64. *See* Tex. Code Crim. Proc. Ann. art. 42.12, § 13A (Vernon Supp. 1994) (providing court with discretion to order defendant to perform community service benefitting target of crime as condition of probation); *id.* at art. 42.18, § 8(o) (as added by Acts 1993, 73d Leg., R.S., ch. 987, § 6) (requiring, in addition to other conditions of parole, that defendant sentenced to incarceration under hate crime statute perform "not less than 300 hours of community service at a project designated by the parole panel that primarily serves the person or group who was the target of the defendant"); *see also* Rodney Ellis, *Texas Must Not Let Hate Crimes Go Unpunished*, 56 Tex. B.J. 1146, 1146–47 (1993) (describing community supervision conditions authorized or required by Act).

65. Search of LEXIS, States Library, Tex File (Nov. 14, 1994). As of this writing, the Office of the Attorney General of Texas has not produced an advisory opinion construing this legislation. Search of LEXIS, Tex Library, Txag File (Nov. 14, 1994).

66. State defendants have argued that penalty enhancement provisions violate the United States Constitution because they: (1) infringe upon First Amendment rights; (2) are overly broad; (3) violate equal protection; and (4) are impermissibly vague. *See, e.g.*,

Court's recent *Wisconsin v. Mitchell*[67] decision, provide a basis for analyzing the grounds upon which Texas defendants will likely challenge the constitutionality of this state's variation of the ADL model.[68] Proceeding once more with Christopher Brosky's hypothetically enhanced sentence as a means of illustration, this section maps out the arguments suggested by these cases and evaluates the merits of each specific contention.

A. *First Amendment Grounds*

1. Punishment of Thought or Motive

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[69] The United States Supreme Court has interpreted the First Amendment

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State v. Stalder, 630 So. 2d 1072, 1073 (Fla. 1994) (acknowledging defendant's challenges to Florida's enhancement statute on First Amendment, vagueness, and overbreadth grounds); State v. Wyant, 597 N.E.2d 450, 458–59 (Ohio 1992) (basing decision on First Amendment rationale, but recognizing plausibility of overbreadth, equal protection, and vagueness challenges to Ohio statute), *vacated*, 113 S. Ct. 2954 (1993); State v. Ladue, 631 A.2d 236, 236–37 (Vt. 1993) (disposing of defendant's allegations that Vermont enhancement provision is overbroad and violates his First Amendment and equal protection rights); State v. Mitchell, 485 N.W.2d 807, 809 n.2 (Wis. 1992) (acknowledging grounds upon which defendant challenged constitutionality of Wisconsin hate crime measure), *rev'd*, 113 S. Ct. 2194 (1993); *cf.* State v. Talley, 858 P.2d 217, 221 (Wash. 1993) (en banc) (recognizing that defendant brought First Amendment, overbreadth, equal protection, and vagueness challenges to Washington's revisionist statute).

67. 113 S. Ct. 2194 (1993).

68. Under the American federalist system, the United States Constitution promulgates only the minimum protections that states must afford individual citizens. Heitman v. State, 815 S.W.2d 681, 682–83 (Tex. Crim. App. 1991) (citing Cooper v. California, 386 U.S. 58, 62 (1967)). State constitutions may and often do guarantee individual rights that are broader than those ensured by the federal model. LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986) (citing Oregon v. Kennedy, 456 U.S. 667 (1982) and PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)). Texas constitutional provisions analogous to those which appear in the federal document may provide additional grounds for challenging the Act's validity. *See, e.g.*, Whitworth v. Bynum, 699 S.W.2d 194, 196–97 (Tex. 1985) (refusing to follow federal precedent concerning claim based on Texas Constitution's equivalent of Equal Protection Clause, and striking down Texas Guest Statute on state constitutional grounds); Hajek v. Bill Mowbray Motors, Inc., 647 S.W.2d 253, 254–55 (Tex. 1983) (dissolving temporary injunction, which prevented petitioner from driving vehicle inscribed with allegation that automobile dealership had sold him "lemon," on ground that Texas Constitution protected petitioner's right to speak freely); State v. Morales, 826 S.W.2d 201, 204 (Tex. App.—Austin 1992) (concluding that Texas Constitution more expansively safeguards individual freedom than its federal counterpart), *rev'd*, 869 S.W.2d 941 (Tex. 1994); *see also* Judith Hession, Comment, *Rediscovering State Constitutions for Individual Rights Protection*, 37 BAYLOR L. REV. 463, 474–75 (1985) (recognizing trend toward specific enforcement of rights guaranteed by Texas Constitution). Any additional grounds provided by these coextensive state provisions, however, are beyond the scope of this Comment.

69. U.S. CONST. amend. I.

broadly, construing it to protect not only a wide variety of outward personal expressions,[70] but an individual's mental processes as well.[71] Fol-

70. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 420 (1989) (construing First Amendment to protect flag burning as form of political expression); Cohen v. California, 403 U.S. 15, 22–26 (1971) (refusing to allow government to proscribe speech simply because it is profane); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 513–14 (1969) (holding First Amendment to protect students who protested Vietnam conflict by wearing black arm bands on campus); New York Times Co. v. Sullivan, 376 U.S. 254, 282–83 (1964) (interpreting First Amendment to protect speech critical of public officials and predicating civil recovery for libel upon showing by official that speaker made statement with actual malice); *see also* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992) (noting presumed invalidity of governmental regulations that restrict individual expression based on its content); Lisa Malmer, Comment, *Nude Dancing and the First Amendment*, 59 U. CIN. L. REV. 1275, 1276 (1991) (recognizing wide variety of expressions that are afforded First Amendment protection). Despite the Supreme Court's broad construction of the First Amendment, the Amendment's protections do not extend to all possible forms of expression that might arguably be classified as "speech." *See, e.g.*, Miller v. California, 413 U.S. 15, 23–25 (1973) (reaffirming rule that "obscene material is unprotected by the First Amendment" and formulating four-pronged test for determining whether specific material is obscene); Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (interpreting First Amendment to allow government regulation of speech that promotes illegal conduct when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (defining "fighting words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" and holding state regulation of such words to raise no constitutional issues).

71. Abby Mueller, Note, *Can Motive Matter? A Constitutional and Criminal Law Analysis of Motive in Hate Crime Legislation*, 61 UMKC L. REV. 619, 624 (1993); *see, e.g.*, *Johnson*, 491 U.S. at 414 (recounting "bedrock principle" underlying First Amendment that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977) (describing First Amendment notion that "an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State"); Wooley v. Maynard, 430 U.S. 705, 715 (1977) (relating that state regulations which force individuals to adhere to unacceptable viewpoints invade sphere of intellect and spirit that First Amendment is designed to protect); Stanley v. Georgia, 394 U.S. 557, 565–66 (1969) (declaring that government control of moral content of thoughts is wholly inconsistent with First Amendment principles); American Communications Ass'n v. Douds, 339 U.S. 382, 408 (1950) (noting that one may not be incarcerated or executed because of particular beliefs); *see also* United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) (stating that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate"), *overruled by* Girouard v. United States, 328 U.S. 61 (1946); LEE C. BOLLINGER, THE TOLERANT SOCIETY 9 (1986) (asserting that tolerance of varying ideas, even those thought to be harmful, is central to American value system). *But see, e.g.*, *R.A.V.*, 112 S. Ct. at 2544 (describing Supreme Court's view that government may constitutionally regulate nonverbal expressive activity when such activity is coupled with conduct); Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) (excluding violence and other potentially expressive acts producing special harms apart from their communicative intent

lowing the lead of defendants sentenced under the hate crime enhancement laws of other states, Brosky might challenge the Texas version on pure First Amendment grounds by alleging that the new law impermissibly punishes his racist beliefs or his motive for selecting Donald Thomas as his victim.[72]

Last Term, in *Mitchell*, the Supreme Court evaluated the merits of this very argument.[73] In that case, the Court considered Mitchell's contention that the Wisconsin hate crimes statute violated the First Amendment by imposing enhanced penalties "solely on the basis of the content and view-

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from constitutional protection); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (proclaiming that First Amendment "does not protect violence"); United States v. O'Brien, 391 U.S. 367, 376 (1968) (denouncing view that "conduct can be labeled as 'speech' whenever the person engaging in the conduct intends thereby to express an idea"), *overruled by* Pickering v. Board of Educ., 391 U.S. 563 (1968); Cox v. Louisiana, 379 U.S. 536, 555 (1965) (rejecting notion that First Amendment affords identical protections to both expressive conduct and "pure speech"). As Justice Black opined in his dissent in *Beauharnais v. Illinois*:

> [A] system of state censorship . . . is at war with the kind of free government envisioned by those who forced adoption of our Bill of Rights. The motives behind [a] state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of "witches."

Beauharnais v. Illinois, 343 U.S. 250, 274 (1952) (Black, J., dissenting).

72. *See, e.g.*, State v. Stalder, 630 So. 2d 1072, 1073 (Fla. 1994) (documenting defendant's contention that Florida statute "punishes pure thought and expression in violation of the First Amendment"); State v. McKnight, 511 N.W.2d 389, 395–96 (Iowa 1994) (describing defendant's First Amendment argument), *cert. denied*, 114 S. Ct. 2116 (1994); State v. Ladue, 631 A.2d 236, 237 (Vt. 1993) (addressing First Amendment contention that Vermont statute impermissibly punishes thoughts); *see also* Michael S. Degan, Comment, *"Adding the First Amendment to the Fire": Cross Burning and Hate Crime Laws*, 26 CREIGHTON L. REV. 1109, 1110–11 (1993) (describing potential First Amendment problems concerning bias crime laws); Abby Mueller, Note, *Can Motive Matter? A Constitutional and Criminal Law Analysis of Motive in Hate Crime Legislation*, 61 UMKC L. REV. 619, 624 (1993) (noting probability that defendants will challenge hate crime statutes on First Amendment grounds); *Hate Crimes Legislation Does Not Protect Gays and Lesbians*, LARRY KING LIVE, Jan. 7, 1994, *available in* LEXIS, Nexis Library, Transcript File, Transcript No. 1012 (statement of Texas Representative Warren Chisum) (asserting that hate crime statutes seek to change individual thought processes and drawing comparison between hate crime laws and Orwellian thought control). *But see* Rodney Ellis, *Texas Cannot Let Hate Crimes Go Unpunished*, HOUS. CHRON., May 28, 1993, at B15 (asserting that Texas legislation "does not punish hateful thoughts or words").

73. *See* Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199–2200 (1993) (addressing Mitchell's contention that Wisconsin enhancement statute "violates the First Amendment by punishing offenders' bigoted beliefs" and by "punish[ing] the defendant's discriminatory motive, or reason, for acting").

point of the offender's motive."[74] "Motive," Mitchell argued, is distinct from "intent" or "purpose," which are the common mental states punishable under criminal law when the actor has undertaken affirmative conduct to commit a crime.[75] In a unanimous opinion, the Court rejected Mitchell's assertion, accepting the State's argument that the Wisconsin statute punishes specific instances of conduct rather than the offender's biased beliefs or motives.[76] The Court reasoned that judges traditionally consider a wide variety of factors, one of which is the offender's motive for committing the crime, in determining an appropriate punishment.[77]

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74. *See* Brief for Respondent at 6, Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (No. 92-515) (advancing this argument in Mitchell's United States Supreme Court brief); *see also Mitchell*, 113 S. Ct. at 2201–02 (disposing of Mitchell's First Amendment contention).

75. Respondent's Brief at 11, *Mitchell* (No. 92-515); *see Mitchell*, 113 S. Ct. at 2200 (addressing Mitchell's argument that Wisconsin statute impermissibly punishes motive).

76. *See Mitchell*, 113 S. Ct. at 2199–2202 (finding Wisconsin's contention that statute punishes conduct rather than thoughts to be "literally correct" and concluding that motive may constitutionally be considered in sentence enhancement decisions). The Court distinguished *Mitchell* from its 1992 *R.A.V.* decision on the basis that while the St. Paul, Minnesota ordinance struck down in *R.A.V.* "was explicitly directed at expression," the statute at issue in *Mitchell* was "aimed at conduct unprotected by the First Amendment." *Mitchell*, 113 S. Ct. at 2200–01; *see R.A.V.*, 112 S. Ct. at 2547–48 (holding city ordinance, which only proscribed class of "fighting words" communicating defendant's discriminatory viewpoint, to violate rule against content-based regulation of personal expression); *cf.* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2468 (1991) (Scalia, J., concurring) (noting risk to individuals who employ conduct as means of expression when conduct selected is generally forbidden).

77. *Mitchell*, 113 S. Ct. at 2199; *see* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.6, at 227 (2d ed. 1986) (noting that court may consider defendant's motive as pertinent factor in sentencing determination); Jonathan D. Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crimes Statutes After* R.A.V., 72 OR. L. REV. 157, 197–98 (1993) (arguing that motive may constitutionally be considered in criminal sentencing); *see also* Payne v. Tennessee, 111 S. Ct. 2597, 2605 (1991) (exploring consideration of special harms caused by defendant's criminal act in determining appropriate punishment); Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (O'Connor, J., concurring) (describing underlying principle that punishment should be tied to defendant's personal culpability and stating that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime"); Tison v. Arizona, 481 U.S. 137, 156 (1987) (noting legal tradition in which severity of punishment increases according to higher level of purpose reflected in criminal conduct); United States v. Tucker, 404 U.S. 443, 446 (1972) (stating general rule that federal trial judges have wide discretion in assessing sentences and that courts may consider "largely unlimited" range of information); Williams v. New York, 337 U.S. 241, 245, 249–51 (1949) (upholding state sentencing policy that encouraged court "to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities"); *cf.* Note, *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314, 1319–23 (1993) (contending that hate crime laws punish purposeful acts rather than motives for engaging in prohibited behaviors). *But see* State v. Wyant, 597 N.E.2d 450, 453–56 (Ohio 1992) (distinguishing "motive" from "intent" and "purpose,"

The Court further deduced that motive plays no different a role in the application of hate crime statutes than it does under antidiscrimination laws, which have survived a number of constitutional challenges.[78] Suggesting that such statutes are permissible as long as some nexus exists between the offender's bias and the criminal conduct in question, the Court concluded that penalty-enhancing hate crime statutes do not exceed First Amendment boundaries.[79]

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and concluding that Ohio statute punishes motive in manner inconsistent with constitutional principles), *vacated*, 113 S. Ct. 2954 (1993); State v. Mitchell, 485 N.W.2d 807, 812–15 (Wis. 1992) (asserting that unlike traditional elements of mens rea, motive alone may not be constitutionally punished), *rev'd*, 113 S. Ct. 2194 (1993); Abby Mueller, Note, *Can Motive Matter? A Constitutional and Criminal Law Analysis of Motive in Hate Crime Legislation*, 61 UMKC L. REV. 619, 626–28 (1993) (discussing motive as concept distinguishable from punishable mental states).

78. *Mitchell*, 113 S. Ct. at 2200; *see, e.g.*, *Roberts*, 468 U.S. at 628–29 (holding that state law prohibiting discriminatory practices did not violate organization's First Amendment freedoms); Hishon v. King & Spalding, 467 U.S. 69, 73, 78 (1984) (rejecting argument that Title VII of Civil Rights Act of 1964, which prohibits employers from discriminating against individuals on basis of race, color, religion, sex, or national origin, transgresses employers' First Amendment rights); Runyon v. McCrary, 427 U.S. 160, 175–76 (1976) (upholding 28 U.S.C. § 1981 over claim that, as applied, statute's prohibition of differential treatment based on race violated school system's First Amendment privileges); *see also R.A.V.*, 112 S. Ct. at 2546–47 (citing Title VII and § 1981 as examples of legitimate content-neutral regulations); Smith v. Wade, 461 U.S. 30, 62–64 (1983) (Rehnquist, J., dissenting) (describing requirement regarding intentionally harmful acts that fact finder inquire into actor's subjective motive and purpose); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2207 (1993) (noting that bias motive constitutes element of some federal civil rights crimes); Jonathan D. Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crimes Statutes After* R.A.V., 72 OR. L. REV. 157, 195 (1993) (asserting that hate crime laws punish motive no differently than does civil rights legislation). *But see* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977) (acknowledging that, under federal law which prohibits workplace discrimination, plaintiff may make out case by proving "disparate impact" resulting from employer's hiring practices rather than outright discriminatory motive); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (noting that plaintiff may prove discrimination for purposes of Title VII by showing that employer's practices are discriminatory in operation); *Wyant*, 597 N.E.2d at 456 (distinguishing antidiscrimination laws from hate crime statutes on basis that antidiscrimination laws focus on employer's discriminatory act rather than motive); *Mitchell*, 485 N.W.2d at 817 (asserting that unlike hate crime statutes, which punish subjective motives, civil rights statutes present measurable range of objectivity in assessing actor's illicit conduct).

79. *See Mitchell*, 113 S. Ct. at 2200–02 (inferring that discriminatory animus relevant to defendant's crime may properly be considered at sentencing and rejecting Mitchell's First Amendment assertions); *see also Mitchell*, 485 N.W.2d at 818–19 (Abrahamson, J., dissenting) (asserting that close fit between selection of victim and underlying crime supports constitutionality of Wisconsin statute). *Compare* Dawson v. Delaware, 112 S. Ct. 1093, 1098 (1992) (finding that because evidence of defendant's membership in Aryan Brotherhood was not relevant to his state of mind in committing crime, but instead proved nothing more than his abstract beliefs, admission of such evidence at punishment stage

Mitchell will probably prove dispositive on the First Amendment issue as it will be raised in Texas courts.[80] Importantly, the scope and effect of the Wisconsin statute upheld in *Mitchell* is substantially similar to that of the new Texas legislation.[81] Barring a change in the Supreme Court's

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violated defendant's First Amendment rights) *with* Barclay v. Florida, 463 U.S. 939, 949 & n.7 (1983) (rejecting contention, in case not involving First Amendment challenge, that trial court, which found elements of racial hatred to be "relevant to several statutory aggravating factors," improperly considered racial motive in assessing punishment). Moreover, the Supreme Court concluded that the Wisconsin statute does not run afoul of the First Amendment because the provision addresses the special harms hate crimes cause and does not merely regulate a defendant's behavior based upon simple disagreement with his individual beliefs or biases. *Mitchell*, 113 S. Ct. at 2201. *Contra Mitchell*, 485 N.W.2d at 815 (holding that Wisconsin's hate crime statue "directly punishes a defendant's constitutionally protected thought"); Michael S. Degan, Comment, *"Adding the First Amendment to the Fire": Cross Burning and Hate Crime Laws*, 26 CREIGHTON L. REV. 1109, 1151 (1993) (arguing that punishment of motive directly violates First Amendment principles); *cf. Wyant*, 597 N.E.2d at 457 (analogizing that "[i]f the legislature can enhance a penalty for crimes committed 'by reason of' racial bigotry, why not 'by reason of' opposition to abortion, war, the elderly (or any other political or moral viewpoint)?").

80. *See Mitchell*, 113 S. Ct. at 2198 n.4 (noting that Supreme Court granted certiorari to resolve conflict among state high courts regarding constitutionality of statutes enhancing penalties for hate crimes); Egger v. State, 817 S.W.2d 183, 186 (Tex. App.—El Paso 1991, pet. ref'd) (recognizing that state courts are bound by stare decisis to follow Supreme Court precedent concerning constitutional issues); Mark A. Thurmon, Note, *When The Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 437 n.89 (1992) (describing duty of inferior courts to follow Supreme Court precedent); *see also* People v. Baker, 25 Cal. Rptr. 2d 372, 376–77 (Cal. Ct. App. 1993) (rejecting defendant's First Amendment challenge to California statute on basis that Supreme Court repudiated First Amendment challenge to similar Wisconsin statute in *Mitchell*); *McKnight*, 511 N.W.2d at 396 (finding Supreme Court's *Mitchell* decision to control First Amendment challenge to Iowa penalty enhancement statute); *cf.* Rodney Ellis, *Texas Cannot Let Hate Crimes Go Unpunished*, HOUS. CHRON., May 28, 1993, at B15 (explaining that although Texas Legislature was aware of pending *Mitchell* decision at time it passed Act, lawmakers could no longer delay action). *But see Hate Crimes Legislation Does Not Protect Gays and Lesbians*, LARRY KING LIVE, Jan. 7, 1994, *available in* LEXIS, Nexis Library, Transcript File, Transcript No. 1012 (statement of Texas Representative Warren Chisum) (inferring that Supreme Court's *Mitchell* decision might not control question of Act's validity in First Amendment context).

81. *See* Rodney Ellis, *Texas Cannot Let Hate Crimes Go Unpunished*, HOUS. CHRON., May 28, 1993, at B15 (noting similarity between Wisconsin hate crimes law and proposed Texas legislation). *Compare* WIS. STAT. ANN. § 939.645 (West Supp. 1993) (enhancing penalty for enumerated crimes when defendant "intentionally selects" victim "because of" specified characteristic) *with* TEX. PENAL CODE ANN. § 12.47 (Vernon 1994) (raising punishment range one level upon affirmative finding under Code of Criminal Procedure article 42.014 that defendant "intentionally selected" victim "primarily because of" bias or prejudice). *Contra Hate Crimes Legislation Does Not Protect Gays and Lesbians*, LARRY KING LIVE, Jan. 7, 1994, *available in* LEXIS, Nexis Library, Transcript File, Transcript No. 1012 (statement of Texas Representative Warren Chisum) (contending that significant difference exists between Wisconsin and Texas statutes).

approach to hate crime enhancement statutes, this argument, if posited by Brosky or similarly situated Texas defendants, will almost certainly fail.[82]

2. Overbreadth

In a line of cases originating with *Thornhill v. Alabama*,[83] the Supreme Court has limited the states' ability to enact regulations that reach beyond proscribable speech or conduct to restrict that which is constitutionally protected.[84] Within the past twenty-five years, however, the Court has significantly narrowed the scope of the overbreadth doctrine by confining the doctrine's application to cases in which the overreaching effect of the state regulation is "substantial."[85] Meanwhile, the Court has re-

82. The Supreme Court "has recently appeared willing to reverse even recent precedents, especially where the earlier decisions were close votes." 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, 354 n.108 (1991); *see* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 787 (1986) (White, J., dissenting) (noting that Court does not rigidly apply rule of stare decisis to cases involving constitutional issues), *overruled by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). *But see* Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 284 (1990) (contending that, while Court overrules itself with some frequency, doctrine of stare decisis governs vast majority of decisions). Because *Mitchell* was a unanimous decision, however, the Court is not likely to reverse this precedent in the foreseeable future.

83. 310 U.S. 88 (1940).

84. *See* Grayned v. City of Rockford, 408 U.S. 104, 114 (1972) (acknowledging that precisely drafted statute may nonetheless be overbroad if it reaches constitutionally protected conduct); Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (striking down Alabama law on ground that law's purported purpose could not justify its "sweeping proscription of freedom of discussion"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12–27, at 1022 (2d ed. 1988) (noting that "[a] law is void on its face if it 'does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise' of protected expressive or associational rights" (quoting *Thornhill*, 310 U.S. at 97)); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 853 n.1 (1991) (crediting *Thornhill* with inception of overbreadth doctrine); *see also* Broadrick v. Oklahoma, 413 U.S. 601, 611–12 (1973) (noting that "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society"); *Cox*, 379 U.S. at 551–52 (reversing conviction under Louisiana "disturbing the peace" statute on grounds that statute permitted conviction for innocent speech); *cf. Barnes*, 111 S. Ct. at 2463 (Scalia, J., concurring) (advocating exclusion from First Amendment scrutiny those laws not specifically intended to regulate expression).

85. *See Broadrick*, 413 U.S. at 613, 615 (describing application of overbreadth doctrine as "strong medicine . . . employed by the courts sparingly and only as a last resort" and positing that when law regulates conduct as well as speech, overbreadth of statute "must not only be real, but substantial as well"); LAURENCE H. TRIBE, AMERICAN CONSTI-

laxed traditional rules of standing to allow claimants to attack allegedly overbroad statutes "with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."[86]

Brosky might challenge the Texas statute on overbreadth grounds by alleging that, even if the law does not violate his own First Amendment rights, the Act effectively "chills" the First Amendment rights of others.[87] In most cases, for example, as in the *Brosky* hypothetical, prosecutors will be forced to rely on evidence concerning the defendant's speech, thoughts, or associations to prove a discriminatory animus.[88] However,

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TUTIONAL LAW, § 12-27, at 1022 (2d ed. 1988) (noting that Court requires law to be substantially overbroad before considering it void under doctrine); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 863–64 (1991) (describing Supreme Court's narrowing of overbreadth doctrine to invalidate only laws that are substantially overbroad); *see also* Maryland v. Joseph H. Munson Co., 467 U.S. 947, 965 (1984) (characterizing substantial overbreadth as standard Court created to avoid facial invalidation of statutes simply because they might be unconstitutionally applied); New York v. Ferber, 458 U.S. 747, 771 (1982) (stating that regulations "should not be invalidated for overbreadth" unless they reach "a substantial number of impermissible applications").

86. Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); *accord Munson Co.*, 467 U.S. at 965 n.13 (asserting that modern overbreadth doctrine allows litigant to challenge statute on behalf of third parties, even though statute would be constitutional as applied to litigant's own conduct); *Broadrick*, 413 U.S. at 612 (noting Court's relaxation of formerly strict standing rules); Gooding v. Wilson, 405 U.S. 518, 521 (1972) (relating that transcendent value of constitutionally protected activities justifies policy of relaxed standing in overbreadth claims); *see Grayned*, 408 U.S. at 114 (recognizing that although appellant made no "as applied" challenge to constitutionality of city antinoise ordinance, appellant nonetheless had standing to challenge ordinance on overbreadth grounds); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 244 (1988) (distinguishing between traditional third-party standing rules and standing for overbreadth purposes). *See generally* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 867–92 (1991) (discussing various theories regarding function of relaxed standing rule in overbreadth claims).

87. *See, e.g.*, *In re* M.S., 22 Cal. Rptr. 2d 560, 571–72 (Cal. Ct. App. 1993) (addressing defendant's argument that California statute chills protected speech); *Stalder*, 630 So. 2d at 1076–77 (recognizing but rejecting assertion that Florida statute unconstitutionally applies to protected speech); *McKnight*, 511 N.W.2d at 396 (acknowledging defendant's argument that Iowa hate crime statute is unconstitutionally overbroad); *see also* Arnett v. Kennedy, 416 U.S. 134, 229–31 (1974) (Marshall, J., dissenting) (describing unjustifiable "chilling effect" that results from enforcement of overly broad regulations); *cf.* NAACP v. Button, 371 U.S. 415, 433 (1963) (acknowledging that overbreadth doctrine provides "breathing space" to First Amendment freedoms).

88. *See* Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 359 (1991) (noting that enforcement of enhancement statutes "must inevitably—and probably exclusively—rely upon defendants' speech and associations for evidence of the motive [they] seek . . . to punish"); *see, e.g.*, United States v. McInnis, 976 F.2d 1226, 1228–29 (9th Cir. 1992) (describing evidence of defendant's speech and associations admitted to prove racial motivation in trial involving alleged violation of 42 U.S.C.

Brosky may contend that the First Amendment protects such personal expressions and that they fall outside the statute's proper reach. Thus, the argument goes, the Act may cause innocent individuals to inhibit their own otherwise protected expressions for fear that evidence of such activities may later be used to prove intentional selection for purposes of the statute.[89]

In *Mitchell*, however, the Supreme Court repudiated this very assertion, stating that "[t]he sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional 'overbreadth' cases."[90]

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§ 3631(a)); United States v. Skillman, 922 F.2d 1370, 1373–74 (9th Cir.) (holding evidence that defendant had asked to attend skinhead picnic to be relevant to issue of defendant's racial animus during alleged violation of § 3631(a)), *cert. dismissed*, 112 S. Ct. 353 (1991); United States v. Redwine, 715 F.2d 315, 319–20 (7th Cir. 1983) (finding evidence of speech and associations, which indicated defendant's racial bias, sufficient to prove conspiracy under 18 U.S.C. § 241), *cert. denied*, 467 U.S. 1216 (1984); *Mitchell*, 485 N.W.2d at 815 (acknowledging Wisconsin's admission that speech may be used as circumstantial evidence to establish actor's intentional selection); *see also* Angelo N. Ancheta, *Fighting Hate Violence*, 29 TRIAL 16, 18, 20 (July 1993) (advocating reliance upon defendant's presumptively discriminatory acts, admissions, contemporaneous statements, statements to third parties, and memberships and associations to prove discriminatory intent at trial).

89. *See, e.g.*, Dobbins v. State, 605 So. 2d 922, 923 (Fla. Dist. Ct. App. 1992) (addressing defendant's contention that Florida statute may inhibit protected classes of speech); State v. Talley, 858 P.2d 217, 228 (Wash. 1993) (en banc) (noting defendant's argument that admission at trial of evidence of expression to prove motive behind victim selection might have chilling effect on otherwise protected activities); *see also Gooding*, 405 U.S. at 521 (acknowledging overbreadth concern that "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression"); 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, 360–61 (1991) (asserting that any person charged with underlying offense could be subject to penalty enhancement and "face the possibility of public scrutiny of a lifetime of everything from ethnic jokes to serious intellectual inquiry," and that "[a]wareness of this possibility could lead to habitual self-censorship of expression of one's ideas"). On a more basic level, Brosky might also object to the admission of evidence of his personal thoughts, expressions, or associations at the punishment phase of his trial on grounds that such evidence is not relevant or is inherently prejudicial in nature. *See* TEX. R. CRIM. EVID. 401 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); TEX. R. CRIM. EVID. 403 (providing that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice"); *see also Mitchell*, 113 S. Ct. at 2200 (implying that in hate crime prosecution, evidence of discriminatory animus must be relevant to be properly considered in penalty enhancement decision).

90. *See Mitchell*, 113 S. Ct. at 2201 (rejecting Mitchell's contention that Wisconsin statute is unconstitutionally overbroad because it chills free speech). The Court dismissed this argument in summary fashion, suggesting that in order to evaluate its merits according to the overbreadth doctrine:

Noting that "[e]vidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like," the Court found no First Amendment prohibition against the use of such evidence to establish a defendant's motive.[91] Thus, in much the same manner as it disposed of the individual First Amendment issue, *Mitchell* will effectively preclude invalidation of the Act on the basis that its "substantial overbreadth" produces a chilling effect on expressions protected by the First Amendment.[92]

B. *Fourteenth Amendment Grounds*

1. Equal Protection

The Fourteenth Amendment's Equal Protection Clause provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[93] The

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> We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty-enhancement. . . . [T]he prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against a person or property . . . is simply too speculative a hypothesis to support Mitchell's overbreadth claim.

Id.

91. *Id.*; *see* Note, *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314, 1318 (1993) (asserting that while "bigoted speech itself may not be criminalized, it may be introduced as evidence that an assailant singled out a victim in a discriminatory manner"); *see also* Street v. New York, 394 U.S. 576, 594 (1969) (disputing contention that use of defendant's words to prove element of flag-burning offense would require reversal of defendant's conviction on constitutional grounds); Haupt v. United States, 330 U.S. 631, 642 (1947) (rejecting argument, in appeal of treason conviction, that incriminating statements made by defendant were improperly admitted into evidence and holding that statements were admissible on question of defendant's intent); *cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 251–52 (1989) (admitting stereotyping remarks by employer as evidence of illicit motive in Title VII discrimination suit).

92. *See Mitchell*, 113 S. Ct. at 2198 (noting importance of resolving constitutional questions concerning statutes similar to Wisconsin penalty enhancement law). Once the Supreme Court has ruled on a constitutional issue, the state courts are bound to follow that ruling. *See, e.g.*, Egger v. State, 817 S.W.2d 183, 186 (Tex. App.—El Paso 1991, pet. ref'd) (relating duty of state courts to follow United States Supreme Court precedent); Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 51 (describing stare decisis effect of Supreme Court decision on lower courts deciding same or similar issue); *see also M.S.*, 22 Cal. Rptr. 2d at 572 (answering appellant's contention based on *Mitchell* rationale); *McKnight*, 511 N.W.2d at 396 (relying extensively on *Mitchell* to dispose of defendant's overbreadth claim).

93. U.S. CONST. amend. XIV, § 1.

Equal Protection Clause prevents state governments from perpetuating discrimination through the enactment of laws that improperly classify social groups and from enforcing facially neutral laws in a manner that creates de facto classifications.[94] To merit heightened scrutiny under the Supreme Court's current equal protection doctrine, a law must differentiate between society in general and a suspect or quasi-suspect class, or must impinge upon a "fundamental" constitutional right.[95] Otherwise, when considering an alleged equal protection violation, the Court will review the law only to ensure that it is rationally related to a legitimate

94. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 14.2, at 570–73 (4th ed. 1991) (describing basic operation of Equal Protection Clause); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-1, at 1439 (2d ed. 1988) (distinguishing between de jure and de facto modes of discrimination). *Compare* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (holding San Francisco, California ordinance prohibiting operation of laundry business without consent of city board to violate equal protection as applied to Chinese-American residents) *with* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977) (rejecting respondents' contention that denial of zoning request by Chicago, Illinois suburb violated equal protection because respondents failed to prove that village intended to discriminate against minorities). *But see* Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1313 (1991) (asserting that equal protection doctrine serves as "a function of majoritarian convenience . . . characterized by sophisticated fictions and glosses that deny the reality of racial discrimination and inequality"). Professor Tribe has conceptualized the Equal Protection Clause as encompassing two general guarantees: (1) that similarly situated individuals should be treated similarly; and (2) that those who are not similarly situated should be afforded different protections. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-1 at 1436–39 (2d ed. 1988).

95. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 14.3, at 575–78 (4th ed. 1991) (recognizing use of "strict scrutiny" standard in cases implicating suspect classifications or "fundamental" constitutional rights, and describing employment of "intermediate" level of review in cases involving "quasi-suspect" classifications based on gender or illegitimacy); *see also* Trimble v. Gordon, 430 U.S. 762, 772–73 (1977) (refusing to apply strict scrutiny standard to statute classifying children according to parents' marital status at time of child's birth, but implying that proper standard of review exceeds mere rationality test); Craig v. Boren, 429 U.S. 190, 197–98 (1976) (setting intermediate review standard for gender-based classifications); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973) (noting that strict scrutiny is appropriate only with respect to legislative judgments that infringe on fundamental constitutional rights or involve suspect classifications); GERALD GUNTHER, CONSTITUTIONAL LAW 605–06 (12th ed. 1991) (acknowledging areas reviewable under intermediate scrutiny standard); *cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-6, at 1451 (2d ed. 1988) (noting that while courts defer to certain legislative and administrative choices, more critical analysis of political choices burdening fundamental rights or discriminating against racial or other minorities is justified "to preserve substantive values of equality and liberty").

governmental interest.[96] Statutes reviewed under this "mere rationality" standard almost always survive equal protection analysis.[97]

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96. *See* Heller v. Doe, 113 S. Ct. 2637, 2642 (1993) (stating that classifications that implicate neither fundamental rights nor suspect criteria "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose"); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 14.3, at 574–75, 578–79 (4th ed. 1991) (explicating "rational relationship" standard of review and noting that standard is employed when court finds no basis for independent examination of government classification); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1068 (1979) (describing scope of minimal scrutiny standard of review in equal protection claims); *see also* Note, *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314, 1329 (1993) (stating that all state actions are subject to some form of equal protection analysis). *Compare* Michael H. v. Gerald D., 491 U.S. 110, 131 (1989) (rejecting contention that child had been subjected to discrimination because of her illegitimacy and therefore applying rational relationship test to her equal protection claim) *with* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (refusing to recognize mentally retarded as quasi-suspect class and thus applying rational relationship test to claim that state law violated equal protection rights of such persons).

97. Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401, 428 (1986); *see* GERALD GUNTHER, CONSTITUTIONAL LAW 609 (12th ed. 1991) (explaining Supreme Court's policy of deference to legislative discretion regarding most types of economic or social regulations); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 14.3, at 579 (4th ed. 1991) (noting that under rational basis test, court invalidates law only if "it has no rational relationship to any legitimate interest of government," and that this test "gives a strong presumption of constitutionality to the governmental action"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-2, at 1442–43 (2d ed. 1988) (acknowledging that traditional deference to legislative purpose and selection of means "make[s] the rationality requirement largely equivalent to a strong presumption of constitutionality"). Several United States Supreme Court decisions illustrate the notion, proffered by constitutional scholars, that regulations examined under the minimal scrutiny standard are presumptively constitutional. *See, e.g.*, Lyng v. Castillo, 477 U.S. 635, 639 (1986) (finding statutory distinction between immediate family members living together as "household" and group of more distant relatives or unrelated persons sharing same home to be rationally related to prevention of fraud in allocation of government entitlements); Bowen v. Owens, 476 U.S. 340, 350 (1986) (concluding that Congress's assumption that divorced widowed spouses were less likely to depend on resources of former spouses than decedent's spouse at time of death was rationally related to denial of survivor's benefits to former spouses who had remarried). Despite this apparent presumption, however, the Court has invalidated regulations it has deemed insufficient to serve any rational purpose. *See, e.g.*, Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618–22 (1985) (denouncing rationality of state policy that granted tax exemption to Vietnam veterans residing in New Mexico before certain date and holding that policy served no legitimate state purpose); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 880–83 (1985) (concluding that Alabama tax policy favoring in-state corporations over those incorporated outside Alabama served no legitimate state end); Zobel v. Williams, 457 U.S. 55, 61–64 (1982) (finding no rational justification for Alaska policy classifying citizens based upon year they established official residency in that state).

Although the Supreme Court has yet to address an equal protection issue as it relates to hate crime legislation, defendants challenging the statutes of their respective states have couched certain arguments in equal protection terms.[98] Brosky might raise such an argument on appeal by alleging that, on its face, the Act either (1) creates and provides disproportionate protection to a special class of victims[99] or (2) creates and authorizes the inequitable punishment of an underlying class of defendants.[100] Brosky's claim would merit only minimal scrutiny in either instance, however, because the Act does not create what is considered a suspect or quasi-suspect class, nor does it intrude on a fundamental right.[101] Thus, for the Act to survive an equal protection challenge, the

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98. *See, e.g.*, Wisconsin v. Mitchell, 113 S. Ct. 2194, 2197 n.2 (1993) (refusing to address Mitchell's equal protection claim because claim was not developed in lower courts and therefore fell outside issue on which Supreme Court granted certiorari); People v. Grupe, 532 N.Y.S.2d 815, 820 (N.Y. 1988) (responding to defendant's argument that New York statute violated his equal protection rights); State v. Beebe, 680 P.2d 11, 12–13 (Or. Ct. App. 1984) (reversing trial court decision, which ruled Oregon statute unconstitutional on equal protection grounds); State v. Ladue, 631 A.2d 236, 237 (Vt. 1993) (noting defendant's assertion that Vermont hate crime law violates federal and state equal protection doctrines); State v. Talley, 858 P.2d 217, 229–30 (Wash. 1993) (en banc) (addressing respondent's allegation that Washington statute impinged upon his equal protection rights).

99. *See, e.g.*, *Ladue*, 631 A.2d at 237 (responding to defendant's argument that Vermont statute impermissibly treats hate crime victims as favored class of persons); *Beebe*, 680 P.2d at 13 (rejecting trial court's conclusion that Oregon regulation offers greater protection to specified class of victims). *But see* Rodney Ellis, *Texas Cannot Let Hate Crimes Go Unpunished*, HOUS. CHRON., May 28, 1993, at B15 (contending that Texas provision, rather than providing special treatment to minority groups, affords protection equally to minorities and nonminorities).

100. *See, e.g.*, *Grupe*, 532 N.Y.S.2d at 820 (acknowledging defendant's argument that New York law violates Equal Protection Clause by treating classes of criminal defendants differently); *Ladue*, 631 A.2d at 237 (addressing defendant's contention that Vermont provision "singles out a particular class of criminal defendants who are motivated by legislatively selected bigoted ideas and punishes them more severely than other similarly situated defendants"); *Talley*, 858 P.2d at 230 (responding to assertion that Washington statute violates equal protection because same-race violence would be charged at lower offense level).

101. *See* State v. Mitchell, 485 N.W.2d 807, 829 (Wis. 1992) (Bablitch, J., dissenting) (concluding that Wisconsin hate crime statute does not infringe on fundamental right or create classification based on suspect criterion), *rev'd*, 113 S. Ct. 2194 (1993); Note, *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1129, 1130 n.97 (1993) (contending that hate crime statutes do not violate Equal Protection Clause as long as scope of law applies equally to all citizens, and reporting that no enhancement statute has been invalidated on equal protection grounds); *see also Cleburne Living Ctr.*, 473 U.S. at 442 (noting that economic and social legislation normally warrants only minimal judicial scrutiny); *Grupe*, 532 N.Y.S.2d at 820 (opining that because statute only affected extent and duration of deprivation of liberty, strict scrutiny was not appropriate standard of review). The Supreme Court has narrowly defined "fundamental rights" for purposes of equal protection analysis. *See Rodriguez*, 411 U.S. at 35–40 (noting

State need only show that the Act's provisions are rationally related to the government's legitimate interest in punishing bias-related crime—a burden that the State could easily meet.[102]

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that right infringed must be explicitly guaranteed by Constitution to trigger strict scrutiny analysis). *Compare* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668–70 (1966) (holding that imposition of poll tax constitutes unjustifiable burden on fundamental right to vote) *and* Griffin v. Illinois, 351 U.S. 12, 18–20 (1956) (finding state's denial of trial transcripts to indigent criminal defendants attempting to perfect appeal violative of basic due process) *with Rodriguez*, 411 U.S. at 35 (asserting that education is not fundamental right under constitutional analysis) *and* Dandridge v. Williams, 397 U.S. 471, 486–87 (1970) (finding no denial of fundamental constitutional rights in state policy limiting access to welfare benefits). Likewise, the Court has generally restricted the concept of "suspect classes" to include only those groups holding "traditional indicia of suspectness." *Rodriguez*, 411 U.S. at 28. The Court considers only classes "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" to satisfy this standard. *Id.* The Court recognizes a limited number of other classification forms to warrant a level of scrutiny above mere rationality review. *Compare* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (noting that gender-based classifications "must bear a close relationship to important governmental objectives") *and Trimble*, 430 U.S. at 772–73 (finding that reach of statute, which discriminated against out-of-wedlock children, extended well beyond its stated objectives) *with Cleburne Living Ctr.*, 473 U.S. at 442–47 (concluding that under equal protection rubric, mentally retarded persons do not constitute quasi-suspect class) *and* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312–14 (1976) (holding that class of police officers over age 50 does not constitute suspect class for equal protection purposes). In *State v. Wyant*, the Ohio Supreme Court provided an example of the type of enhancement statute that would merit close equal protection scrutiny:

> [T]he legislature could decide that blacks are more valuable than whites, and enhance the punishment when a black is the victim of a criminal act. Such a statute would pass First Amendment analysis because the *motive* or the thought which precipitated the attack would not be punished. However, [the Ohio hate crime law] could not have been written that way because such a statute would not survive analysis under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Wyant, 597 N.E.2d at 456.

102. The State may assert that the Act serves any number of legitimate public interests in response to future equal protection challenges. From a utilitarian approach, for example, the State might argue that punishment of hate crime serves the general public interest because of the unique harms such crimes inflict upon society. *See supra* notes 24–26 and accompanying text (detailing inter- and intragroup injuries hate crimes cause); *see also* Jonathan D. Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crimes Statutes After* R.A.V., 72 OR. L. REV. 157, 177–180 (1993) (discussing state interests that support necessity of hate crime laws, which include: (1) frequency with which hate crimes occur in form of serial or group attacks; (2) uniquely traumatic effect bias-related crimes have upon their victims; (3) disparate impact hate crimes have upon community at large; and (4) epidemic proportions indicated by increasing number of hate crime incidents). Alternatively, the State might contend that the Act protects historically subjugated groups from further victimization by criminal offenders. *See, e.g., R.A.V.*, 112 S. Ct. at

2. Vagueness

The Fourteenth Amendment's Due Process Clause prohibits states from making or enforcing laws which "deprive any person of life, liberty, or property, without due process of law."[103] The Supreme Court has long held the view that vague criminal laws implicate the due process guarantee.[104] The Court's vagueness doctrine turns on two related principles.

2549–50 (finding ordinance's asserted purpose of safeguarding "the basic human rights of members of groups that have historically been subjected to discrimination" to be compelling government interest); Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984) (describing elimination of discrimination as goal which "plainly serves compelling state interests of the highest order"). *But see Hate Crimes Legislation Does Not Protect Gays and Lesbians*, LARRY KING LIVE, Jan. 7, 1994, *available in* LEXIS, Nexis Library, Transcript File, Transcript No. 1012 (statement of Texas Representative Warren Chisum) (characterizing Act as having equal protection problems, but failing to specify how Fourteenth Amendment might operate to void such legislation). Furthermore, the State might emphasize the inherent discretion state legislatures possess, restricted only by constitutional limitations, concerning the assignment of criminal penalties. *See Mitchell*, 113 S. Ct. at 2200 (placing primary responsibility for establishing criminal penalties with legislature); *Beebe*, 680 P.2d at 13 (holding that legislatures have power to determine that bias crimes cause greater social harm than same conduct under other circumstances and therefore may require that such crimes be punished more severely than others); *cf.* TEX. PENAL CODE ANN. § 1.02 (Vernon 1994) (providing, among other purposes, assurance of public safety through deterrence of criminal behavior and prescription of punishment fitting seriousness of offense as Penal Code objectives). In accordance with its well-recognized discretion, the Texas Legislature has enacted penalty enhancement statutes designed to punish offenses thought to inflict greater harm upon society than normal criminal conduct or those committed by persons thought to deserve harsher criminal penalties. *See, e.g.*, TEX. PENAL CODE ANN. § 12.31(a) (Vernon 1994) (setting punishment for capital felonies, as distinguished from other types of felony offenses, at either life imprisonment or death); *id.* § 12.42 (enhancing punishment for defendants who have prior felony convictions). The United States Supreme Court rejected a constitutional challenge to one such enhancement statute, albeit in the Eighth and Fourteenth Amendment contexts. *See* Jurek v. Texas, 428 U.S. 262, 276 (1978) (holding that Texas capital sentencing scheme meets constitutional requirements of Eighth and Fourteenth Amendments).

103. U.S. CONST. amend. XIV, § 1.

104. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (describing vagueness doctrine as basic tenet of due process); *see also* Jordan v. De George, 341 U.S. 223, 230 (1951) (acknowledging that vague criminal proscriptions unconstitutionally restrict due process rights); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (noting that laws facially repugnant to due process may not be validated by specification of details of offense at later time); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (recognizing due process implications regarding vague criminal statutes); Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 115 (1960) (describing doctrine as "creature of due process"). While they have common elements, the Supreme Court's vagueness and overbreadth doctrines are distinguishable concepts in constitutional law. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983) (noting that Supreme Court has traditionally considered vagueness and overbreadth to be logically related and similar doctrines); Zwickler v. Koota, 389 U.S. 241, 249–50 (1967) (delineating differences between

First, the law must be precise enough to convey to persons of ordinary intelligence fair notice of the conduct that the law proscribes.[105] Second, the doctrine requires legislatures to provide reasonably clear guidelines to government officials applying the provision in order to prevent its arbitrary and discriminatory enforcement.[106]

By incorporating a requisite mental state into the language of the statute's triggering mechanism, the drafters of this legislation have probably averted several potential vagueness problems.[107] Nonetheless, Brosky

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vagueness doctrine, which emphasizes notice to defendant of proscribed activity, and overbreadth doctrine, which prohibits enforcement of laws that "sweep unnecessarily broadly and thereby invade the area of protected freedoms"); GERALD GUNTHER, CONSTITUTIONAL LAW 1202 (12th ed. 1991) (noting that despite similar risk of "chilling effect" in First Amendment arena, "a statute can be quite specific—i.e. *not* 'vague'—and yet be overbroad").

105. *E.g.*, *Grayned*, 408 U.S. at 108; Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); *Jordan*, 341 U.S. at 231–32; *Lanzetta*, 306 U.S. at 453; *Connally*, 269 U.S. at 391; *see* J. Steven Justice, *Ethnic Intimidation Statutes Post-*R.A.V.: *Will They Withstand Constitutional Scrutiny?*, 62 U. CIN. L. REV. 113, 127 (1993) (relating notice prong of vagueness doctrine as described by Supreme Court in *Grayned*); Edward F. Malone, Comment, *Legacy of the Reconstruction: The Vagueness of the Criminal Civil Rights Statutes*, 38 UCLA L. REV. 163, 166 n.16 (1990) (describing vagueness doctrine's notice requirement).

106. *E.g.*, *Kolender*, 461 U.S. at 357–58; Smith v. Goguen, 415 U.S. 566, 572–73 (1974); *Grayned*, 408 U.S. at 109–10; *Papachristou*, 405 U.S. at 162; *see* Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940) (criticizing Alabama loitering statute on grounds that statute "readily lends itself to harsh and discriminatory enforcement by local prosecuting officials"); John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 215 (1985) (recognizing prevention of arbitrary and discriminatory enforcement of laws as purpose of vagueness review); *cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 661 (1984) (contending that courts should evaluate allegedly vague statutes from perspective of officials charged with their enforcement).

107. *See* TEX. CODE CRIM. PROC. ANN. art. 42.014 (Vernon Supp. 1994) (requiring that defendant "intentionally" select victim "primarily because of" bias or prejudice); 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, 356–57 (1991) (criticizing ADL model statute as unconstitutionally vague because statute (1) does not specify culpable state of mind and (2) is unclear concerning whether discriminatory animus must be "the predominant reason, . . . a substantial reason, a significant reason, a contributing reason, a barely existing reason, or an objectively possible reason"); *see also* Colautti v. Franklin, 439 U.S. 379, 395 (1979) (noting Supreme Court's recognition that constitutionality of vague statute "is closely related to whether that standard incorporates a requirement of *mens rea*"); *In re* M.S., 22 Cal. Rptr. 2d 560, 565–66 (Cal. Ct. App. 1993) (rejecting defendant's vagueness challenge to California statute on basis that proper limiting construction applied to impute specific intent requirement); People v. Superior Court, 22 Cal. Rptr. 2d 311, 318–20 (Cal. Ct. App. 1993) (rejecting defendant's argument that "because of" language in statute failed to provide constitutionally sufficient notice to public or sufficient guidelines for statute's application); State v. Stalder, 630 So. 2d 1072, 1074 (Fla. 1994) (reading Florida statute punishing those who "evidence" prejudice in com-

might challenge the Act on vagueness grounds by alleging that the Act's "bias or prejudice" language fails to satisfy either of the two doctrinal requirements.[108] Unlike the "intentionally selects" and "primarily because of" components, the meaning of "bias or prejudice" as it applies to this statute may not be extrapolated from either the Penal Code or Texas case law, nor does the common meaning of the term obviate a plausible vagueness challenge.[109]

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mission of crime against enumerated class of victims to permit penalty enhancement upon proof that defendant was motivated in whole or in part by status of victim); State v. Plowman, 838 P.2d 558, 560, 562 (Or. 1992) (upholding Oregon law penalizing defendant's intentional, knowing, or reckless conduct causing injury to another "'because of their perception of that person's race, color, religion, national origin or sexual orientation'" (quoting OR. REV. STAT. § 166.165(1)(a)(A) (1989))), *cert. denied*, 113 S. Ct. 2967 (1993).

108. The United States Supreme Court has not yet addressed a vagueness challenge brought in reference to a hate crime enhancement statute. *See Mitchell*, 113 S. Ct. at 2197 n.2 (noting that Mitchell challenged Wisconsin provision on vagueness grounds, but declining to address issue in Supreme Court opinion). At the state court level, however, defendants sentenced under hate crime laws have asserted that the statutes of their respective jurisdictions are unconstitutionally vague. *See, e.g.*, *Stalder*, 630 So. 2d at 1073 (acknowledging defendant's vagueness challenge to Florida statute); *Plowman*, 838 P.2d at 562 (addressing argument that Oregon statute is unconstitutionally vague); *Mitchell*, 485 N.W.2d at 825 (Bablitch, J., dissenting) (acknowledging argument that "the phrases 'intentionally selects,' 'because of,' and 'race,' . . . lead to erratic convictions and unfair prosecutions").

109. "Intentionally" is a well-defined concept in criminal law. *See* TEXAS PENAL CODE § 6.03 (Vernon 1994) (stating that "[a] person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result"); MODEL PENAL CODE § 1.13(12) (1985) (adopting same meaning for "intentionally" or "intent" as term "purposely" is used in Texas Penal Code). Under the Model Penal Code:

> 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 existence of such circumstances or he believes or hopes that they exist.

MODEL PENAL CODE § 2.02(2)(a) (1985).

Although neither the Texas Penal Code nor the Texas Court of Criminal Appeals has defined "primarily," the Texas Supreme Court has interpreted the term to mean "chief, first, or foremost in degree, quality or importance or in a list, series, or sequence." *See* Gragg v. Cayuga Indep. Sch. Dist., 539 S.W.2d 861, 868 (Tex. 1976) (equating "primary" and "primarily" in suit to collect ad valorem taxes). The word does not mean "exclusively" and likewise is not a synonym for "majority." *See* El Paso Nat'l Bank v. Shriners Hosp. for Crippled Children, 615 S.W.2d 184, 185 (Tex. 1981) (asserting, in will construction case, that "primarily" does not mean "exclusively"); *Gragg*, 539 S.W.2d at 868 (noting that "primary" does not equate with "majority"). Taken together, therefore, the words "intentionally" and "primarily" appear to require the defendant's bias or prejudice to have been at least a substantial factor in the selection of his or her victim. "Bias or prejudice," however, is not so easily construed for purposes of the hate crime statute. *See* Freddie Baird, *Hate Crimes Conference: Should Hate Be Criminalized?*, 56 TEX. B.J. 1148, 1172 (1993) (quot-

Quite simply, unlike hate crime enhancement provisions that have passed constitutional muster, the Act fails to designate the object toward which the offender's bias or prejudice must have been directed.[110] If read literally, the Act might subject a defendant convicted of any criminal offense to penalty enhancement merely because the prosecution could prove that the defendant exhibited some arbitrary bias motive in choos-

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ing Galveston lawyer Anthony P. Griffin as stating that statute "just says bias or prejudice, whatever that means. . . . You don't even get a good definition under the statute"). Although the term is employed in various sections of the Code of Criminal Procedure and Rules of Criminal Evidence, these provisions do not provide guidance with respect to the term's meaning in the context of the Act. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 35.16(a) (Vernon 1989) (authorizing challenge of juror "for cause" on ground that juror "has a bias or prejudice in favor of or against the defendant"); TEX. R. CRIM. EVID. 411 (admitting evidence of liability insurance for limited purpose of proving bias or prejudice of witness); TEX. R. CRIM EVID. 612(b) (detailing impeachment procedure for examining witness alleged to hold bias or prejudice). Similarly, the terms "bias" and "prejudice," as they have been defined by the Court of Criminal Appeals regarding voir dire challenges for cause, do not assist in the interpretation of the phrase "bias or prejudice" as it is used in the Act. *See* Anderson v. State, 633 S.W.2d 851, 853 (Tex. Crim. App. 1982) (adopting Texas Supreme Court definitions of "bias" as "'an inclination toward one side of an issue rather than to the other'" and "prejudice" as simply "'prejudgment'" (quoting Compton v. Henrie, 364 S.W.2d 179 (Tex. 1963))).

110. *See* Lisa Teachey, *Protecting Victims of Hate Crimes Urged*, HOUS. CHRON., Oct. 17, 1993, at C7 (comparing language of Texas statute to phrasing of Wisconsin law that United States Supreme Court upheld in *Mitchell*). *Compare* TEX. PENAL CODE ANN. § 12.47 (Vernon 1994) (expanding range of available punishment when trial court finds, pursuant to Code of Criminal Procedure article 42.014, that defendant "intentionally selected the victim primarily because of the defendant's bias or prejudice against a person or a group") *with* WIS. STAT. ANN. § 939.645 (West Supp. 1993) (increasing penalties if defendant intentionally selected victim "because of . . . the race, religion, color, disability, sexual orientation, national origin or ancestry of that person"). In *Mitchell*, the Supreme Court upheld the Wisconsin statute against Mitchell's constitutional challenges, but did not specifically analyze the language of that law. *See Mitchell*, 113 U.S. at 2197, 2202 n.1 (citing, but not analyzing, text of Wisconsin statute and rejecting Mitchell's constitutional assertions). *But see Hate Crimes Legislation Does Not Protect Gays and Lesbians*, LARRY KING LIVE, Jan. 7, 1994, *available in* LEXIS, Nexis Library, Transcript File, Transcript No. 1012 (statement of Texas Senator Rodney Ellis) (asserting that in *Mitchell*, Supreme Court accepted language of Wisconsin statute encompassing defined categories of hate crime victims). State high courts that have construed their respective hate crime statutes in light of *Mitchell* have upheld laws that specifically define the target of the offender's bias motive. *See, e.g.*, *Stalder*, 630 So. 2d at 1077 (concluding that Florida statute, which includes classifications of "race, color, ancestry, ethnicity, religion, national origin, or sexual orientation," passes constitutional scrutiny); State v. McKnight, 511 N.W.2d 389, 396–97 (Iowa) (rejecting constitutional challenge to Iowa statute containing similar classifications), *cert. denied*, 114 S. Ct. 2116 (1994); *Ladue*, 631 A.2d at 237 (rejecting defendant's constitutional challenges to Vermont's enhancement provision, which specifies particular classes of victims).

ing the victim.[111] With no more specific a proscription than "bias or prejudice," the common citizen cannot reasonably be expected to know what type of discriminatory animus may trigger statutory enhancement.[112] Furthermore, this vague language allows state officials charged with the duty of enforcing the law to construct its content on a piecemeal basis.[113]

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111. For example, had Christopher Brosky and Donald Thomas been of the same race, and had Thomas possessed some immutable characteristic Brosky despised, under the plain meaning of the statutory language Brosky could conceivably still fall within the statute's reach. *See* TEX. CODE CRIM. PROC. ANN. art. 42.014 (Vernon Supp. 1994) (requiring that court find defendant to have selected victim primarily because of defendant's "bias or prejudice against a person or a group" in order to invoke enhancement provision, but failing to define scope of bias or prejudice required under statute); *see also* Freddie Baird, *Hate Crimes Conference: Should Hate Be Criminalized?*, 56 TEX. B.J. 1148, 1172 (1993) (reporting statement of Galveston attorney Anthony P. Griffin that "'[t]his statute allows the bringing in of any type of evidence if there is a bias or prejudice against a person or group. . . . After the prosecutor brings in anything and everything but the kitchen sink, anybody can be convicted under this kind of proof'"); Lisa Teachey, *Lawyers, Lawmakers, Activists Debate State's Hate-Crimes Law*, HOUS. CHRON., Oct. 16, 1993, at A40 (noting concern of conference panelists that Texas statute could be interpreted to apply to almost any criminal incident).

112. *See Grayned*, 408 U.S. at 109 (asserting that uncertain statutory meanings inevitably impact individual conduct in manner that would not occur if proscribed activity were more clearly defined); *see also* Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 83 n.306 (1992) (noting that "hate crimes generally are not defined to include any crime motivated by hate, but only those motivated by hatred of certain groups"); *Hate Crimes Legislation Does Not Protect Gays and Lesbians*, LARRY KING LIVE, Jan. 7, 1994, *available in* LEXIS, Nexis Library, Transcript File, Transcript No. 1012 (statement of Texas Senator Rodney Ellis) (noting that existing language of statute puts it on "touchy ground" and stating that substitution of more specific language would "send a signal out to the public"). *Compare* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 500–03 (1982) (holding that licensing guidelines for sales of paraphernalia "designed for use" and "marketed for use" with illicit substances provided adequate notice to businesses engaged in these practices) *with Papachristou*, 405 U.S. at 162–68 (invalidating Jacksonville, Florida vagrancy ordinance, which criminalized "nightwalking" and "wandering or strolling," for lack of notice to potential offenders).

113. *See Kolender*, 461 U.S. at 358 (noting that "[w]here the legislature fails to provide . . . minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections'" (quoting *Smith*, 415 U.S. at 575)). Absent a more specific definition of the conduct which the Act proscribes, criminal conduct believed by some individuals charged with enforcing the law to have been motivated by "bias or prejudice" may not appear as such to other similarly situated persons. *Compare Cox*, 379 U.S. at 543–46 (invalidating conviction under Louisiana "breach of the peace" statute on basis that law was impermissibly vague and indefinite because law allowed persons to be punished merely for expression of unpopular views) *with* Coates v. City of Cincinnati, 402 U.S. 611, 615–16 (1971) (holding regulation, which prohibited "annoying" conduct, to be unconstitutionally vague and noting that "such a prohibition . . . contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens"). Without further gui-

Such a result is inconsistent with the fundamental principles of criminal law as well as the tenets of the Fourteenth Amendment paradigm.[114]

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dance, this mechanism might permit police, prosecutors, jurors, or judges, rather than the legislature, to determine which motives are worthy of enhanced punishment. *See* Stefanie Asin, *Hate Crime Tally For '92*, HOUS. CHRON., Jan. 8, 1992, at A19 (noting that Houston Police Department had encountered difficulty identifying hate crimes under definition of term which was more specific than criteria later adopted in Act); *see also* United States v. Reese, 92 U.S. 214, 221 (1876) (noting danger of allowing legislature to create criminal net so wide that it leaves judicial branch with unfettered discretion to determine law's application). In contrast to the general aim of hate crime legislation, such discretion might actually perpetuate the unequal treatment of disfavored groups and thereby further destabilize social structures. *See* Robin D. Barnes, *Standing Guard for the P.C. Militia, or, Fighting Hatred and Indifference: Some Thoughts on Expressive Hate-Conduct and Political Correctness*, 1992 U. ILL. L. REV. 979, 982 (expressing concern for unrestricted prosecutorial discretion in light of evidence that discriminatory patterns function at subconscious level); 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, 362 (1991) (describing risk that enhanced penalty will be sought in every conceivable circumstance and that hate crime statutes will actually inflame, rather than improve, race relations).

114. *See, e.g.*, Dowling v. United States, 473 U.S. 207, 213–14 (1985) (relating requirement that vague criminal statutes be strictly construed in favor of defendants); *Kolender*, 461 U.S. at 358–59 n.8 (recognizing that statutes may be void for vagueness even when law might conceivably have some valid application); Winters v. New York, 333 U.S. 507, 515 (1948) (acknowledging heightened certainty standard regarding statutorily proscribed conduct in vagueness challenges to criminal laws); *Lanzetta*, 306 U.S. at 453 (positing that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes" and that individuals "are entitled to be informed as to what the State commands or forbids"); *see also Village of Hoffman Estates*, 455 U.S. at 494 (permitting facial challenges to statutes on vagueness grounds if they reach "a substantial amount of constitutionally protected conduct"); J. Steven Justice, *Ethnic Intimidation Statutes Post-*R.A.V.: *Will They Withstand Constitutional Scrutiny?*, 62 U. CIN. L. REV. 113, 129 (1993) (noting that hate crime statutes must pass muster under vagueness doctrine to be constitutional); *cf.* Richard A. Lingg, Note, *Stopping Stalkers: A Critical Examination of Anti-Stalking Statutes*, 67 ST. JOHN'S L. REV. 347, 363–67 (1993) (assessing potential Fourteenth Amendment problem that emerges regarding stalking statutes when such statutes are evaluated in light of vagueness principles). As Chief Justice Marshall observed in *United States v. Wiltberger*:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

IV. THE TEXAS HATE CRIMES ACT REVISITED

Considering the narrow context of the United States Supreme Court's *Wisconsin v. Mitchell*[115] decision, as well as the broader principles of Fourteenth Amendment equal protection, the Texas Hate Crimes Act appears to stand on relatively firm constitutional ground. Because of the lack of clarity in its triggering mechanism, however, the Act is not completely inoculated against future constitutional challenges.[116] Although the question of the Act's constitutionality has yet to be litigated in Texas courts, state officials would be wise to consider the conceivably debilitating vagueness issue raised by the Act's ambiguous language.

Short of repealing the Act, the Texas Legislature may respond to this potential vagueness problem in one of two ways. First, bolstered by the presumption of statutory validity,[117] the legislature may simply choose to ignore the issue altogether. This approach would not necessarily prove fatal, even if a court later renders an adverse declaratory judgment, because the judiciary has no authority to excise an invalid statute from the

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115. 113 S. Ct. 2194 (1993).

116. *See* Freddie Baird, *Hate Crimes Conference: Should Hate Be Criminalized?*, 56 TEX. B.J. 1148, 1172 (1993) (noting alleged vagueness problem caused by statute's ambiguous language); Sylvia Moreno, *Legal Experts Question Hate-Crime Law*, DALLAS MORNING NEWS, Oct. 17, 1993, at A21 (exploring lawyers' concern that legislature's failure to include specific triggering language may render Act "too general to survive a constitutional challenge"); Lisa Teachey, *Lawyers, Lawmakers, Activists Debate State's Hate-Crimes Law*, HOUS. CHRON., Oct. 16, 1993, at A40 (reporting concerns of legal conference participants regarding vagueness issue); *see also* Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (noting that statutory enactment is "void for vagueness if its prohibitions are not clearly defined"); Jordan v. De George, 341 U.S. 223, 230 (1951) (restating rule that "criminal statutes which fail to give due notice that an act has been made criminal before it is done" impinge on individual due process rights); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (relating that "the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties"). *But see* Kucharek v. Hanaway, 902 F.2d 513, 519 (7th Cir. 1990) (noting that mere ambiguity in statute does not render law unconstitutionally vague), *cert. denied*, 498 U.S. 1041 (1991); Harper v. Lindsay, 616 F.2d 849, 857 (5th Cir. 1980) (acknowledging that "[t]he prohibition against excessive vagueness does not invalidate every enactment which could have been drafted with greater precision").

117. *See* Cotton v. State, 686 S.W.2d 140, 144 (Tex. Crim. App. 1985) (noting that when constitutionality of statute is questioned, Texas Court of Criminal Appeals begins with presumption that statute is valid); *Ex parte* Granviel, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978) (acknowledging presumptions that statute under court's consideration is constitutional and that legislature did not act unreasonably or arbitrarily in statute's enactment). The Texas Supreme Court follows the same general rule as the Court of Criminal Appeals regarding this presumption. *See* Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985) (identifying Texas Supreme Court rule which presumes constitutionality of statute regardless of grounds upon which statute is challenged).

body of state law.[118] Thus, the legislature might hesitate to take immediate action in the hope that the courts, if they acknowledge the vagueness issue at all, will either reject such challenges or provide a limiting construction that will bring the statute into constitutional compliance.[119]

Second, the legislature might take a proactive approach by amending the statute's language to reflect the level of specificity contained in the comparable laws of other states. By simply reinserting the phrase "race, color, ethnicity, religion, national origin, or sexual orientation" into the current "bias or prejudice against a person or a group" provision, the legislature could probably save the Act from significant constitutional scrutiny.[120] As the Act's history shows, however, the legislature has been

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118. *See, e.g., Ex parte* Levinson, 160 Tex. Crim. 606, 274 S.W.2d 76, 78 (1955) (reaffirming rule that courts may not "enter the field of legislation and write, rewrite, change, or add to a law"); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 854 (1991) (acknowledging limitations on United States Supreme Court's power to declare state laws unconstitutional); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 767 (1979) (noting that federal courts may not repeal legislative enactments).

119. Courts have a duty to interpret vague statutes in a manner that will save such laws from constitutional infirmity. United States v. Delaware & Hudson Co., 213 U.S. 366, 407 (1909). An otherwise vague statute may be cured by a satisfactory judicial construction which restrains the law's application within constitutional boundaries. *See* Gooding v. Wilson, 405 U.S. 518, 520 (1972) (noting that state courts may supply limiting construction to save ambiguous statutes); *see also Kucharek*, 902 F.2d at 519 (asserting that statute containing "one or several ambiguities that can be dispelled at a stroke by interpretation . . . is not vague in the constitutional sense"); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 853 n.3 (1991) (acknowledging states' discretion to seek narrowing construction of vague statutes in declaratory judgment actions). Thus, Texas courts are "reluctant to strike down a legislative act because of conflicting or vague provisions." Southern Canal Co. v. State Bd. of Water Eng'rs, 159 Tex. 227, 318 S.W.2d 619, 624 (1958); *see* Yorko v. State, 690 S.W.2d 260, 270 (Tex. Crim. App. 1985) (Teague, J., dissenting) (noting that courts should declare statutes unconstitutional only when "absolutely necessary on the facts or circumstances presented by the particular case"). Contrary to its past approach, the Texas Court of Criminal Appeals has recently shown an increased willingness to clarify terms insufficiently defined in statutory enactments. *Compare* Russell v. State, 665 S.W.2d 771, 780 (Tex. Crim. App. 1983) (refusing to define "deliberately" in context of Code of Criminal Procedure article 37.071), *cert. denied*, 466 U.S. 932 (1984) *with* Geesa v. State, 820 S.W.2d 154, 161–62 (Tex. Crim. App. 1991) (adopting definition of "reasonable doubt" for purposes of § 2.01 of Penal Code and imposing requirement that jury be instructed on meaning of phrase in all criminal cases).

120. *See, e.g.*, State v. Stalder, 630 So. 2d 1072, 1077 (Fla. 1994) (declaring Florida statute containing specific classifications to be constitutional); State v. McKnight, 511 N.W.2d 389, 396–97 (Iowa) (holding Iowa law specifying group of victims to pass constitutional scrutiny), *cert. denied*, 114 S. Ct. 2116 (1994); State v. Ladue, 631 A.2d 236, 237 (Vt. 1993) (rejecting constitutional challenge to Vermont provision containing precise victim categories). *Compare* WIS. STAT. ANN. § 939.645 (West Supp. 1993) (conditioning enhanced penalty upon intentional selection of victim from specified categories of persons) *with* TEX. PENAL CODE ANN. § 12.47 (Vernon 1994) (predicating penalty enhancement

reluctant to accept this terminology because it distinguishes the homosexual community as a latent group worthy of heightened legal protection.[121] Thus, the probability that the legislature will alter its stance on this issue as it relates to the Texas Hate Crimes Act, absent an actual challenge to the Act's constitutionality or a judicial interpretation that narrowly construes its enigmatic terms, remains uncertain.[122]

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only upon affirmative finding, under Code of Criminal Procedure article 42.014, that defendant selected victim because of "bias or prejudice against a person or a group"). *But cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (contending that race-based classifications should be "reserved for remedial settings [because] they may in fact promote notions of racial inferiority and lead to a politics of racial hostility").

121. *See, e.g., Gay Rights Group Files Complaint Against Lobbyists*, UPI, May 10, 1989, *available in* LEXIS, Nexis Library, UPI File (citing allegation of gay rights lobbyist concerning Texas House of Representatives' bias against homosexuals); *Hate Crimes Legislation Does Not Protect Gays and Lesbians*, LARRY KING LIVE, Jan. 7, 1994, *available in* LEXIS, Nexis Library, Transcript File, Transcript No. 1012 (statement of Texas Senator Rodney Ellis) (noting Texas Senate's refusal to pass hate crime bill that included phrase "sexual orientation"); Sylvia Moreno, *Legal Experts Question Hate-Crime Law*, DALLAS MORNING NEWS, Oct. 17, 1993, at A21 (reporting that some Texas legislators "threatened to derail" hate crime bill because it included reference to sexual orientation); *see also* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1483 (1992) (noting general legislative reluctance to classify violent acts against homosexuals as hate crimes); Tanya K. Hernández, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence,"* 99 YALE L.J. 845, 851 (1990) (lamenting inadequacy of statutes that "fail to include members of other discrete groups, such as gay men and lesbian women"). Other states have also declined to extend positive legal rights to homosexuals. *See, e.g.*, COLO. CONST. art. II, § 30b (prohibiting enactment of gay rights initiatives, as matter of state constitutional law, following statewide election on issue); GA. CODE ANN. § 16-6-2 (Michie 1992) (criminalizing sodomy and authorizing penalty of imprisonment for between one and twenty years upon conviction); Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (upholding constitutionality of Georgia sodomy statute and reasoning that provision does not impinge upon homosexuals' fundamental right of privacy). *But see* Evans v. Romer, 854 P.2d 1270, 1285–86 (Colo.) (striking down Colorado constitutional amendment, which precluded gay rights initiatives, on basis that amendment infringed upon homosexuals' fundamental right to equal participation in political process), *cert. denied*, 114 S. Ct. 419 (1993); Baehr v. Lewin, 852 P.2d 44, 67–68 (Haw. 1993) (concluding that Hawaii statute, which allows marriage licenses to be issued only to male-female couples, creates gender-based classification meriting strict scrutiny under Hawaii constitution).

122. *See Mitchell*, 113 S. Ct. at 2297 n.2 (reserving vagueness issue in case upholding constitutionality of Wisconsin hate crime law); *Governor Signs Hate Crime, Penal Code Bills*, UPI, June 19, 1993, *available in* LEXIS, Nexis Library, UPI File (quoting Texas Governor Ann Richards's assertion that United States Supreme Court, in light of its *Mitchell* decision, would consider Act to be constitutional); Clay Robison, *Richards Signs Hate Crimes Bill Into Law*, HOUS. CHRON., June 20, 1993, at 3 (noting that Act's supporters believed broad "bias or prejudice" language to be sufficient to include bias crimes committed against members of traditionally protected social groups).

VI. CONCLUSION

Nearly without exception, modern legislatures have responded to the reprehensible nature and detrimental social effects of hate crime by enacting laws specifically designed to punish the offender's discriminatory animus. Texas has now joined the ranks of these jurisdictions by adopting legal provisions that authorize heightened penalties upon a trial court finding that the defendant selected a victim based upon the defendant's personal bias or prejudice. Although the social affliction of bias-related crime may warrant a legislative response, even the current magnitude of this quandary does not overshadow the need for compliance with constitutional norms in the fashioning of a legal solution.[123]

In the wake of intense media publicity and resulting political pressure, the Texas Legislature hurriedly enacted a law which, while following a sound general approach, may be subject to constitutional challenge for its ambiguity. The legislature's rationale for failing to specify the type of "bias or prejudice" required to trigger enhanced penalties is tantamount to the very type of motive that antidiscrimination laws are designed to punish. While lawmakers and jurists throughout the nation have begun to implement legal provisions which proscribe discriminatory practices that are motivated by the defendant's bias against another's sexual preference, Texas has apparently reached an impasse on this issue. Perhaps the time has come to break the stalemate.

123. *See* Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 354 (1991) (noting that despite strong feelings which may promote oversight of constitutional infirmities, importance of bigotry problem "does not reduce the necessity of complying with constitutional limits on governmental action").