MOTIVATION, CAUSATION, AND HATE CRIMES SENTENCE ENHANCEMENT: A CAUTIOUS APPROACH TO MIND READING AND INCARCERATION

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I. INTRODUCTION

In its recent unpublished decision in *State v. Hennings*, the Iowa Court of Appeals dealt with a case of first impression concerning the meaning of the words "because of" in Iowa's hate crimes statute.[1] These words require that bias, animus, or hate play a causal role in the perpetration of an enumerated crime under Iowa law.[2] If convicted of the underlying assault, the defendant can also be subject to an additional sentence if it can be shown there was a causal connection between a particular class of hateful motivation and the foundational crime.[3]

The causal phrase "because of" is subject to a wide range of potential connotations, ranging from a negligible contribution on one extreme, to an

1. *See* State v. Hennings, No. 08-1845, 2009 WL 2960616, at *5–9 (Iowa Ct. App. Sept. 2, 2009), *vacated on other grounds*, No. 08-1845, slip op. at 15–18 (Iowa Dec. 23, 2010). As this Note went to press, the Iowa Supreme Court issued an opinion that vacated the Iowa Court of Appeals's decision on other grounds, though it did not explicitly modify the causation analysis used by the court of appeals.

2. *See id.* at *6; *see also* IOWA CODE §§ 708.2C(1)–(2), 729A.2(1) (2009).

3. *See* §§ 708.2C(1)–(2), 729A.2(1).

exclusive contribution on the other.[4] Because the Iowa Code, like other state statutes, does not provide further specificity, the Iowa Court of Appeals was called upon to render its own construction concerning the quantum of causality that would be sufficient to satisfy the "because of" statutory requirement.[5] In *Hennings*, it chose to adopt the standards developed by the Supreme Court of California, which required hatred to be a "but-for" cause and a "substantial factor."[6]

This Note will argue that the California, and now Iowa[7], standard for hate crime causality is too broad relative to the nature of the evidence that is likely to be available to fact finders in these cases. This standard can lead to situations in which only a very small quantum of speculative bias can result in a lengthy prison sentence that is completely separate from the full and just sentence assigned to the underlying crime. Under the currently applied Iowa standard for causation construction, disproportionate—and therefore potentially unjust—penalties can be imposed based substantially upon judicial speculation concerning the inscrutable dynamics of human motivation.[8] This stands in contrast to our normal criminal law expectations that harder kinds of evidence should normally be required before society condemns an individual to a lengthy prison sentence.[9] A more cautious legal approach to the determination of

4. *See Hennings*, 2009 WL 2960616, at *6.

5. *Id.*

6. *Id.* at *6–7, *7 n.6. On review, the Iowa Supreme Court confirmed that bias had to be a but-for cause, but it did not explicitly address whether bias also needed to be a substantial factor in situations where multiple sufficient causes were not present. *See Hennings*, No. 08-1845, slip op. at 10–13.

7. This Note uses the reasoning from the Iowa Court of Appeals in *Hennings* to establish the current standard for Iowa caselaw concerning hate crime causality when both bias and nonbias factors *combine* to trigger a hate crime, though neither in isolation would have been sufficient to do so. The Iowa Supreme Court's subsequent review of this case did not specifically address this issue, leaving the court of appeals's analysis intact for now.

8. As applied in *Hennings*, this standard led to a doubling of the defendant's sentence despite no prospective evidence of causative bias, only a single piece of contradicted testimony as contemporaneous evidence of causative bias, and debatable retrospective evidence, which the court of appeals relied on to impute animus-driven causation. *See infra* Part VI.

9. *See In re* Winship, 397 U.S. 358, 363 (1970) (defining the "Winship Doctrine," which holds, according to the Due Process Clause of the Fourteenth Amendment, the prosecution must persuade the jury "'*beyond a reasonable doubt* the existence of every fact necessary to constitute the crime charged.'" (emphasis added) (quoting Davis v. United States, 160 U.S. 469, 484, 493 (1895))). This compares to a much lower burden of proof common to civil proceedings—the *preponderance of the*

motivational causation in the judicial construction of this open-ended statutory language is needed. Iowa, California, and the vast majority of state courts that have yet to consider this issue need a standard that is commensurate with the intrinsically speculative nature of this kind of fact-finding process.[10] That standard needs to be something more challenging than merely satisfying the minimal tests of "but-for" and "substantial-factor" causation.[11] These tests are too easy to satisfy with too little evidence. Instead, this Note will argue for a quantitatively higher—and therefore more cautious—standard that incorporates a substantial margin of error into our evaluative process in recognition of the intrinsic imprecision and uncertainty that courts are confronted with when they embark upon this kind of "mind reading" exercise.

At a minimum, the courts should use their discretion in interpreting "because of" terminology to require that the animus element be substantial enough to satisfy the causation equivalent of at least a "preponderance of the evidence" or a "more likely than not" quantum of proof.[12] In fact, the

evidence standard. JOHN WILLIAM STRONG ET AL., MCCORMICK ON EVIDENCE 574 (4th ed. 1992).

10. *See* Adam Candeub, Comment, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2077–81 (1994). "The problem in determining what is in another's mind is a perennial problem in philosophy, commonly called 'the other minds problem.' . . . Intents, beliefs, and other mental states are by their nature suspect classes because they are not physical entities . . . ." *Id.* at 2078.

11. The Iowa Court of Appeals explicitly followed California judicial precedent in adopting a combination of but-for and substantial-factor tests for cases in which bias alone was not a sufficient cause. *See Hennings*, 2009 WL 2960616, at *6–8. The Iowa Supreme Court confirmed the but-for standard but did not explicitly address whether bias also needed to be a substantial factor in cases where it would have been insufficient to trigger a crime if not combined with nonbias motivations. *See Hennings*, No. 08-1845, slip op. at 10–13. Following the Restatement (Third) of Torts, the Iowa Supreme Court recently eliminated the substantial-factor test, but only "when multiple causes were present that alone would have been sufficient to be a factual cause of the harm." State v. Tribble, 790 N.W. 2d 121, 126 n.2 (Iowa 2010) (citations omitted); *see also* Thompson v. Kaczinski, 774 N.W. 2d 829, 836–39 (Iowa 2009); *Hennings*, No. 08-1845, slip op. at 10–11; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26, at 346 (2010). The Iowa Supreme Court never addressed the central analysis of the court of appeals, in which *both* bias and nonbias motivations coincide and neither alone is sufficient to trigger the underlying crime.

12. *Cf.* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350 (2009) (addressing a provision of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a) (2006), the Supreme Court interpreted "because of" not to mean *a* motivating factor but rather *the* reason an adverse decision was made (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993))). The Court spoke to the necessity that the "because of" cause have "'*a determinative influence on the outcome*.'" *Id.* (quoting *Hazen*, 507 U.S. at 610).

arguments explored can also be used to support even higher causal thresholds. The evidentiary challenges that must be confronted when wrestling with the inscrutable indicia of motivation may be so strong that both caution and justice might argue for a causation threshold parallel to "clear and convincing" evidence, and perhaps even as strong as a "beyond a reasonable doubt" threshold, making it conform to the normal burden of proof that is standard in criminal cases.[13]

The purpose of this Note is fivefold: first, to find a better way to advance legislative interests with respect to the punishment of bona fide hate crimes while avoiding societal disrespect for the law through unjust or overbroad application; second, to define a more workable standard of statutory construction for the courts to apply; third, to create a sustainable and defensible standard that can persist over time; fourth, to achieve the kind of just and rational results most people expect the law to uphold; and finally, to define an optimal level of substantiality that represents the intersection of consistency with overall criminal law objectives, legislative policies, and general fairness.

This Note argues for a refinement of courts' application of existing hate crimes statutory language, rather than the elimination of these provisions. Taking these statutes as a given, the goal is to help courts apply them in a way that maximizes societal respect for the law, ensures that results stay within constitutional boundaries, and avoids unjustified speculation about personal motivations and the corresponding conviction of individuals to which the law was not meant to be applied.

II. DEFINING "HATE CRIMES" TERMINOLOGY

"Hate crimes" statutes are relative newcomers to the legal landscape, with most state laws tracing back only to the 1981 model legislation drafted by the Anti-Defamation League (ADL).[14] Nevertheless, today they have become firmly established in one form or another across forty-six states

13. Some noncriminal cases employ the tougher "clear and convincing" standard, which requires more than a preponderance of the evidence. *See, e.g.*, STRONG ET AL., *supra* note 9, at 575–76 (noting certain civil cases involving individual rights require a finding of clear and convincing evidence); *see also In re Winship*, 397 U.S. at 363–64 (discussing the constitutional requirement for the "beyond a reasonable doubt" threshold in criminal cases).

14. *Hate Crimes Laws*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/99hatecrime/print.asp (last visited Oct. 26, 2010). The ADL introduced the "penalty enhancement" concept where animus-motivated criminal activity is subject to harsher sentencing. *See id.*

and the District of Columbia.[15] The federal government also has established a variety of different bias-crime prohibitions and reporting laws,[16] and the Supreme Court has so far upheld the constitutionality of hate crimes statutes, at least against First Amendment challenges.[17] Constitutional challenges have also failed at the state level in at least five states, including Iowa.[18]

15. ALA. CODE § 13A-5-13 (LexisNexis 2005); ALASKA STAT. § 12.55.155(c)(22) (2008); CAL. PENAL CODE § 422.55–.93 (West 2010); COLO. REV. STAT. § 18-9-121 (2010); CONN. GEN. STAT. ANN. § 53a-181i–l (West 2007 & Supp. 2010); DEL. CODE ANN. tit. 11, § 1304 (2007); D.C. CODE §§ 22-3701 to -3704 (LexisNexis 2010); FLA. STAT. ANN. § 775.085 (West 2010); HAW. REV. STAT. §§ 846-51 to -53 (Supp. 2007); IDAHO CODE ANN. §§ 18-7901 to -7904 (2004); 720 ILL. COMP. STAT. 5/12-7.1 (West 2002 & Supp. 2010); IND. CODE ANN. § 10-13-3-1 (LexisNexis 2003); IOWA CODE § 729A.1–5 (2009); KAN. STAT. ANN. § 21-4716(c)(2)(C) (2007); KY. REV. STAT. ANN. § 532.031 (LexisNexis 2008); LA. REV. STAT. ANN. §14:107.2 (2004 & Supp. 2010); ME. REV. STAT. ANN. tit. 17-A, § 1151(8)(B) (2006 & Supp. 2009); MD. CODE ANN., CRIM. LAW §§ 10-301 to -306 (LexisNexis 2002 & Supp. 2010); MASS. GEN. LAWS ANN. ch. 22C, §§ 32–35 (West 2010); MICH. COMP. LAWS ANN. § 750.147b (West 2004); MINN. STAT. ANN. § 244.10 subdiv. 5a(11) (West 2010); MISS. CODE. ANN. §§ 99-19-301 to -307 (West 2006); MO. ANN. STAT. § 557.035 (West Supp. 2010); MONT. CODE ANN. § 45-5-221 to -222 (2009); NEB. REV. STAT. ANN. § 28-111–15 (LexisNexis 2009 & Supp. 2010); NEV. REV. STAT. §§ 193.1675, 207.185 (2009); N.H. REV. STAT. ANN. § 651:6(I)(f) (LexisNexis 2007 & Supp. 2009); N.J. STAT. ANN. § 2C:16-1 (West 2005 & Supp. 2010); N.M. STAT. ANN. §§ 31-18B-1 to -5 (2010); N.Y. PENAL LAW § 485.00–.10 (McKinney 2008); N.C. GEN. STAT. § 14-3(c) (2009); N.D. CENT. CODE § 12.1-14-04 (1997); OHIO REV. CODE ANN. § 2927.12 (LexisNexis 2010); OKLA. STAT. ANN. tit. 21, § 850 (West 2002); OR. REV. STAT. ANN. § 166.155–.165 (West 2003 & Supp. 2010); 18 PA. CONS. STAT. ANN. § 2710 (West 2000 & Supp. 2010); R.I. GEN. LAWS § 12-19-38 (2002); S.D. CODIFIED LAWS §§ 22-19B-1 to -5 (2006); TENN. CODE ANN. § 40-35-114(17) (2010); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West 2006); UTAH CODE ANN. § 76-3-203.3 to -203.4 (LexisNexis 2008); VT. STAT. ANN. tit. 13, § 1455 (2009); VA. CODE ANN. § 52-8.5 (2009); WASH. REV. CODE ANN. §§ 9A.36.078–9A.36.083 (West 2009 & Supp. 2010); W. VA. CODE ANN. § 5-11-20 (LexisNexis 2006); WIS. STAT. ANN. § 939.645 (West 2005); WYO. STAT. ANN. § 6-9-101 to -102 (2009).

16. *See, e.g.*, 18 U.S.C. § 245(b)(2) (2006) (prohibiting the use of force on, intimidation of, or interference with "any person because of his race, color, religion or national origin"); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (defining hate crimes and directing the United States Sentencing Commission to establish sentencing enhancements for such crimes); *see also* 20 U.S.C. § 1092(f)(1)(F)(ii) (2006) (requiring reporting of bias crimes); Hate Crime Statistics Act, 28 U.S.C. § 534 (2006) (requiring the Attorney General to acquire data on "crimes that manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity").

17. Wisconsin v. Mitchell, 508 U.S. 476, 489–90 (1993).

18. *See* State v. McKnight, 511 N.W.2d 389, 396 (Iowa 1994) (holding Iowa's hate crime statute with enhanced penalties for bias-motivated offenses did not violate

Although there are a number of strong arguments against the basic concept and the underlying premises of hate crimes laws, and critics continue to passionately assert these criticisms,[19] the focus of this Note is not on evaluating the strengths and weaknesses of these statutes, but rather on finding a way for courts to administer them, as written, in a way that

First Amendment rights and was not unconstitutionally overbroad); State v. Wyant, 624 N.E.2d 722, 724 (Ohio 1994) (holding, in light of *Wisconsin v. Mitchell*, Ohio's ethnic intimidation law did not violate state or federal constitutions); State v. Beebe, 680 P.2d 11, 13 (Or. Ct. App. 1984) ("[I]t is constitutionally permissible to punish otherwise criminal conduct more severely when it is motivated by racial, ethnic or religious hatred than by individual animosity."); State v. Talley, 858 P.2d 217, 221 (Wash. 1993) (en banc) (holding Washington's hate crimes statute regulates conduct and only incidentally affects speech, but striking down the part of the statute making certain actions per se hate crimes); State v. Mitchell, 504 N.W.2d 610, 610 (Wis. 1993) (per curium) (recognizing the Supreme Court's reversal of the Wisconsin Supreme Court's prior ruling in the case).

19. *E.g.*, David Goldberger, *The Inherent Unfairness of Hate Crime Statutes*, 41 HARV. J. ON LEGIS. 449, 449, 451, 464 (2004) (pointing out that hate crime enhancement charges and penalties expand "the ability of prosecutors to dominate sentencing and plea bargaining" and arguing for a "return to a judge-based sentencing regime that confines consideration of a biased motive to the sentencing phase of the case[,] . . . [which] would preserve the intended power distribution of the legal system"); *see also* Marc Fleisher, *Down the Passage Which We Should Not Take: The Folly of Hate Crime Legislation*, 2 J.L. & POL'Y 1, 50 (1994) ("If bias-assault statutes will result in difficult proof problems, exacerbate racial tensions, and be used against the very groups they were intended to protect, then why enact them at all?"); 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, 334 (1991) (questioning "whether 'super-criminalization' of bias-motivated offenses is a wise and effective approach to the elimination of either the offenses or the bias motives"); James B. Jacobs & Kimberly A. Potter, *Hate Crimes: A Critical Perspective*, 22 CRIME & JUST. 1, 32–39 (1997) (enumerating the practical problems confronting both police and prosecutors in the investigation and prosecution of hate crimes); Brian S. MacNamara, Commentary, *New York's Hate Crimes Act of 2000: Problematic and Redundant Legislation Aimed at Subjective Motivation*, 66 ALB. L. REV. 519, 538–44 (2003) (exploring the evidentiary, procedural, and jurisdictional challenges created by making motive an element of a criminal charge); Lu-in Wang, *Unwarranted Assumptions in the Prosecution and Defense of Hate Crimes*, 17 CRIM. JUST. 4, 10 (2002) (examining social science research indicating that "the term 'hate crime' is 'actually a misnomer,' because . . . 'hatred or animus may or may not be a component'" (quoting People v. McCall, Nos. D035520, SCD148400, 2001 WL 1230495, at *4 (Cal. Ct. App. Oct. 16, 2001))); Candeub, *supra* note 10, at 2073–77 (highlighting the intrinsically speculative nature of investigating human motivation); Gregory R. Nearpass, Comment, *The Overlooked Constitutional Objection and Practical Concerns to Penalty-Enhancement Provisions of Hate Crime Legislation*, 66 ALB. L. REV. 547, 561–63 (2003) (objecting that hate crimes laws in practice can often lead to a violation of the Fifth Amendment prohibition against double jeopardy).

promotes the highest degree of justice for the parties involved. This Note assumes that hate crimes statutes are here to stay and that they will remain in substantially the same form as they are now codified in state and federal statutes.

Most of these statutes lack sufficient specificity in terms of exactly how tight the causative link must be between the forbidden animus and the underlying crime.[20] This lack of definitional specificity passes the responsibility to the courts to determine how much causal hatred is required to trigger hate crime culpability.[21] Unless or until legislatures amend their statutory language to more clearly address their intentions with respect to the issue of causality and hate crimes, judges must exercise their discretion to decide the quantum of motivational evidence required. Judges should use this discretion in a way that protects the integrity of the judicial process and recognizes the special limitations and great risks inherent in using motivational analysis to dramatically increase the length of a felony sentence based on suspicion of a biased motive.[22]

20. *See, e.g.*, State v. Hennings, No. 08-1845, 2009 WL 2960616, at *5 (Iowa Ct. App. Sept. 2, 2009) (analyzing Iowa Code section 729A.2, which defines "hate crime" as a "public offense[] . . . committed against a person . . . *because of* the person's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability . . . ." (emphasis added)); *see also In re* M.S., 896 P.2d 1365, 1375 (Cal. 1995) (analyzing the meaning of the phrase "because of" in California Penal Code section 422.6). California Penal Code section 422.6(a) provides "[n]o person . . . shall . . . willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege . . . in whole or in part *because of* one or more of the actual or perceived characteristics of the victim . . . ." CAL. PENAL CODE § 422.6(a) (West 2010) (emphasis added). The California Supreme Court acknowledged that this statute does not "specif[y] whether that intent must be the sole reason behind the defendant's act or, if not, to what degree it must have motivated the defendant." *In re M.S.*, 896 P.2d at 1375. The Iowa Court of Appeals acknowledged that "the common words 'because of' are susceptible of several potential interpretations." *Hennings*, 2009 WL 2960616, at *6.

21. *See, e.g.*, *In re M.S.*, 896 P.2d at 1376–77 (attempting to discern the intent of the California legislature despite the range of possible meanings attributable to "because of"); *Hennings*, 2009 WL 2960616, at *6 (comparing the language of hate crimes causation to parallel language in Iowa's other discrimination laws in order to import and impart a clearer meaning to the ambiguous language of the hate crimes statute).

22. *See* Goldberger, *supra* note 19, at 451 ("Some current hate crime penalty enhancements even double or triple the penalty that would be imposed for the same criminal conduct without proof of the defendant's biased motivation." (citation omitted)); *see also* ALA. CODE § 13A-5-13 (LexisNexis 2005) (requiring a minimum sentence of fifteen years for Class A felonies motivated by bias); CAL. PENAL CODE §§ 190(a), 190.03(a) (West 2008 & Supp. 2010) (increasing minimum penalty for first-

It is widely recognized by both the courts and the academic literature that the term "hate crime" is actually a misnomer.[23]

> The term actually refers to criminal behavior motivated, not by hate, but by *prejudice*, although there is undoubtedly some overlap. Generically, "hate crime" is meant to distinguish criminal conduct motivated by prejudices from criminal conduct motivated by lust, jealousy, greed, politics, and so forth. Unlike theft, burglary, or assault, hate crime emphasizes the offender's attitudes, values, and character.[24]

If the concept is given its broadest connotation, "then every crime in which the perpetrator and victim are members of different groups could potentially be labeled a hate crime."[25] Of course, this is not the actual intent of these statutes, and even if it were, it would clearly be logistically impossible to enforce them as such.[26] That is one reason most statutes limit the application of their enhanced penalties to crimes against specifically enumerated groups.[27] For example, the Iowa hate crimes statute only

degree, hate crime murder from twenty-five years to mandatory life without parole); FLA. STAT. ANN. § 775.085(1)(a) (West 2010) (reclassifying crimes involving bias); OHIO REV. CODE ANN. § 2927.12 (LexisNexis 2010) (making "ethnic intimidation" a penalty one degree higher than the underlying offense). The statute upheld by the Supreme Court in *Wisconsin v. Mitchell* went even further, raising the two-year maximum sentence for aggravated battery from two years to seven years, increasing it to a level *three and a half times* what it would have been without the additional bias charge. *Mitchell*, 508 U.S. at 480.

23. *See, e.g.*, *McCall*, 2001 WL 1230495, at *4 ("[B]ias offenders will often commit the crimes for excitement or to achieve feelings of domination or superiority and target victims they perceive as weak or vulnerable; hatred or animus may or may not be a component . . . ." (citing Steven Bennett Weisburd & Brian Levin, *"On the Basis of Sex": Recognizing Gender-Based Bias Crimes*, 5 STAN. L. & POL'Y REV. 21, 25, 36–37 (1994))).

24. Jacobs & Potter, *supra* note 19, at 2.

25. *Id.* at 4.

26. For example, if hate crime statutes were taken to their logical extreme, every assault of a male by a female, or vice versa, would require a full investigation concerning the degree gender animus might have played. Similarly, every assault by an individual outside their own racial or ethnic group would have to be subjected to hate crime motivational analysis.

27. *See, e.g.*, COLO. REV. STAT. § 18-9-121(a) (2010) ("person's or group's race, color, ancestry, religion, national origin, physical or mental disability, or sexual orientation . . ."); CONN. GEN. STAT. ANN. §§ 53a-181j(a) (West 2007 & Supp. 2010) ("actual or perceived race, religion, ethnicity, disability, sexual orientation or gender identity or expression of such person . . ."); GA. CODE ANN. § 17-10-17 (West 2003 & Supp. 2009) *invalidated by* Botts v. State, 604 S.E.2d 512 (2004) (statutory language

applies when an underlying crime is committed because of a "person's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability."[28] This is a fairly typical list of protected groups, but each state has its own list that may exclude some of these factors and include others.[29] For example, unlike Iowa, many states do not include sexual orientation,[30] and while many states include a category for institutional vandalism, Iowa does not.[31] The reality is that "the boundaries

"because of bias or prejudice . . ." held to be unconstitutionally vague); HAW. REV. STAT. § 706-662(6)(b) (1993 & Supp. 2007) ("actual or perceived race, religion, disability, ethnicity, national origin, gender identity or expression, or sexual orientation of any person"); IDAHO CODE ANN. § 18-7902 (2004) ("race, color, religion, ancestry, or national origin . . ."); IOWA CODE § 729A.2 (2009) ("race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability"); MO. ANN. STAT. § 557.035 (West 1999 & Supp. 2010) ("race, color, religion, national origin, sex, sexual orientation or disability"); MONT. CODE ANN. § 45-5-222 (2009) ("race, creed, religion, color, national origin, or involvement in civil rights or human rights activities"); NEB. REV. STAT. § 28-111 (2009) ("race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability"); NEV. REV. STAT. § 193.1675 (2009) ("race, color, religion, national origin, physical or mental disability or sexual orientation"); N.H. REV. STAT. ANN. § 651:6(I)(f) (Supp. 2009) ("religion, race, creed, sexual orientation . . . national origin or sex"); OHIO REV. CODE ANN. §§ 2307.70, 2927.12 (LexisNexis 2010) ("race, color, religion, or national origin"); WIS. STAT. ANN. § 939.645 (West 2005 & Supp. 2009) ("race, religion, color, disability, sexual orientation, national origin or ancestry").

28. IOWA CODE § 729A.2 (2009).

29. *See, e.g.*, *id.* ("race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability"); MINN. STAT. ANN. § 611A.79 (West 2009) ("race, color, religion, sex, sexual orientation, disability . . . age, or national origin"); MO. ANN. STAT. § 557.035 (West Supp. 2010) ("race, color, religion, national origin, sex, sexual orientation or disability"); NEB. REV. STAT. ANN. § 28-111 (LexisNexis 2009) ("race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability"); N.D. CENT. CODE § 12.1-14-04 (1997 & Supp. 2009) ("sex, race, color, religion, or national origin"); S.D. CODIFIED LAWS § 22-19B-1 (2006 & Supp. 2010) ("race, ethnicity, religion, ancestry, or national origin").

30. *See, e.g.*, OKLA. STAT. tit. 21, § 850 (2002 & Supp. 2010) ("race, color, religion, ancestry, national origin or disability"); S.D. CODIFIED LAWS § 22-19B-1 (2006 & Supp. 2010) ("race, ethnicity, religion, ancestry, or national origin").

31. *See, e.g.*, CAL. PENAL CODE § 594.3 (West 2010) ("vandalism to a church, synagogue, mosque, temple, building owned and occupied by a religious educational institution, or other place primarily used as a place of worship . . . or a cemetery"); KY. REV. STAT. ANN. § 525.113 (LexisNexis 2008 & Supp. 2009) ("A person is guilty of institutional vandalism when he, because of race, color, religion, sexual orientation, or national origin of another individual or group of individuals, knowingly vandalizes, defaces, damages, or desecrates [public monuments, objects, places of worship, national or state flags or other patriotic or religious symbols]"); OHIO REV. CODE. ANN. § 2927.11 (LexisNexis 2010) ("No person, without privilege to do so, shall

of hate crimes legislation are fixed by political decision rather than by any logical or legal rationale."[32] Many vulnerable minority groups such as Native Americans and immigrants are typically excluded.[33]

The vast majority of hate crimes are not committed by groups that most Americans typically associate with bias-driven crimes; indeed, relatively few hate crimes are perpetrated by organized hate groups or their members.[34] Instead, they are overwhelmingly committed by teenagers.[35] In New York City, sixty-four percent of bias-crime offenders were under nineteen.[36] Research shows that in reality "only a small minority of offenders are hard-core ideologically committed haters."[37] Most hate crimes "are low-level crimes committed . . . by nonideological young men who could be described as alienated, antisocial, impulsive, and frequently prejudiced."[38] "The typical hate crime offender is an individual, usually a juvenile, who . . . holds vague underlying prejudices which on occasion spill over into criminal conduct."[39]

purposefully deface, damages, pollute, or otherwise physically mistreat . . . [a]ny public monument; [a]ny historical or commemorative marker, or any structure, Indian mound or earthwork, cemetery . . . place of worship, its furnishings, or religious artifacts or sacred texts within the place of worship or within the grounds upon which the place of worship is located"); S.D. CODIFIED LAWS § 22-19B-1 (2006 & Supp. 2010) ("No person may maliciously and with the specific intent to intimidate or harass any person or specific group of persons because of [their] race, ethnicity, religion, ancestry, or national origin . . . [d]eface any real or personal property of another person; or . . . [d]amage or destroy any real or personal property of another person"); *see also* IOWA CODE § 729A.2 (2009) (which does not provide a category for institutional vandalism: "'*Hate Crime*' means one of the following public offenses when committed against a person or person's property").

32. Jacobs & Potter, *supra* note 19, at 3.

33. *Id.* This is despite the fact Native Americans and immigrants could arguably be classified by race or national origin.

34. *See id.* at 19. Although hate crime advocates like to cite cases "of hard-core ideologically based violence," research shows most hate crimes consist of "vandalism and low-level offenses by juveniles and 'Archie Bunkers,' not neo-Nazi violence by 'Tom Metzgers.'" *Id.*

35. *See id.* (citations omitted) (noting these teenagers are "primarily white males, acting alone or in a group").

36. *Id.*

37. *Id.* at 21.

38. *Id.* at 41.

39. *Id.* at 21.

III. THE INSCRUTABILITY OF MOTIVATION

"The problem in determining what is in another's mind is a perennial problem in philosophy, commonly called 'the other minds problem.' . . . Intents, beliefs, and other mental states are by their nature suspect classes because they are not physical entities . . . ."[40] If reading minds is a difficult problem in philosophy, it is an even more challenging endeavor in legal adjudication in which mistaken analysis could lead to a lengthy period of incarceration. If analyzing motivation is a philosophically "suspect" endeavor, this should encourage jurists to approach such a practice with a cautious and humble recognition of the limitations of our human ability to opine on what really caused someone to act as they did.

The inscrutability of "other minds" raises a daunting evidentiary challenge when motivation is allowed to become a pseudo-element in the definition of a criminal act.[41] This is why the vast majority of crimes do not require inquiry into motivation in order to establish an element of the crime.[42] Indeed, it is a staple of the criminal law that motive is irrelevant to the determination of guilt.[43] Unless there is an affirmative defense like necessity, the law punishes lawbreaking irrespective of the reasons motivating the violation.[44] "[T]he government does not usually have to prove motive, as the Penal Law only recognizes the *mens rea* elements of *intentionally*, *knowingly*, *recklessly*, and *criminal negligence*."[45]

> [M]otives are far more difficult than intents to demonstrate with certainty. . . . [T]he beliefs and desires which constitute motive crimes' mens rea are, in general, more difficult to determine than intent crimes. Motive crimes, therefore, present greater epistemological

40. Candeub, *supra* note 10, at 2078.

41. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW, § 6.6.4, at 472 (1978) ("[T]he requirement of manifestly criminal conduct might be defended on evidentiary grounds . . . . It is so difficult to discern the subjective state of intending . . . ."); *see also* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 176 (1990) (criticizing the concept of intent, noting "[t]he persistence of mentalist language in law may merely bespeak the cultural conservatism of the legal enterprise").

42. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.04(a)(2), at 131–32 (4th ed. 2006) (noting the exception of specific intent crimes).

43. *See* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 88 (2d ed. 1960) ("[H]ardly any part of penal law is more definitely settled than that motive is irrelevant." (citing State v. Logan, 126 S.W.2d 256 (Mo. 1939))).

44. *See* DRESSLER, *supra* note 42, § 10.04(a)(2), at 131–32.

45. MacNamara, *supra* note 19, at 539 (citing N.Y. PENAL LAW § 15.00(6) (McKinney 1998)); *see also* MODEL PENAL CODE § 2.02(1)–(3) (1985).

> difficulties than do those of intent—difficulties which may make determinations under motive laws arbitrary.[46]

For this reason, "labeling particular incidents as hate crimes bristles with subjectivity and potential for bias."[47]

It is essential to understand the critical distinction between motive and intent in the criminal law. Although it is not uncommon to use these words somewhat interchangeably in ordinary parlance, they are fundamentally different concepts in the law and therefore require distinctly different analytical approaches.[48] For example, when *X* assaults *Y* in order to take *Y*'s money, *X*'s *intent* is to assault but his *motive* is to get money.[49] The concept of motive explains *why* we did something while the concept of intent explains *what* we did.[50] That is, motive speaks to the "ends" of our actions while intent addresses the "means."[51] "'Motive,' 'intent,' and 'purpose' are related concepts in that they all refer to thought processes[, but] [t]hey are legally distinct . . . . Unlike purpose or intent, motive cannot be a criminal offense or an element of an offense."[52]

In general, we intend the logical results of our actions, and therefore, intent and action bear some logical relationship.[53] However, motivation is a deeper issue that is analytically more distant from our actions, and therefore, much more difficult to deduce based on actions alone.[54] Intent is defined as "[t]he state of mind accompanying an act."[55] "While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists, motive becomes immaterial."[56] In contrast, motive is defined as

46. Candeub, *supra* note 10, at 2104.

47. Jacobs & Potter, *supra* note 19, at 42.

48. *See generally* WAYNE R. LAFAVE, CRIMINAL LAW § 3.6, at 241–42 (3d ed. 2000) (portraying the legal distinction between motive and intent).

49. *Id.* at 242.

50. Candeub, *supra* note 10, at 2105.

51. *Id.*

52. Gellman, *supra* note 19, at 364 (citations omitted).

53. *E.g.*, JUDICIAL COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 7.05, at 468 (2009) ("You may . . . infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.").

54. *See* Candeub, *supra* note 10, at 2104–08.

55. BLACK'S LAW DICTIONARY 369 (3d pocket ed. 2006).

56. *Id.*

"willful desire, that leads one to act."[57] In other words, motive drives intent, and intent drives action.

Because of the relative proximity between intent and action, inferences can be drawn concerning intent based on evidence of the actions taken.[58] However, because of their logical and causative distance, it is substantially harder to draw any confident inferences about internal motivation based solely on external evidence of the criminal acts committed.[59]

> To assign a motive to an intent requires [more detail] . . . about the actor's subjective mental state and inevitably more interpretation on the jury's part—thus creating ample room for uncertainty and inaccuracy. Because an intent is, however, "closer to the actus reus" and has more direct causal relationship, the intent is easier to read from the act.[60]

"[F]or the plaintiff to prevail in the civil context, it has always been necessary to establish that the defendant had a *conscious intent to discriminate.*"[61] This requirement is even more critical when considering criminal charges, given the higher degree of moral condemnation they bring and the generally more severe punishments assigned to them.[62]

57. *Id.* at 470.

58. Both legislatures and courts can recognize the traceable connection between intent and action by creating legal presumptions. *See* DRESSLER, *supra* note 42, § 8.01, at 85 (describing how the gap between external tangible actions and internal intangible intentions can be bridged by the use of a presumption); *see also* Fleisher, *supra* note 19, at 9–10 ("Proof that the defendant intended harm may be inferred from the conduct itself."). Dressler offers this example of a presumption at work: "'Whenever it is proved in a criminal trial that a person fired a loaded gun at another person, the factfinder must [or may] presume that the actor intended to kill the other person.'" DRESSLER, *supra* note 42, § 8.01, at 85.

59. This is why legal scholars as far back as Oliver Wendell Holmes advocated for criminal liability evaluations to focus more on the external and to avoid excessive reliance on mental state analysis. POSNER, *supra* note 41, at 168 ("Holmes believed . . . that the role of mental states in law diminishes as law becomes more sophisticated. . . ."). This is also why Richard Posner advocates for an almost total elimination of the use of mental states in criminal law. *Id.* at 175–76; *see also* Fleisher, *supra* note 19, at 10 ("[I]t may often remain a mystery *why* a particular act of violence occurred. It may be described as senseless, gratuitous or arbitrary" but that does not mean it was bias-driven.).

60. Candeub, *supra* note 10, at 2106.

61. Fleisher, *supra* note 19, at 21 (emphasis added) (citing 42 U.S.C. § 1981 (1991)).

62. *Id.*

While determination of intent requires some degree of assessment about the mind of the accused, and while this is subject to the imprecision and uncertainty posed by the "other minds" challenge, our legal system has nevertheless been "comfortable with juries making those decisions, even though some of the lines may be difficult to draw."[63] However, "crimes of motive require courts to do *more* mind reading than plain old crimes of intent."[64]

"While intent crimes seem to use mentalistic terms in ways few would find difficult to accept, motive crimes cross the other minds Rubicon where knowledge is more problematic . . . ."[65] Someone who points a gun at another and pulls the trigger almost certainly *intends* to kill, but his *motivation* could be revenge, honor, vindication, anger, jealousy, reputation, fear, relief from bullying, annoyance, the need to save face with peers, a desire for attention, or many other driving reasons. The act itself rarely carries with it any motivational signature to tell the fact finder the real motive. Unless there is a direct confession of motivation by the defendant, or strong contemporaneous verbal evidence of motivation, all a jury can work with is the act itself, and the act itself is often silent with respect to motive.[66]

Courts have stated that hate crimes penalty enhancement is no different than distinguishing between intentional first-degree, premeditated murder and second-degree murder.[67] However,

> [c]lassification of an offense on the basis of mental state is [not] analogous to penalty enhancement for motive. State of mind refers to culpability; it affects exactly what was done (e.g., a deliberate act as opposed to an accident), not why it was done. If a killer acts "with prior calculation and design," for example, it makes no difference whether he or she is motivated by jealousy, hatred, bigotry, greed, altruism, or by no reason at all. Mental states form a continuum of culpability of which motive is not a part. Thus, they provide no basis

63. State v. Hennings, No. 08-1845, 2009 WL 2960616, at *9 (Iowa Ct. App. Sept. 2, 2009); *see also* State v. Hennings, No. 08-1845, slip op. at 14–15 (Iowa Dec. 23, 2010).

64. Candeub, *supra* note 10, at 2107.

65. *Id.* at 2115.

66. *See id.* at 2118. "[V]erbal evidence can establish only that one is a bigot, not that bigotry served as the motivating factor in a hate crime." *Id.*

67. *See, e.g.*, *Hennings*, 2009 WL 2960616, at *9; *see also Hennings*, No. 08-1845, slip op. at 14.

for criminalizing bias motivation.[68]

The psychological reality that is fact finders are rarely privy to the motivational inner-workings of the defendants who come before them. The law in general recognizes this, which is why most laws do not attempt to probe the mind further than the level of intent.[69] Most laws recognize both the irrelevancy and the uncertainty of human motivation.[70] Hate crimes laws are one major exception to this sober concession to the reality of the human condition.

> [H]ate-crimes statutes presume knowledge is possible in areas in which such knowledge is virtually *always* suspect and in which the threat of punishing thought is always present. These laws feed a legal vanity that human motivations are transparent when, in fact, they are opaque. When courts make decisions based on inherently speculative knowledge, their decisions will inevitably be seen as arbitrary. Laws which require judges and juries to make such uncertain determinations can only hurt the judicial process, especially when errors lead to the punishment of thought.[71]

IV. EVIDENTIARY OBSTACLES

Because the underlying criminal acts that form the foundation for hate crimes penalty enhancement can, by themselves, tell us precious little about motivation, prosecutors must look elsewhere to find evidence, first, of proscribed animus, and second, of a quantity of such animus sufficient to satisfy causation analysis.[72] Because most defendants are unwilling to provide a direct confession concerning their criminal motivation, the most common evidence available consists of witness testimony concerning the contemporaneous use of bigoted language in connection to the underlying crime.[73]

"However, even epithets at the crime scene will not invariably mean

68. Gellman, *supra* note 19, at 367 (footnotes omitted).

69. *See, e.g.*, MODEL PENAL CODE §§ 2.01–.02 (1985).

70. *See supra* note 43 and accompanying text.

71. Candeub, *supra* note 10, at 2122.

72. *See, e.g.*, Fleisher, *supra* note 19, at 9–10 ("This latter proof requirement . . . requires a far more subtle inquiry into the defendant's mind than does proof of whether he intended to injure or kill the victim." (citations omitted)).

73. *E.g.*, State v. Hennings, No. 08-1845, 2009 WL 2960616, at *8 (Iowa Ct. App. Sept. 2, 2009) (noting that the evidence used to convict the defendant was a combination of contemporaneous and retrospective use of bigoted language).

that the defendant was motivated by prejudice."[74] Indeed, both the epithets and the criminal actions "may have been triggered by an unplanned encounter, not by an ideologically driven determination to terrorize a specific racial, ethnic, or religious group."[75] The reality is that animus can be the cause of the derogatory language without being the motive for the criminal activity.[76] Just because the crime and the epithets are relatively contemporaneous, does not mean they necessarily sprang from the same motivational source.

Fact finders must also confront the challenge of determining motive when only one member of a group shouts an epithet.[77] At most, this might reflect that single individual's biased motive. But should that motive also be attributed to all of the codefendants who have not offered any verbal window into their own thought processes?[78]

The evidentiary challenges are compounded by the lack of legal standards to define the necessary quantity or timing of "epithet evidence" required to prove that a criminal act was actually motivated, even in part, by bigotry.[79] If nothing is said at the scene of the crime, can the fact finder consider something said beforehand? If so, how far back should one probe—an hour, a day, a week, a month, a year, or perhaps longer? If even contemporaneous statements are not conclusive evidence of biased motivation—as opposed to bias in general—how relevant or probative can past statements really be?

In reality, "[m]ost hate crime statutes do not require proof of *manifest* prejudice. Thus where manifest prejudice was not evident at the crime scene, the prosecutor may attempt to prove prejudice based on the defendant's character, activities, and pronouncements."[80] When this happens, "the trial may turn into an inquisition on the defendant's character, or at least his values and beliefs[,] . . . [a test] which defendants

74. Jacobs & Potter, *supra* note 19, at 36.

75. *Id.* (citations omitted).

76. Some animus can be just strong enough to inspire an epithet without being nearly strong enough to inspire an assault. When an assault takes place, and the perpetrator happens to feel animus toward a group to which his victim belongs, this does not mean animus was the reason for the assault.

77. *See id.* at 37 (noting "[a]ccomplice liability typically requires that the accomplice desire the crime to be committed," and questioning whether this can be extended to include bias motivation).

78. *See id.*

79. *See id.* at 36–37.

80. *Id.* at 37.

will pass only if they are politically correct multiculturalists."[81]

Bias motivation requires the presentation of "evidence about the defendant's prejudiced statements, bigoted ideas, and association with biased groups or individuals. It is this kind of evidence that jurors find offensive and inflammatory."[82] Normally this kind of evidence would be excluded under the rules of evidence as unduly prejudicial information tending to imply conduct in conformity.[83] Here it is not admitted into evidence in order to establish a tangible fact, but rather to prove what the defendant may have been thinking at the time of the underlying criminal act in order to prove the speculative element of motivation and its possible contribution to causing the act itself.[84]

Prosecutors can use either direct admissions by defendants or circumstantial evidence.[85] This means there could be a great deal of additional evidentiary debate and an increase in the number of suppression hearings because even a very small statement with biased connotations can now have the potential of doubling or tripling a sentence whereas in the past it would not have had any effect on sentencing.[86] Every mildly biased statement that might have been admitted by defendants in the past could now be subject to extensive litigation with corresponding burdens for our overstrained legal system.[87]

"Hate-crimes statutes require courts to separate out a defendant's general political or social views and to concentrate on the act itself."[88] However, "[t]he problem with motive crimes . . . is that verbal evidence—one of the key types of evidence used for their proof—can show only general attitude; it cannot show whether the act itself was so motivated."[89] In practice, it is quite difficult for juries to make these subtle but critical distinctions,[90] however, if they cannot, the application of hate crimes enhancements could lead to lengthy periods of unjust incarceration for

81. *Id.* at 37–38.
82. Goldberger, *supra* note 19, at 461.
83. *E.g.*, FED. R. EVID. 403–05.
84. Goldberger, *supra* note 19, at 462.
85. MacNamara, *supra* note 19, at 540.
86. *Id.*
87. *See id.*
88. Candeub, *supra* note 10, at 2116.
89. *Id.* at 2118 (citing James B. Jacobs, *Should Hate Be a Crime?*, 113 PUB. INT. 3, 8 (1993)).
90. *See id.*

defendants after they have paid their debt to society for the underlying crime. Under these conditions, those with bigoted backgrounds will find it extremely difficult to prove that they were not substantially motivated by bigotry, especially in the eyes of a jury.

V. QUANTITATIVE CAUSATION

Very few hate crimes statutes actually use the word "motivation."[91] The most popular phrases are "because of" or "by reason of."[92] Other terminology includes the requirement that the underlying crime "demonstrate prejudice"[93] or that the defendant "*select* a victim by reason of" any enumerated classification.[94] Another variant requires the perpetrator to "intentionally select" the victim based on a protected status, such as race.[95]

All of these variations leave us with the same open question concerning how much bias is required to satisfy the causation element of a hate crime.

> Must the criminal conduct have been wholly, primarily, or slightly motivated by the disfavored prejudice? The answer determines how much hate crime there is. If a hate crime must have been *wholly* motivated by prejudice, there will be only a very small number of hate crimes—those perpetrated by individuals whose prejudice amounts to an ideology or perhaps an obsession. By contrast, if a hate crime must have been only *in part* motivated by prejudice, a significant percentage (possibly nearly all) of intergroup crimes is potentially classifiable as hate crime.[96]

New York uses different language but still leaves us with the same question concerning the requisite quantum of motivational evidence. Instead of the wholly nebulous term "because of," it uses the phrase "in whole or in substantial part because of."[97] Of course, this does not tell us how to define what "substantial part" means. Will ten percent suffice, or twenty percent, or would it have to be fifty percent or even higher?[98]

91. Jacobs & Potter, *supra* note 19, at 6.
92. *Id.*
93. *Id.* (citations omitted).
94. *Id.* (citations omitted).
95. *Id.* (citing WIS. STAT. ANN. § 939.645(1)(b) (West 2005)).
96. *Id.* at 4–5.
97. *See* N.Y. PENAL LAW § 485.05(1)(a)–(b) (McKinney 2008 & Supp. 2010).
98. *See* MacNamara, *supra* note 19, at 539.

"Such a loose standard leaves both the police and prosecutor with very little guidance in making arrests and bringing charges . . . ."[99] It is therefore up to judges, through the exercise of their discretion, to provide the clarity and guidance necessitated by the lack of specificity in the statutory language.

Unless "because of" is interpreted to mean "solely" or "exclusively," hate-crimes-motivational analysis must consider the issue of mixed motives. Senator Clifford Case, during congressional hearings concerning Title VII employment discrimination, declared, "If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of."[100] While perhaps slightly overstating the case, Senator Case highlights the reality that many human actions, including criminal actions, are driven by more than one motivation. In addition, courts and commentators have

> universally accepted . . . that the problem of mixed motives is a problem of causation, similar to causation problems in tort law in which the causal link that courts must discover is one between an external event (the allegedly discriminatory act) and an internal entity or event (the discriminatory "intent" or "motive").[101]

This analysis, taken from the realm of Title VII employment discrimination law, can also be applied to the criminal law arena and specifically to hate-crimes-motivational inquiries.

Once a mixed-motive construction is established for our causation standard, it raises the critical and difficult question of exactly how much bias must be found within the mix. If animus does not have to be the sole cause of the underlying crime, does it have to be the predominant cause, a substantial or significant cause, just a contributing cause, or only a barely existing or objectively possible cause? The answer to this question has enormous implications in terms of just sentencing, as well as in terms of prosecutorial and judicial logistics. For instance:

> What percentage of robberies by black perpetrators against white victims might be classified as hate crime if the key question is whether

99. *Id.*

100. 110 CONG. REC. 13,837 (1964).

101. Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 20 (1991) (claiming the interpretation of actions as "problems in causation is fundamentally misconceived").

> the robbery or choice of robbery victim was *in part* attributable to antiwhite prejudice? What percentage of violence by males against females ought to be investigated as possible hate crime if the critical question is whether the perpetrator was *in part* motivated by prejudice against women?[102]

The answer to these questions depends on the quantum of biased motivation we select for our causation threshold. The lower that quantum, the higher the number of hate crimes prosecutions our law enforcement and judicial systems will potentially have to handle.

If mixed-motive causality is allowed, the challenge becomes how to sort through the mix and assign proportional blame to the various factors. Because of the extreme difficulty of reading the minds of others, it is far from certain whether prosecutors, judges, or juries are capable of assigning the right causative weight to the various factors that may have been in play.[103]

The following example is a redaction of the facts from a famous case out of the state of New York.[104] It clearly illustrates the daunting task that confronts the legal system when it attempts to apply a hate crime motivational test.

> The defendant, . . . a white high-school student, attends a party at which he is intoxicated. He becomes angry and uses racial epithets when he sees the victim, who is black, speaking with his former girlfriend, who is white. He had already known that the two were seeing each other. The victim and the defendant had previously socialized together among a racially-mixed group of students. It was common for these students to use racial epithets when bantering with each other. The defendant's feelings of rage and humiliation intensify when a group of the guests forces him to leave because of his boorish conduct. Later that evening, the defendant, aided by four of his friends, stalks and brutally attacks the victim with a baseball bat.
>
> . . . .
>
> . . . [T]he jury had to determine . . . whether the defendant attacked the victim *because of* his race or whether his rage was

102. Jacobs & Potter, *supra* note 19, at 5.

103. *See supra* Part III (discussing the "other minds" problem and the inscrutability of human motivation).

104. People v. Siegel, 663 N.E.2d 872 (N.Y. 1995).

> attributable more to racially transcendent factors—feelings of jealousy about a former girlfriend and feelings of humiliation about being ejected from the party. . . . [G]iven the portrait of a drunk, jealous, rejected, and humiliated adolescent, how could the jury conclude . . . that the defendant was selected because of his race?[105]

The key question the jurors asked themselves in this case was: "'Would this have happened if [the victim] was white?'"[106] Applying traditional but-for analysis from tort law, "[t]he defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it."[107] The cause of the assault must be the *sine qua non*—"without which it is not"—of the action; it must be an indispensible prerequisite of the outcome.[108] Therefore, with any hate crime charge, we must compare what did happen to what would have happened if the bias had not existed. If other factors are sufficient to explain the outcome on their own, the mere coexistence of some measure of animus should not be sufficient to satisfy the causation requirements of a hate crimes statute.

"No writer could venture into the mysteries of causation without profound trepidation."[109] Causation is indeed a difficult concept to analyze even in the physical world, but it is far more difficult to apply when the mysteries of human motivation are involved. In tort law, "negligence in the air" is considered irrelevant to the legal causation of an injury.[110] Accordingly, when it comes to hate crime causation analysis, "animus in the air," in the absence of other confirmatory evidence, should arguably be considered even less probative of the cause of the underlying crime.

However, just because the analysis may be difficult and fraught with potential for error, as long as hate crimes statutes remain on the books in their current imprecise form, courts must find a way to apply them.

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105. Fleisher, *supra* note 19, at 14–15 (footnote omitted).

106. *Id.* at 17 (quoting Craig Gordon, *The Jermaine Ewell Case; What's Next? After Siegel's Conviction, Fewer Witnesses Against Others*, NEWSDAY, Nov. 23, 1992, at 3).

107. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 266 (5th ed. 1984) (citations omitted).

108. *Id.*

109. JOSEPH W. GLANNON, THE LAW OF TORTS: EXAMPLES AND EXPLANATIONS 139 (3d ed. 2005).

110. *See id.* at 140.

> [O]ne of the majesties of the law is that it must answer the unanswerable: It must decide, *today*, between plaintiff and defendant, and lacks the luxury of indefinite speculation. Consequently, judges must settle for some working approaches to thorny problems like causation, approaches that are no doubt imperfect, perhaps not even fully intellectually consistent, and always subject to refinement and eventual change.[111]

"To be a completely equal and tolerant society, we must not focus solely on promoting justice, but must also pay close attention to *how* that justice is administered. Only then will the scales of justice be truly balanced."[112] Hate crimes statutes were implemented with the intention of promoting justice, but if we are not very careful in how we wield this powerful sword of justice, it may ultimately be used against those to whom it was never intended to be applied. That is why this Note argues for a cautious approach to mind reading and incarceration based on motivational speculation.[113]

VI. EXAMPLE: *STATE V. HENNINGS*

Hennings is a case in which five African-American boys, ranging in age from eleven to fourteen, admitted they were walking in the street instead of on the sidewalk.[114] The boys testified they were blocking a pickup truck driven by Hennings—who was approaching them from behind—but moved to the side after, according to some of the boys, Hennings honked at them.[115] The boys admitted they cursed at the truck.[116] In response, Hennings cursed at them and told them to get off the road.[117] The boys testified that Kwane—age thirteen—yelled back at Hennings, telling him they did not have to get off the street.[118]

Hennings then stopped and stepped out of his pickup truck carrying a large pocket knife, which—according to the testimony of one boy—he may

111. *Id.* at 139–40.

112. Nearpass, *supra* note 19, at 573 (emphasis added).

113. *See infra* Part VII (proposing a cautious solution to this challenge).

114. State v. Hennings, No. 08-1845, 2009 WL 2960616, at *1 (Iowa Ct. App. Sept. 2, 2009). For the Iowa Supreme Court's narrative of the facts in this case, see State v. Hennings, No. 08-145, slip op. at 2–5 (Iowa Dec. 23, 2010).

115. *Hennings*, 2009 WL 2960616, at *1.

116. *Id.*

117. *Id.*

118. *Id.*

have threatened to use.[119] Initially, the boys began running away, but Kwane decided to stand his ground.[120] Kwane testified that because Hennings was outnumbered, he asked, "'Why are we running?'"[121] He also testified that he verbally challenged Hennings, telling him "'to drop the knife, we'll beat his ass.'"[122] At this time, Hennings remained near his truck and did not pursue any of the boys.[123]

When the boys realized Kwane had not followed them, they began to return to the scene of the conflict.[124] They found Kwane and Hennings arguing but could not understand what was being said.[125] As the boys arrived at Kwane's side, Hennings turned around and walked to his truck.[126] Darwin, the youngest boy—age eleven—"testified that Hennings called the boys 'f---ing niggers,'" but no one else heard that or any other racial epithet.[127] Kwane, the boy who was closest to Hennings throughout the incident, testified he was certain Hennings never used the word "nigger" because that term infuriates him, and he would definitely remember it if Hennings had really said it.[128] Darwin is the only witness who claims to have heard this single use of a racial slur.[129]

Hennings sped away in his truck and the boys, believing the conflict was over, continued on their way.[130] However, Aerean—age twelve—realized he had dropped his swim trunks during his earlier flight, so he went back to retrieve them.[131] Meanwhile, Hennings turned his vehicle around and began heading back toward the boys, who were in an intersection and directly in the truck's path.[132] "Aerean was a short distance behind the other boys after retrieving his trunks."[133]

Witnesses testified that Hennings drove his truck in a manner

119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at *2.
125. *Id.*
126. *Id.*
127. *Id.* at *1–2.
128. *Id.* at *2.
129. *Id.*
130. *Id.*
131. *Id.* at *1–2.
132. *Id.* at *2.
133. *Id.*

designed to aim for the boys, who were forced to jump onto a brick retaining wall for protection.[134] "Hennings changed direction again, this time aiming for Aerean."[135] Hennings ran over Aerean and "then left the scene without ever slowing down."[136] Aerean's wounds were potentially severe, but except for some permanent scarring and discoloration, most healed before trial.[137]

The next day, three officers interrogated Hennings at his home.[138] The Hennings family is well known in Fort Dodge, Iowa, and they are not well-liked because of their bigoted racial views.[139] When asked about the accident, Hennings defended himself, partly through denial of certain alleged facts—such as having a knife at the scene and denying knowledge of a knife in his glove box—and partly through justification of his actions based on the actions of the boys.[140] True to his reputation for racist attitudes, he described the boys as a big group of "monkeys," an epithet he repeated at least two more times.[141] Hennings defended his action by declaring, "What . . . f---in nigger don't have enough sense to stay out the f---in road . . . they deserve to get hit."[142] When one officer tried to search his truck, "Hennings resisted violently, cursing and kicking at the officers."[143] Following the incident, Hennings never inquired about Aerean's condition, nor did he express remorse for the acts he committed.[144]

A jury found Hennings guilty of willful injury causing bodily injury in violation of Iowa Code section 708.4(2), [i]ntent to inflict serious injury in violation of [Iowa Code] section 708.2(1), and assault in violation of individual rights with the intent to commit a serious injury in violation of

134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at *3.
138. *Id.*
139. *Id.* at *4. This is according to Hennings's father's statement to the police. *Id.* at *3–4. The father also told the police Hennings had frequently been picked on by black children when he was a child. *Id.* at *4.
140. *Id.* at *3–4 (explaining that his actions were driven by the boys walking in the middle of the road and blocking his truck).
141. *Id.*
142. *Id.* at *4.
143. *Id.*
144. *Id.*

Iowa Code sections 708.2C(1), 708.2C(2), and 729A.2(1).[145] Iowa's hate crimes statute is found in Chapter 729A of the Iowa Code.[146] Hennings was sentenced to five years for Counts II and III, with the terms set to run consecutively.[147]

Hennings's main issue on appeal to the Iowa Court of Appeals concerned the sufficiency of the evidence for the third count under Iowa's hate crimes statute, namely "assault in violation of individual rights with the intent to commit a serious injury."[148] Hennings claimed that the evidence presented was not sufficient to permit a jury to conclude beyond a reasonable doubt that the underlying assault he committed was "because of" Aerean's race.[149]

VII. PROPOSED SOLUTIONS TO THE PROBLEMS OF HATE CRIME CAUSALITY

A. *General Solutions*

On their face, the words "because of" have a semantic range that can run from a one percent negligible causative contribution to a one hundred percent exclusive contribution.[150] Unfortunately, this apparently simple phrase is not self-defining.[151] If case law, legislative history, or general principles of statutory construction cannot narrow the range for us, courts will have to make their own choice within the entire spectrum or, if some limiting constraint can be discovered, within the remaining range beyond

145. *Id.*

146. *Id.* at *4 n.1.

147. *Id.* at *4.

148. *See id.* The Iowa Court of Appeals rejected Henning's insufficiency-of-the-evidence argument and confirmed his conviction. *Id.* at *10. However, it vacated his sentence and remanded the case for rehearing because the trial court "did not explain why it was sentencing him consecutively on the two counts." *Id.* (citing State v. Uthe, 542 N.W.2d 810, 816 (Iowa 1996)). On review, the Iowa Supreme Court affirmed the judgment of both the trial court and the court of appeals concerning the sufficiency of the hate crimes evidence, but it vacated the remand and affirmed the trial court's sentencing, holding that "[t]he district court provided a sufficient statement on the record regarding the reasons behind the decision to sentence Hennings to consecutive sentences." State v. Hennings, No. 08-1845, slip op. at 17–18 (Iowa Dec. 23, 2010).

149. *Id.*

150. *See In re* M.S., 896 P.2d 1365, 1375 (Cal. 1995) (noting the parties' claims "because of" can mean anything from but-for causation to merely "contributing to" the offense).

151. *See, e.g.*, *id.* at 1376–77; *see also Hennings*, 2009 WL 2960616, at *6.

that constraining threshold.

The Iowa Court of Appeals suggested the use of a "crude . . . numerical illustration" to help us organize and compare the various motivational combinations that can confront the courts.[152] They ask us to

> suppose that 100 total units of motivation were the minimum required to trigger an act of assault by the defendant, i.e., to tip the defendant over the edge. If non-racial motives provided fifty units and racial motives provided seventy-five units, then the hate crimes statute would apply. The accused would not have committed the assault but for the victim's race and race was a substantial factor in the accused's commission of the assault. Similarly, if non-racial motives provided 125 units and racial motives provided 125 units, the hate crimes statute still would apply. In this instance, although the accused would have committed the assault anyway, the racial motives by themselves would have been enough to bring about the assault and clearly were a substantial factor.[153]

In this hypothetical, the court suggests that "the 'substantial factor' requirement could be used to eliminate the case where the defendant had 99 units of nonracial motivation and one unit of racial motivation, so that racial motivation was technically a but-for cause but only a minor consideration."[154]

Because of the highly speculative nature of proving "hateful" intent, courts should choose a cautious, narrow construction that requires high levels of bias causation as opposed to broad construction that accepts minimal bias causation or contribution as being sufficient to make "hate" a "but-for" cause. It is clear that situations can arise where there are dual motivations but where one element serves not as a "but-for" cause, but merely as a redundant factor.[155] It is entirely possible for biased motivation

152. *Hennings*, 2009 WL 2960616, at *7.

153. *Id.* Unfortunately, the Iowa Supreme Court did not address this motivational model or any of the arguments that the Iowa Court of Appeals made based upon this model.

154. *Id.* at *7 n.6. The Iowa Supreme Court also never addressed the issue of whether animus must be a substantial factor. It is possible to read its silence on this critical issue as an endorsement of using the but-for test alone, without applying the additional hurdle of a substantial-factor analysis. However, without explicit language to this effect, there simply is not sufficient evidence to draw this conclusion.

155. For example, if rage because of a provocation, desire for revenge, or desire to impress one's friends is sufficient in and of itself to prompt an assault, irrespective of the group status of the victim, then this assault would have taken place

to exist without this being either necessary or sufficient to produce the assault.[156] If there are nonbias motivations that in combination are sufficient to trigger the underlying crime, the bias factor is not *necessary* to produce the crime. Also, unless the bias factor is a very substantial motivating factor, it would also not be sufficient on its own.

The 100-unit scale proposed by the Iowa Court of Appeals is an extremely helpful organizational and analytical tool. By expanding on this model and overlaying the full variety of combinational possibilities, we can better identify those scenarios in which unjust results might become possible or even probable. If we can identify a range on the causality spectrum that is susceptible to the production of unjust convictions—those based more on speculation than on real evidence—then we can design a constructional rule for a more precise definition of causality that substantially reduces the chances of unjust results.

In this model, 100 units of motivation—whether from anger, greed, revenge, hatred, or bias—are needed to make a particular individual decide to commit an assault. For the purposes of hate crime analysis, there are essentially two categories of causation: bias and nonbias.[157] While there are many different nonbias motivations, they can be aggregated and treated as one bundle. For bias-analysis purposes, we do not need to break out the individual nonbias motives, assuming there are more than one.[158] The particulars of these nonbias motives are not important, only their collective weight as a package compared to the threshold trigger point—100 units—and compared to the legally relevant bias motive.

In this model where 100 units of motivation are required to catalyze an assault, it is clear that if there are only ninety-five units of nonbias

regardless whether the attacker's motivational matrix also included a measure of bias.

156. In the court's numerical illustration, the existence of bias was not *necessary* to trigger an assault. Applying the 100-unit motivational model, nonbias motivations alone passed the threshold to trigger the underlying crime. In this case, if bias represented less than 100 units of motivation, on its own it would not be *sufficient* to trigger an assault. Nevertheless, a low quantum standard of bias for hate crimes will create the anomalous situation in which a measure of bias that *fails both the necessity and sufficiency tests* of causation is allowed to satisfy our causation requirement.

157. *See Hennings*, 2009 WL 2960616, at *7.

158. Nonbias motives cover a wide range of human conditions. Among other factors, they include: fear, insecurity, annoyance, greed, jealousy, politics, revenge, shame, manipulation, relief from bullying, desire to earn respect or save face with peers, desire to pass an initiation requirement, sexual desire, a need for dominance, desire for attention, or deviant desire to make others suffer.

motivation and no bias at all, no assault will take place. However, if five units of bias motivation are added to the mix, the threshold level of 100 total motivational units is reached and the assault is triggered, even though bias is a very small contributor to the causation equation. In this first scenario, there are two different "but-for" causes, even though they are grossly disproportional, and bias only contributes five percent to the total. No matter how little bias may have contributed to the causation equation, we can still say that but for the bias, the assault would not have occurred.

The Iowa Court of Appeals addressed a variant of this scenario, declaring that ninety-nine nonbias units combined with only one bias unit, while technically satisfying the but-for test of causation, would not produce legal liability because in that case, bias would not be a "substantial factor."[159] Unfortunately, the court did not attempt to quantify exactly how much bias is required to qualify as a substantial factor. The law in Iowa remains unsettled in this respect.[160] The only certainty is that one bias unit is not a substantial factor, but it remains unclear how two or three units—or even five or ten units—would be considered.[161] The substantial-factor test, at least as currently defined, does not seem to be all that substantial when it comes to ensuring that relatively negligible amounts of bias do not result in disproportionately lengthy prison sentences.[162] The substantial-factor test is the key to crafting a cautious threshold standard for applying "because of" causation to hate crimes statutes in a way that respects the challenge of reading the minds of defendants.

In a second scenario, there might be 100 units of nonbias motivation. This would mean that an assault would be triggered without any bias being required. There is only one but-for cause. However, unlike the first scenario, adding five units of bias motivation does not change the result. Bias is now a redundant factor that is not related to causation of the crime because the crime would have occurred even without the bias. In this case, bias is not a but-for cause, and so it should fail the "because of" test used

159. *See Hennings*, 2009 WL 2960616, at *7 n.6.

160. The Iowa Supreme Court's review of this case did not help clarify the law because it never addressed the substantial-factor analysis at all. Therefore, the imprecise standard articulated by the Iowa Court of Appeals arguably remains the law in Iowa.

161. *See* State v. Hennings, No. 08-1845, slip op. at 17–18 (Iowa Dec. 23, 2010)

162. As the Iowa hate crime causality standard is currently articulated, it is possible that a five percent bias contribution could lead to a one hundred percent increase in jail time. *See id.*

by the California and Iowa courts.[163]

There is that a stark difference in results between the first and second scenarios, despite making only a minor adjustment in the causation equations. In the first scenario, a five percent or five-unit bias possibly makes you guilty of a hate crime, while in the second it does not. This highlights the challenge that courts have in speculating about these thresholds and the quantification of contribution sources. The law should result in consistent application to similarly situated individuals, unless there is a very strong reason for distinguishing them.

The reality is that we simply cannot measure any of these factors except in the roughest terms, which is exactly why caution should prevail. Although the model allows us to make simple mathematical adjustments with precision, real-world motivations cannot be analyzed in this way. In one case, five units of bias—though arguably negligible—*is* a but-for cause, and the defendant can receive a doubled jail sentence. In the second, virtually identical scenario, the same quantum of bias is not a determinative factor, and a similarly situated defendant ends up receiving a radically different sentence. How can we practically distinguish between these two scenarios? In practice, no prosecutor, no jurist, no psychologist, and no lay fact finder can define motivations in five percent increments, so our legal standards should not be allowed to hinge on a factor that cannot be objectively measured.

Courts can choose between four different standards for determining the necessary quantum of contributory motivation derived from bias or animosity under the "because of" language of the typical hate crimes statute. These four standards are: a negligible but determinable amount of bias, a trigger amount, the primary cause, or the exclusive cause.[164] The choice of standard determines just how conclusive the substantial-factor test needs to be because the legislature has not specifically defined the

163. *See In re* M.S., 896 P.2d 1365, 1377 (Cal. 1995) (defining "because of" to require causation in fact); *Hennings*, 2009 WL 2960616, at *7 ("[I]f the defendant would not have committed the act but for the victim's race[,] . . . the 'cause in fact' element has been met." (citing *In re M.S.*, 896 P.2d at 1386)).

164. *See Hennings*, 2009 WL 2960616, at *6–7. The Iowa Supreme Court used a more generalized and less precise categorization scheme in which bias can be a zero percent motivating factor, a one-hundred percent motivating factor, or something else in between—dual intent or mixed motives. *Hennings*, No. 08-1845, slip op. at 7–10. The supreme court's analysis lacks precision because it does not address the arguable differences between different mixed-motive combinations that the substantial-factor test is meant to address.

required threshold within the hate crimes context.[165]

Under the first potential standard, any *negligible amount*, even a trace amount, could be enough.[166] This possibility is within the legitimate semantic range of the phrase "because of" if mixed motivations collectively add up to pass the trigger point.[167] However, this construction is arguably too broad and inclusive, and it does not tightly address the issue of cause and effect. Also, it would fail in practical application because it would include far too many people. Many individuals harbor minimal or latent biased feelings which, though morally reprehensible, should not rise to the level of independent criminal culpability. Finally, the smaller the quantum chosen to define our standard, the harder it is to actually recognize and measure the suspected bias, given the daunting challenge of reading other minds.

A second potential standard involves requiring a *trigger amount* of bias to be found.[168] A trigger is any factor that puts total motivational units over the 100-unit threshold, thus actually precipitating the underlying assault.[169] This quantum could be very small, as with the first standard, or it could be substantial depending on the total emotional or motivational threshold for action of the particular individual and the degree to which nonbias factors approach this threshold. This standard would suffice to satisfy a "but for" requirement. However, in practice, it is virtually impossible to calculate either the threshold itself, which will vary from one individual to another, or the proximity to that threshold the accused might have already reached before considering the bias component. Finally, if the trigger amount were a minimal one—akin to a straw that breaks the camel's back—it would suffer from the same weaknesses associated with the first potential standard.[170]

A third potential standard for determining whether an act was perpetrated "because of" a prohibited animus is that this animus must have served as the *primary cause*.[171] This is probably the best option given the intrinsic imprecision of this kind of internal psychological speculation.[172] A

165. *See id.* at *6.
166. *See id.*
167. *See id.* at *6–7.
168. *See id.* at *7.
169. *See id.*
170. *See id.*
171. *See id.* at *6.
172. *See supra* Part III (discussing the inscrutability of motivation).

"preponderance of the causation" standard—something akin to the familiar preponderance of the evidence standard—would arguably be appropriate. In the model used by the Iowa Court of Appeals, this standard would require a jury to determine beyond a reasonable doubt that the defendant's animus contributed fifty-one units to the 100-unit motivational calculus—the animus provided more than half of the causation.[173] This standard would require a "substantial factor" to actually be truly substantial when considering the imposition of a lengthy period of incarceration for an element as inscrutable as motivation. This standard gives judges and juries a wide margin for error in an inherently speculative analytical effort that is, by its very nature, prone to error. In fact, given the difficulty of confidently knowing anything about the motivational matrix of others, it can be argued that an even greater margin of error should be built into the process. This would involve a jury instruction that set out a percentage of motivation requirement even higher than fifty-one percent. These higher percentage requirements have analogs in terms of burden of proof concepts, where the law recognizes the clear and convincing threshold and the beyond a reasonable doubt standard.

Under a fourth potential standard for construction of the statutory "because of" requirement, bias must be shown to be the *exclusive cause*.[174] This is probably too narrow a standard, though under primary-cause analysis the court might want to push as close to this standard as possible without going all the way. It is also not likely that legislatures, though using ambiguous language, intended their language to be construed at either extreme of the theoretical connotational spectrum.[175] An exclusivity standard would exclude a hate crimes charge if any secondary motivation could be successfully asserted, yet even the most unambiguous hate crimes may have additional motivations.[176] Even a murderer can choose to rob his victim beforehand or kill partially in order to earn his reputation within a gang to which he is affiliated. Therefore, this constructional option should be rejected.

173. *See Hennings*, 2009 WL 2960616, at *7.

174. *See id.* at *6.

175. *See In re* M.S., 896 P.2d 1365, 1377 (Cal. 1995) ("[N]othing in the text of the statute suggests the Legislature intended to limit punishment to offenses committed exclusively . . . because of the prohibited bias."); *Hennings*, 2009 WL 2960616, at *6 ("The legislature did not choose to restrict the scope of the hate crime statute by qualifying it with words such as 'exclusively' or 'solely.' Therefore, we conclude that mixed-motivation or dual-intent assaults are not excluded from the scope of section 729A.2.").

176. *See supra* note 156.

B. *Specific Application of Solutions to* State v. Hennings

It can be argued that Hennings did not deliberately target a protected group.[177] Instead, he targeted individuals who triggered his felonious rage for other reasons, but these individuals also happened to be part of a protected group, albeit a group towards which Hennings clearly had an undeniably strong bias.[178] There is overwhelming evidence of unabashed racist attitudes on the part of Mr. Hennings,[179] but little or no evidence in the record that this racism was the specific cause of his criminal assault.[180]

Could racism have been a part of Hennings's motivational equation? Given his longstanding and well-documented racist sentiments,[181] it is likely to have been at least a part of his motivational mix. However, we cannot know if it played a significant role unless there was an unambiguous external concurrent manifestation of this bias driving the requisite *mens rea* intent.[182] This would have to be a verbal declaration with respect to the act itself. Such verbal evidence would logically have to be either: (1) contemporaneous to the crime, to show Hennings's state of mind at that time; (2) a prospective declaration of intent to commit the crime because of race; or (3) a retrospective declaration that race was the primary or exclusive reason for the crime.[183]

In this case there is no *prospective* evidence of a biased motivation for

177. Indeed, this is exactly what Hennings argued at trial and on appeal. *Hennings*, 2009 WL 2960616, at *6 ("Hennings insists that it is 'just as likely' he assaulted Aerean because the boys had been blocking the roadway or because of the comments Kwane made to him, rather than because of Aerean's race.").

178. *Id.*

179. *See id.* ("Hennings concedes that the jury had a basis for concluding he was a racist. He has made no effort to contest this.").

180. *See id.* at *2, *8 (noting only one boy claimed to hear a racist comment). However, the Iowa Court of Appeals viewed the facts of this case differently and, combining this evaluation with its lower quantum of bias standard and Hennings's actions the following day, held that Hennings's bias was a sufficiently substantial factor to warrant conviction for a hate crime. *See id.* at *8–10. The Iowa Supreme Court also concluded that "[t]here was substantial evidence supporting the State's position that Hennings' bias towards the boys' race played a causal role in his actions." State v. Hennings, No. 08-1845, slip op. at 9 (Iowa Dec. 23, 2010).

181. *Id*. at *3–4.

182. *See supra* Part IV (discussing the kinds of evidence needed to demonstrate causally relevant bias).

183. In this case, the Court of Appeals considered both contemporaneous and retrospective evidence. *Hennings*, 2009 WL 2960616, at *8.

the assault Hennings committed.[184] There are no claims that Hennings ever told anyone he intended to go out that day, or at any future time, and harm minorities because he hated them, because he thought they deserved it, or for any other reason or rationalization.[185] The nature of the encounter clearly shows it was spontaneous and unplanned.[186]

There is very minimal and highly debatable contemporaneous evidence of biased motivation that may have been operating at the time of the assault.[187] Only one out of five boys—the youngest one who was just age eleven—testified at trial that he heard the defendant use the word "nigger," and even he claimed that only a single use of this or any other racial slur occurred.[188] None of the other boys or witnesses heard Hennings use even a single racial epithet.[189] In fact, the boy closest to the defendant specifically testified that if "nigger" had been used, it would have greatly offended him, and he would certainly have remembered it.[190] The boy who claimed that a slur had been used only made the claim at trial fifteen months after the incident. It can be argued that making this kind of retrospective charge is all-too-common, and it is all-too-easy and convenient to make such an assertion without corroboration.

Without this one, potentially suspect claim, there is no *contemporaneous* evidence of biased motivation.[191] Even if a single, crude epithet were used, it still does not prove the defendant committed this assault *because of* race. It is an unfortunate fact of life that when crude tongues express outbursts of rage, for whatever reason, they are prone to use all kinds of profanities and derogatory terms. In this case, any racial slur that might have been used could easily be understood as just another expression of the same rage that motivated Hennings to perform the underlying crime. His nonracially motivated rage could have triggered both his assault and verbal tirade. If Hennings really did call the victims "niggers," this still does not necessarily indicate that the reason he assaulted the boys was because they are of a different race. His racial slur

184. *See id.* at *1–4. The only possible evidence of this nature would be whatever past actions caused Hennings's father to claim the family's racist views were well-known. *Id.* at *4.

185. *See id.* at *1–4.

186. *See id.* at *1–2.

187. *See id.* at *2, *8.

188. *See id.*

189. *See id.*

190. *See id.* at *2.

191. *See id.* at *2, *8.

may not have been the *cause* or motivation of his actions, but rather just another *effect* of the real cause—his unjustifiable rage at the kids for blocking the road and then mouthing off at him when challenged.[192]

There is also only one potential piece of *retrospective* evidence of race being the motivation for the assault. It comes from the statement Hennings made to the police during their next-day investigation.[193] Although this conversation provides a great deal of verbal confirmation of the racist *attitudes* of the defendant, the only possible statement that might speak to his *motivation* was that the boys "deserved" to get hit.[194] As misguided as this rationalization certainly is, Hennings is clearly saying that the boys deserved what they got because of what they *did*, not because of who they *are*.[195] They deserved to get hit because they did not "have enough sense to stay out [of] the f---in road," not because of their race.[196] Of course, given his racist worldview and his anger because of the interrogation of the police, Hennings intertwined his explanation with numerous racial slurs, but none of these ever approached a cause-and-effect claim.[197] His statements can be viewed as transparent, retrospective attempts to justify his actions, but they are not retrospective claims to having had a contemporaneous bias motivation during his assault.

The kind of retrospective statement required in order to establish a nexus between the assault and Hennings's evident hatred of African-Americans should be something equivalent to "I ran down *X because* I hate, or I am sick of, or I want to punish or intimidate, etc. . . . black people." However, we do not find anything remotely close to the kind of self-testimonial proof we need in order to know anything substantial about his actual motivation at the time of the crime.[198] When initially interviewed by the police, Hennings was not shy about declaring his bigoted views.[199] He was clearly not trying to cover up his beliefs or his motivation because in his mind he had done nothing wrong.[200] Yet—despite the frankness of this conversation—he did not say anything that could be considered

192. *See id.* at *1–2.
193. *See id.* at *3–4.
194. *See id.* Evidence of Hennings's racist attitude is seen in his repeated use of the words "monkey" and "nigger." *Id.*
195. *See id.*
196. *See id.*
197. *See id.*
198. *See id.* at *1–4.
199. *See id.* at *3–4.
200. *See id.*

explicit retrospective confirmation of a racial impetus for his criminal act.[201]

It is clear that from the facts of this case that Hennings's assault was the result of a spontaneous incident.[202] There was no long-term premeditation to target African-Americans for assault and clearly no intentional planning to execute his attack in a clandestine manner so as to avoid detection.[203] His crime was perpetrated in broad daylight in front of many witnesses after the boys crossed his path on the street.[204] If bias were the cause, we might wonder why there were no reported incidents of Hennings driving by minorities and trying to run them down or intimidate them with his vehicle in some other way, and why he had no history of previous racial incidents of any kind.[205] Of course, there is always a first time, but there is arguably something different about these circumstances. The difference in *Hennings* is that there were substantial and possibly even exclusive, independent nonbiased motivations for these acts.[206] These motivations were, of course, equally indefensible but have been fully punished through the sentence for the underlying assault. Nonbiased motivations fall outside the scope of the hate crimes statute that, arguably, was designed to apply only in situations where there is proof beyond a reasonable doubt that bias was at least the primary motive behind an underlying assault.

VIII. CONCLUSION

This Note has examined the dangers and difficulties of applying ambiguous hate-crimes-statutory-causality language against the backdrop of the challenges of reading the minds of others to discern the motivational matrix that drives their actions. As long as legislatures retain nebulous "because of" causality language, courts will be challenged to pick the appropriate place on the causality spectrum in order to decide what quantum of animus must be present to qualify an underlying crime as a hate crime, always remembering that hate crimes subject the perpetrator to a substantially longer period of incarceration.

201. *See id.*

202. *See id.* at *1–4.

203. *See id.*

204. *See id.* at *2.

205. The State never claimed that Hennings acted upon his racist views in any way before this one incident.

206. *See id.* at *1–2, *6. Nonbiased motivations included the fact that the boys had blocked the roadway and that one of them had talked back, cursed at Hennings, and physically challenged him. *Id.*

The purpose of this Note is to argue that judges should use their discretion to craft a cautious evidentiary standard that takes into account the inscrutable nature of the human mind and the inherently speculative and error-prone nature of any attempt to read it, especially with such a tremendous lifetime stigma and lengthy jail sentence hanging in the balance. A cautious approach, one that provides the necessary margin for error that is commensurate with the unique potential for error in this kind of analysis, would require that any demonstrated animus be at least the primary cause of the underlying crime. Any lesser standard runs the grave risk of applying a hate crime label and hate crime punishment to individuals whom the legislature and society at large never intended to include within the scope of hate crimes legislation.

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During the summer of 2009, when the Iowa Court of Appeals decided *Hennings*, the author was an extern at the Iowa Court of Appeals for the Honorable Edward M. Mansfield, the opinion's author. This Note was prepared after completing the externship, and the author bears sole responsibility for its contents.