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Recycled Hate: Tyler Clementi, Dharun Ravi, and Those in the Crossfire

Joseph Bui†

In the aftermath of Tyler Clementi’s tragic suicide, many called for the imprisonment and deportation of the young man they found to be responsible: his roommate, Dharun Ravi. Ravi briefly viewed and publicly ridiculed Clementi’s romantic encounters with another man. Clementi jumped off the George Washington Bridge shortly after. Punishing Ravi became a rallying cry for many progressive-minded people who believed that imprisoning and deporting Ravi would promote civil rights.

This Article complicates that narrative. Punishing non-citizens uniquely harshly for hate and bias offenses does not advance the goals of hate crime legislation. It subverts those goals. The disproportionate attention on Dharun Ravi and the South Asian community allows homegrown homophobia to go unchecked. The calls to deport and criminalize non-citizens feed into narratives that facilitate hate-motivated violence against people of color and the LGBT community. And the renewed tensions between the LGBT and South Asian communities allow conservatives to continue pursuing a policy of divide and conquer.

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† J.D., University of California, Berkeley, School of Law (2013); B.A. Legal Studies (Highest Honors), University of California, Berkeley (2009). Special thanks to Berkeley Law Professor Leti Volpp for her insights and support. I started writing this Article as a student in her thought-provoking class on “Asian Americans and the Law.” I also want to thank the editors at the Asian American Law Journal (AALJ) for their hard work on this piece—particularly Winny Young, Jennifer Le, Tony Huynh, and Chris Lau. Please note that the opinions expressed in this Article are solely my own and do not reflect the opinions of AALJ or any organizations with which I am affiliated.
INTRODUCTION

On September 19, 2011, Dharun Ravi and Molly Wei used a webcam to secretly watch Ravi’s roommate Tyler Clementi engaging in a romantic encounter with another male.\(^1\) Three days and another viewing attempt later, Clementi jumped off the George Washington Bridge, taking his own life.\(^2\) Clementi’s suicide and the role Ravi’s webcam may have played in pushing him off the bridge sparked national outrage. New York Times correspondent John Schwartz observed that the tragedy of Clementi’s death marked just the latest of several bullying-induced gay teen suicides in recent memory.\(^3\) The cases of Molly Wei and, in particular, Dharun Ravi subsequently became “message” trials—ones that are supposed to speak directly to the severe consequences of homophobic teen bullying and hate crimes. Prosecutors ultimately charged Wei and Ravi with violating invasion of privacy laws.\(^5\) They also charged Ravi with “bias intimidation.”\(^6\) The New Jersey bias intimidation statute imposes additional punishment on criminal offenders where “the predicate offense was committed under circumstances that caused the victim to be intimidated or to ‘reasonably believe’ the purpose was to intimidate.”\(^7\)

Although prosecutors offered Wei and Ravi plea bargains that did not include jail time, Ravi refused.\(^8\) Experts speculated that unlike Wei, Ravi

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2. *Id.*
4. See generally Ari E. Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 436 (2012) (observing that “it seems that the animating factor behind criminalization and other draconian punishments is to send a message, not to stop bullying.”)
6. Parker, supra note 1.
did not take a plea bargain “[m]ost Americans in his position would have jumped at” because of his citizenship status.  

Born in India, raised most of his life in the United States but still an Indian citizen, he was afraid he would be deported. He gambled he could prove to a jury that he was not some gay-bashing bigot, that the webcam he secretly turned on his roommate Tyler Clementi was a college prank that went tragically wrong. He lost his gamble and faces up to ten years in prison and deportation.

Cooler heads appear to have prevailed. The judge ultimately sentenced Ravi to thirty days in prison. And immigration officials have assured they will not try to deport him. Both the prosecution and defense nevertheless say they plan on filing an appeal.

Many commentators applauded Ravi’s prosecution and conviction—declaring victory on behalf of the gay and lesbian community and for the broader civil rights community. Steven Goldstein, chair of Garden State Equality, a New Jersey-based gay rights organization, found that the verdict sent “the important message that a ‘kids will be kids’ defense is no excuse to bully another student.” Goldstein was nevertheless deeply disappointed with a sentence he found to be too light and a “travesty of justice.”

http://newamerica.media.org/2012/03/dharun-ravis-biggest-liability-he-was-indian.php.

9. Id. But see Alice Gomstyn, Rutgers’ Ravi: ‘I Wasn’t the One Who Caused Him to Jump, ABC News (May 22, 2012), http://abcnews.go.com/blogs/headlines/2012/03/rutgers-ravi-i-wasnt-the-one-who-caused-him-to-jump/, where Ravi states that he did not accept a plea bargain because he was confident of his innocence. “I had to go up there in front of a judge under oath and say I intimidated Tyler because of sexual orientation – (to say that) I did this because I had this hate for gay people. . . . I don’t hate gay people.” Id.

10. Roy, supra note 8. Immigration authorities have since said they will not deport him to India, but their promise is not a permanent stay. See Geoff Mulvihiill, Dharun Ravi Will Not Be Deported, HUFFINGTON POST (June 18, 2012), http://www.huffingtonpost.com/2012/06/18/dharun-ravi-not-deported-ice-n_1606817.html. At any moment, immigration officials may change their minds and, as someone convicted of an aggravated felony, Ravi will have little recourse to stop them. For example, many in the Southeast Asian community who immigrated to the United States as refugees following the Vietnam War are now facing deportation orders for aggravated felonies they were convicted of or pled guilty to over twenty years ago. See, e.g., Michael Matza, 200 March in Philly to Protest Deportation of Four Cambodians, THE INQUIRER (Jan. 18, 2011), http://articles.philly.com/2011-01-18/news/27034660_1_protest-deportation-khmer-rouge-cambodian-men.


cases of bullying and cyber-bullying. Other pundits and commentators sought even more draconian measures to respond to bullying-related suicides.  

In contrast, few commentators asked whether it was appropriate to continue to use the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) as a means to enforce the criminal law. And no commentators asked whether it was appropriate in the context of hate and bias-motivated crimes. IIRIRA greatly expanded the types of crimes that made non-citizens eligible for deportation. Advocates calling for IIRIRA’s repeal correctly note that deportation is a severe consequence. Immigrants who commit aggravated felonies already face sanctions for their actions through the criminal law. Further, the acts that constitute aggravated felonies (and trigger automatic qualification for deportation) include even the pettiest of offenses, such as shoplifting and public urination.

The public’s failure to consider these questions is alarming, but not surprising. Pooja Gehi, the Director of Immigrant Justice at the Sylvia Rivera Law Project, notes that the modern push for gay rights has, at times, been at odds with the interests of communities of color. For example, laws that criminalize gay bullying in schools arguably encourage overreliance on a criminal justice system that inflicts disproportionate harm on immigrants and racial minorities. But how would the public consider the violence inflicted on the LGBT community while also considering the interests of immigrants and people of color? What would it mean to acknowledge that “it was in fact the violent beating, public harassment, and death of numerous South Asians in the late 1980s and early 1990s, that forced the passage of New Jersey’s first penalty-specific hate crimes law”? The district attorney’s aggressive prosecution of Dharun Ravi, and the continuing threat of deportation Ravi faces as someone convicted of a crime, presents us with an opportunity to consider these questions. Pundits

16. Waldman, supra note 4, at 386.
17. I do not have a source that establishes this as a matter of fact because of the difficulty in proving that a phenomenon did not occur. I make this comment based on my personal observation of the case and the media surrounding it. See Roy, supra note 8, for one commentator who suggested that the Dharun Ravi case was a missed opportunity to discuss the use of immigration law to punish those who violate the criminal law.
19. Cook, supra note 18; See, e.g., Christopher Shay, In Cambodia, a Deportee Breakdances to Success, TIME (Sept. 19, 2009), http://www.time.com/time/world/article/0,8599,1924835,00.html
21. See Gehi, supra note 20, at 372–73.
argue that the imprisonment and potential deportation of a South Asian teen benefits the civil rights community. This Article complicates that narrative. Through the simultaneous consideration of race, sexual orientation, and immigration status, I demonstrate that—rather than helping the LGBT community—calls to use the criminal justice system to address hate-motivated crimes may make immigrants, people of color, and the LGBT community more vulnerable. This is especially true for LGBT immigrants of color.

In Part I, I discuss the utilitarian and retributivist goals hate crime legislation aims to achieve. I note that we may punish those who commit hate crimes more harshly because 1) they are more likely to escape criminal liability and 2) because they inflict more harm on the victim, on the victim’s targeted community, and on society.

In Part II, I explain why calls to criminally sanction and deport non-citizens for hate crimes frustrate the utilitarian and retributivist purposes of hate crime legislation.

In Part III, I discuss how penalizing non-citizens for bias offenses more harshly than citizens who commit comparable acts may expose the LGBT community to more hate violence, not less. I make two arguments to support this claim. First, I discuss how punishing non-citizens more harshly for hate or bias-motivated offenses suggests that homophobia is an “immigrant problem.” This, in turn, masks the homegrown discrimination against the LGBT community that informed Ravi’s actions and Clementi’s self-hatred. Second, I explain that punishing non-citizens more harshly for hate or bias-motivated offenses feeds into broader narratives that encourage war with the East. I then discuss how U.S. militarism fosters a climate that breeds private hate-motivated violence against the LGBT community and immigrant communities.  

In Part IV, I assert that calls to punish immigrants more harshly than citizens for hate crimes escalate tensions between marginalized communities and disrupt coalition building. The relationship between people of color and the LGBT community is a tenuous one that some conservative groups have attempted to pit these communities—both generally liberal voting blocs—against one another.

I conclude by urging marginalized communities to consider how their political activism is connected and to consider what that means for those


24. For example, National Organization for Marriage (“NOM”) internal documents revealed that NOM’s strategic goal is to drive a wedge between gays and blacks—two key Democratic constituencies—find, equip, energize, and connect African American spokespeople for marriage; develop a media campaign around their objections to gay marriage as a civil right; provoke the gay marriage base into responding by denouncing these spokesmen and women as bigots. Adam Serwer, ‘You Can’t Equate Your Sin With My Skin’, MOTHER JONES (Sept./Oct. 2012), http://www.motherjones.com/politics/2012/07/you-cant-equate-your-sin-my-skin.
least advantaged in their respective communities.

I. WHY HATE CRIME LEGISLATION

In early 2012, the Asian American community memorialized the thirtieth anniversary of Vincent Chin’s death. 25 Chin was at a strip club for his bachelor party when two white men confronted him. 26 Ronald Ebens and Michael Nitz—a Chrysler plant supervisor and his stepson—held Chin personally responsible for the loss of jobs in the U.S. auto industry to Japan. Ebens shouted, “It’s because of you little motherfuckers that we’re out of work.” He presumably did not recognize or care that Chin was of Chinese descent. 27 Ebens and Nitz then followed Chin out of the club and stalked him for over twenty minutes before repeatedly bludgeoning him with a baseball bat. 28 Chin passed away from the injuries four days later. 29 The price these men paid for taking Chin’s life? No jail time, 30 three years of probation, 31 and $3,000 in fines. 32

Chin’s death and the slap-on-the-wrist punishment the men who killed him received illustrate the unique nature of hate crimes. Around the time of Chin’s death—presumably against a backdrop where other criminal offenders targeted their victims due to aspects of their identities—the Anti-Defamation League drafted a model intimidation statute that became the basis for modern hate crime legislation. 33 The model intimidation statute provided that “[a] person commits the crime of intimidation, if, by reason of the actual or perceived race, color, religion, national origin, or sexual orientation of another individual or group of individuals,” he violates certain sections of the penal code, including “criminal trespass, criminal mischief, harassment, menacing, assault, and/or other statutorily proscribed criminal conduct.” 34 Modern hate crime statutes generally define hate crimes as acts of violence motivated by animus against certain

27. Alethea Yip, Remembering Vincent Chin, ASIAN WEEK (June 5–13, 1997), http://yellowworld.org/antiasian_violence/263.htmlhttp://www.asianweek.com/061397/feature.html. I, of course, do not suggest that their act would have been any less egregious had Chin been, in fact, of Japanese descent. I only make this observation because, as Frank Wu has noted, it illustrates the power of and danger behind “you all look the same.” See Wu, supra note 25.
29. See Wu, supra note 25.
30. See id.
31. Id.
32. Id.
34. Id.
characteristics of a person’s identity. While race, color, religion, national ancestry, and sexual orientation are included in most state hate crime legislation, some statutes also include disability, sex, gender identity, age, political affiliation, and homelessness. Hate crime statutes are structured in many different ways. Nevertheless, “each variation has the end result of enhancing the penalty or sentence for crimes motivated or inspired by hate or bias.” In this Part, I discuss how utilitarian and retributivist rationales for hate crimes may explain why the state issues harsher criminal sanctions when a person is motivated to commit a crime due to animus toward a particular community.

A. Utilitarian Justifications

Utilitarian theorists posit, “criminal sanctions should be established only where they would confer some net benefit or desirable consequence upon society at large.” Sanctions “may be justified on the grounds that they deter (generally or specifically), incapacitate, reinforce social norms, satisfy a desire for revenge, or rehabilitate, where rehabilitation is understood as eliminating the propensity to engage in crime rather than improving the character of the criminal for his own sake.” This does not suggest that actors who commit the same offense must be punished to the same extent. For instance, if actors who commit crimes due to racial animus are more likely to face little or no consequences for their actions relative to those who commit crimes for other purposes, the criminal justice system’s current sanctions may not deter all similar criminal acts equally. After all, as legal philosopher Kent Greenawalt explains, general deterrence is supposed to afford rational self-interested persons an incentive not to commit crimes. Penalties should consequently increase as the chance of detection decreases.

Indeed, those motivated to commit crimes due to feelings of animus toward particular communities are uniquely positioned to escape criminal liability. The American jury system entrusts to the people significant discretion in finding guilt, which leaves it vulnerable to the biases of the

36. Dillof, supra note 33, at 1023. Forty-five states and the District of Columbia currently have some version of hate crime legislation. Of these states, thirty-two cover disability; thirty-one cover sexual orientation; twenty-eight cover gender; fourteen cover gender-identity; thirteen cover age; five cover political affiliation; and four cover homelessness. Id.
37. McCoy, supra note 35, at 649.
38. Dillof, supra note 33, at 1025.
39. Id.
Looking at cases in which men murder their wives after (perceived) infidelity, feminist legal scholar Victoria Nourse explains that jurors, judges, and other legal decision makers treat criminal defendants with more leniency when they can relate to the defendants’ motives for committing the crimes.\(^{42}\) Nourse discusses the case of Kenneth Peacock to illustrate her point.\(^{43}\) When Peacock walked in on his wife in bed with another man, he reached for his shotgun to scare her lover away.\(^{44}\) Peacock did not, however, then shoot his wife in a sudden lack-of-control scenario that a provocation defense envisions.\(^{45}\) Instead, he waited several hours and drank a gallon of wine before using a loaded shotgun to end her life.\(^{46}\) Yet “[t]o the judge assigned to this case, there was no question that Peacock suffered adequate provocation resulting in ‘uncontrollable rage.’” He sentenced Peacock to eighteen months to be served on work release, and within two weeks, Peacock was out of jail.\(^{47}\) Nourse explains that “the key here is the judge’s openly sympathetic reaction, which verged on suggesting that the judge would have done the same himself since the reason for this killing, the provocation, was enough to propel any man to ‘corporal’ punishment.”\(^{48}\)

The same phenomenon likely occurs within the context of hate and bias-motivated crimes, where the actor targets her victims due to character traits that make them vulnerable to discrimination. Hate crimes do not occur in a vacuum. Rather, they are informed by public opinion and the current political landscape. Few know this better than Sikhs, Muslims, and others believed to be of Middle Eastern or South Asian descent. In the immediate aftermath of the terrorist attacks of September 11, 2001, members of these communities reported more than one thousand incidents of hate violence in the United States.\(^{49}\) While the public deplored these crimes as wrong, many did not equate the hate violence inflicted upon these communities with the type of senselessness, irrationality, and malice


\(^{43}\) Id. at 41.

\(^{44}\) Id.

\(^{45}\) See id.

\(^{46}\) Id.

\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) Leti Volpp, The Citizen and the Terrorist, 49 UCLA L. REV. 1575 (2002). The estimate of 1000 incidents in all likelihood vastly underestimates the violence. “Between September 11, 2001, and January 31, 2002, in six jurisdictions in the state of California alone, the state attorney general reported 294 incidents of anti-Arab hate crimes . . . under investigation.” Id. at 1575 n.1.
typically associated with violent crime. Many in the public, instead, understood these acts as inarticulate expressions of “socially appropriate” anger.

Shortly following the 2012 Oak Creek Massacre—where a white supremacist entered a Sikh Gurdwara (place of worship) and shot and killed men, women, and children—Deepa Iyer, the Executive Director of South Asians Leading Together, wrote an impassioned plea to USA Today’s online readers. Iyer called for an end to the hate-motivated violence directed toward Sikhs and Muslims in the Arab and South Asian communities. Iyer explains that the shooting at Oak Creek added to a lengthy history of discrimination that followed September 11. This discrimination manifests itself in different ways: a mosque blocked for the past two years from being developed in Tennessee; a Bangladeshi cab driver brutally assaulted in New York because his passenger thought he was Muslim; and a mosque in Missouri destroyed by a suspected arson a day after the Oak Creek tragedy. It [also] extends to politicians, such as Rep. Peter King, R-N.Y., [who held] anti-Muslim hearings, and Rep. Michele Bachmann, R-Minn., [who made] unsubstantiated claims [regarding] disloyal Muslims infiltrating our government.

Despite the length of time that has passed since September 11, many wholly dismissed Iyer’s concerns. “Charles Semardo,” the first user to respond, reasserted the Muslim-as-terrorist trope in justifying the discrimination directed at these communities:

The shoe bomber, Ft. hood, little rock, NYC attempted bomber... yeah... no threat there. Actual terrorists who belong to a worldwide warrior religion base [sic] on JIHAD [sic] and extermination of jews [sic] and infidels [sic]. yeah, [sic] lets [sic] forget all about that.

If juries are likely to resonate with hate crime offenders, the threat of more severe punishment may be necessary to sufficiently deter others from committing these acts.

B. Retributivist Justifications

But utilitarian justifications cannot justify hate crime legislation on their own. Legal philosophers criticize utilitarianism for producing results

51. Id.
53. Id.
54. Id.
55. See id.
56. Id.
that violate basic principles of fairness.\textsuperscript{57} For example, as criminal law scholar Anthony Dillof explains, “utilitarianism would recommend such counter-intuitive practices as punishing minor offenses severely and convicting those known to be innocent if sufficient deterrence was achieved.”\textsuperscript{58} I consider the retributivist justifications for hate crime legislation to fill the void.

Retributivism is a “straightforward theory of punishment: We are justified in punishing because and only because offenders deserve it. Moral culpability (‘desert’) is viewed as both a sufficient and necessary condition of liability to punitive sanctions.”\textsuperscript{59} Retributivism helps illustrate why hate crime offenders may deserve harsher punishments. Retributivist theorist Herbert Morris explains that the criminal law serves to enforce a social contract in which individuals in a society exercise self-restraint in exchange for the “noninterference by others with . . . matters such as continuance of life and bodily security.”\textsuperscript{60} While anyone who violates the criminal law necessarily violates this social contract, all criminal actors are not equally culpable. The actor’s intent, the harm he has caused, or both, help determine his moral culpability and the extent of criminal sanctions the state should impose.\textsuperscript{61} For instance, in determining the severity of murder charges, those who act with deliberation and premeditation are found to be more culpable.\textsuperscript{62} Likewise, those who intend to commit greater acts of harm are judged as more culpable.\textsuperscript{63}

Both rationales help to explain why the state punishes hate crimes more harshly than other offenses. A criminal actor who targets a particular type of victim necessarily acts with some level of deliberation. Further, “[t]he harm associated with hate crime is considered to be more insidious and far-reaching than the harm associated with the same non-hate-motivated behavior.”\textsuperscript{64} This is because “hate crimes attack more than the physical well-being of the victim.”\textsuperscript{65} They attack characteristics that are

\begin{footnotes}
\footnotetext{57}{See Dillof, supra note 33, at 1025–26.}
\footnotetext{58}{Id. at 1026.}
\footnotetext{62}{Intent-based retributivists, for example, find that moral culpability is so fundamentally tied to the actor’s intent that they would not reduce a person’s punishment based on the actual harm the person caused. See Meghan J. Ryan, Proximate Retribution, 48 Hous. L. Rev. 1049, 1062–63 (2012). “They believe that it is unfair to treat culpable defendants differently based on the ‘moral luck’ of whether their culpable actions actually caused harm.” Id.}
\footnotetext{63}{Id.}
\footnotetext{64}{McCoy, supra note 35, at 650.}
\footnotetext{65}{Id. at 651.}
\end{footnotes}
fundamental to the victim’s identity. Victims may have unique difficulties coping with the attack since they were specifically targeted for characteristics they either cannot (easily) change or should not be asked to change. Hate violence has a uniquely harmful effect on society as well. When someone commits a hate crime, he sends a message to the victim’s community: they, too, are despised, unwelcomed, and vulnerable to attack. Hate violence may also aggravate tensions between different communities, and increase the possibility of retributive violence. Lastly, hate crimes threaten “the broad social order,” the idea that different members of society should be equally protected. Responding to the slap-on-the-wrist the Chrysler plant manager and his stepson received for killing Vincent Chin, his mother, Lily Chin, asked, “What kind of law is this? What kind of justice? This happened because my son is Chinese. If two Chinese [people] killed a white person, they must go to jail, maybe for their whole lives . . . [Something] is wrong with this country.”

II. THE LIMITATIONS OF PUNISHMENT

Shortly after Clementi’s suicide, talk show host and lesbian icon Ellen DeGeneres described her personal devastation at the premature death of yet another bullied gay teen and demanded that “something must be done.” To many, the answer to DeGeneres’ call to action was state-induced punishment. Jane Clementi spoke before a packed courtroom in New Brunswick, New Jersey—which included the young man she found responsible for her son’s death—and made a plea for justice that echoed Lily Chin’s sentiments thirty years before: “The court needs to show . . . this is not right and it was not acceptable behavior and it will not be tolerated.” Unsurprisingly, when NPR commentator Sandip Roy called on the public to use Ravi’s case to spark a national conversation on gay suicides and “America’s broken immigration system,” few in the public wanted to engage him. The public wanted blood as proof of justice.

66. See id.
67. See id. at 652.
68. See id. at 652–63
69. Id. at 653.
70. Id.
74. See Roy, supra note 8.
75. See id.
A. Punishment as an Expression of (In)equality

Retributivists argue that it is right to punish a criminal offender because it expresses the hate that society should feel for him. Although there is some disagreement, retributivists generally agree that the extent of punishment he receives (and the amount of hate society should feel) can be measured by the proportionality principle: the more morally repugnant the actor (as determined by the actor’s intent and the harm caused), the harsher the punishment. In this Section, I examine the public’s call for retributivist justice in the Dharun Ravi/Tyler Clementi case. I argue that non-citizens are not any more culpable than citizens who commit comparable acts and explain how calls to punish non-citizens more harshly stem from the inequities immigrants face when navigating the legal system, rather than from a commitment to equality under the law.

1. The Moral Culpability of Non-Citizens

If moral culpability and the extent to which the state punishes illegal acts are determined by the intent of the criminal actor, the harm the criminal actor has caused, or both, non-citizens cannot be any more culpable than citizens who commit comparable acts. Indeed, scholars argue that non-citizens who commit crimes may actually be less culpable as they may not act with the intent to violate the law or the social norms that the law attempts to enforce. The Harvard Law Association found that there are two situations in which it may be fair to consider the cultural background of the criminal defendant to mitigate their sentences.

First, such a person may have committed a criminal act solely because she was ignorant of applicable law. . . . Second, an ordinarily law-abiding person raised in a foreign culture may have committed a criminal act solely because the values of her native culture compelled her to do so.

These rationales are admittedly overly simplistic. They fail to take into account the way culture changes through debates within communities and interactions between communities. The rationales also risk reducing people from multicultural backgrounds into simple stereotypes. For instance, when the Harvard Law Association asks whether the defendant was “compelled” to act in a particular way “solely because” of some pre-determined cultural code—rather than considering the defendant’s actions in light of her position within the social structure of her community—the Association assumes that people from multicultural backgrounds lack individual agency

77. See Dillof, supra note 61, at 653.
and act in a depoliticized vacuum.  

Nevertheless, these rationales highlight why non-citizen defendants may be less morally culpable than their counterparts blessed with U.S. citizenship. The American legal system operates against the backdrop of American culture. Criminal law scholar Cynthia Lee explains that Americans who commit crimes do not have to specially argue that their cultural background influenced their actions because dominant social norms already support their claims of reasonableness. Moreover, there is no risk of inadequate translation because all the relevant decision makers—the judge, jury, and prosecutor—are part of the same culture. Thus, “treatment persons raised in a foreign culture differently should not be viewed as an exercise in favoritism, but rather as a vindication of the principles of justice.”

Various socializing institutions such as the family, school, and place of worship can reasonably be expected to have instructed [people raised in this country] about the norms upon which society’s laws are based” and which legal decision makers understand. “A new immigrant, however, has not been given the same opportunity to absorb . . . the norms underlying this nation’s criminal laws.”

It may sound offensive and paternalistic to suggest that immigrants may be less culpable when they commit hate crimes. Indeed, legal decision makers have relied upon a view of non-Western cultures as unchanging, backwards, and intolerant to justify applying the cultural defense in cases involving in-group gendered violence. Critical Race Theorist Sherene Razack notes that when a judge takes the cultural contexts of Aboriginal men during a rape trial, “i[t] can mean, and it has, that the rapes are viewed as a kind of cultural practice: these people do these kinds of things.”

Considering how a defendant’s culture may have informed his actions does not necessarily lead to that result, though. A defendant’s cultural context may reveal that he did not intend to violate the norms that underlie those offenses—even in the case of hate crimes. For example, a lesbian Jewish-American Holocaust survivor who kills a German-American police officer after he asks for her identification does so within a specific cultural context. She may have killed him “due to” his race. But as someone who fled a racist regime in which German police officers (hypothetically) approached gay Jewish women to sexually assault them, her actions may have been informed by a belief that she needed to protect herself, rather

79. See Leti Volpp, (Mis)identifying Culture: Asian Women and the “Cultural Defense” 17 HARV. WOMEN’S L.J. 57, 98 (1994) for a richer discussion about the essentializing nature of the cultural defense.


82. Id.

83. Id.

84. SHARENE RAZACK, LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN CLASSROOMS AND COURTROOMS 19 (Univ. of Toronto Press, 1998).
than the type of animus hate crime legislation envisions.

2. The Racism and Xenophobia Informing Calls to Punish Non-Citizens

During and after Ravi’s case, many nevertheless called for Ravi’s imprisonment and deportation, citing his background as a non-citizen as reason to punish him more harshly. Many responded to news of the U.S. Immigration and Customs Enforcement (“ICE”) decision not to deport Ravi with moral outrage. One person, for instance, called Ravi a “monster” that “should be deported. He is not going to be deported and needs to suffer extreme pain the rest of his miserable dam [sic] life.”

How do we make sense of the calls to imprison and deport Dharun Ravi for a non-physical act that, legally speaking, may only have a tenuous connection to Clementi’s suicide? Ari Waldman explains that what makes punishment attractive following gay bullying cases is “not the knowledge that it will stop bullying in schools,” This impulse is, instead, motivated by “the public’s emotional and retributive reactions.”

The demand for harsh, retributivist justice makes non-citizens especially vulnerable. The public is not always rational or fair. To the contrary, the public’s sense of moral outrage is informed by the extent to which we relate to the parties. To quote Micah West, a friend and classmate who was recently acknowledged for his work in Berkeley Law’s clinics:

We live in a country where race and class profoundly shapes who dies, who lives, and under what conditions. The Death Penalty Clinic taught me just how literal this is. In America, you’re 11 times more likely to receive the death penalty if the victim is white than if the victim is black, and 22 times more likely to receive the death penalty if the defendant is black and the victim is white.

Jeffrie G. Murphy and Jean Hampton’s retributivist-based theory of

85. I do not suggest that Ravi should be punished less harshly than a citizen in this case. I only point out that Ravi’s actions are not any more egregious due to his citizenship status.
86. Mulvihill, supra note 10.
87. I initially described this as a “non-violent act,” but this Article’s insightful editor, Jennifer Le, correctly noted that we can understand Ravi’s acts as forms of emotional and social violence not unlike the violence inflicted in emotionally abusive relationships.
89. Waldman, supra note 4, at 386.
90. Id.
91. Andrew Cohen, Micah West ’13 Wins Sax Prize for Excellence in Clinical Advocacy, BERKELEY LAW (April 24, 2013), http://www.law.berkeley.edu/15222.htm. See also JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 368 (West Academic Publishing, 5th ed. 2007), which cites a “study commissioned by the Maryland Governor Parris Glendening, a supporter of the death penalty,” which “found that from 1978 through 1999, blacks who killed whites were significantly more likely to face the death penalty in Maryland than blacks who killed blacks or white killers (regardless of the race of the victim).”; Adam Liptak, Death Penalty Found More Likely When Victim is White, N.Y. TIMES, Jan 8, 2003, at A12.
punishment as a form of victim vindication helps explain this phenomenon. Murphy and Hampton assert that “those who wrong others . . . incorrectly believe or implicitly assume that their own value is high enough to make this treatment permissible.”

Punishment is supposed to assert “moral truth in the face of its denial.” If the offender suffers the way the victim has, punishment informs the offender and society that their respective values as members in society are back at equilibrium. What equilibrium are they returning to though? When juries systematically sentence black defendants more harshly for killing white victims, juries both reflect and reinforce a message that white life is more valued than black life. A black man who claims that he is morally superior to a white man by committing a crime against him can be understood as making such an outrageously false claim that juries must punish him more harshly so he knows “his place.”

A 2004 study by Services and Advocacy for Asian Youth (“SAAY”) concluded that, relative to other racial groups, Asian Americans are also punished more harshly by the criminal justice system. Even though “overall arrest rates for Asian Americans were lower than for other racial groups, their conviction rates were 28 percent higher and they were placed into institutions at significantly higher rates than African American, Latino/a, or white youth.”

Northwestern Clinical Professor Sheila A. Bedi explains that “Asian Americans are often devalued as compared to their white counterparts, both when they are victims and perpetrators of crime. . . . The consistent message . . . directed against Asian Pacific Americans is that you are the foreigner, you do not belong here, you are not an American.”

Because Asian Americans are seen as undeserving of citizenship and inclusion, they must be reminded that their presence in this country is a privilege that can and will be taken away when they commit crimes. They, too, must learn “their place.”

This devaluation may help explain the calls to deport Dharun Ravi. As “Gabrielle Rossi” wrote in response to the news that ICE would not deport Ravi:

Ravi harassed a citizen of this country and invaded his privacy and very well may have contributed to Clementi’s state of mind in deciding to commit suicide. . . . [H]e should be deported if he wants to behave in that way in this country. Being in this country is a privilege [sic] not a right if your [sic] are not a citizen of the US [sic].
Likewise, in explaining his or her moral outrage at ICE’s decision to not deport Ravi, “manmi1” wrote that Ravi is “very typically [sic] of Indian people I’ve known. They have a superiority complex and treat others badly, especially if they have a little priviledge [sic].” Underlying these arguments are the problematic beliefs that: 1) South Asians are prone to treat others badly—a revealing suggestion in light of popular beliefs that Asians and Asian Americans are culturally backwards, primitive, and subordinating; 2) South Asians are the same, even if those with “a little priviledge [sic]” may be more prone to wrongdoing; and 3) it is worse when an immigrant commits a crime because he does not belong here. As a South Asian and non-citizen, Ravi’s social transgressions are considered to be more egregious and to reflect traits inherent to him and others in his community.

B. Punishment as a Failed Attempt to Shield the LGBT Community from Violence

Deporting non-citizens who commit hate crimes also fails to shield the LGBT community from violence. While one of the “dominant justifications for punishment is deterrence”—the idea “that the law must sanction deviant acts to uphold the social order”—empirical data does not prove that punishment effectively deters crime.

Georgetown Law Professor Mari Matusda explains:

We have repeated, longitudinal studies proving that the most effective intervention to keep a person on track for a useful and productive life is early intervention. We could build and operate twice as many prisons at a cost greater than what we would pay to fund Head Start in full, and never make a dent in crime. Our love affair with punishment has eclipsed what

99. Id.
100. See Leti Volpp, Feminism Versus Multiculturalism, 101 COLUM. L. REV. 1181, 1185 (2001), where, in the context of Asian Americans, Professor Volpp challenges the “ubiquitous claim that minority and third world cultures are more subordinating than Western culture,” attributing these beliefs to a “history of colonialism, liberalism, depictions of the feminist subject, and binary logic” which positions the liberated West against the oppressive East. See also Heben Negatu, 10 Ridiculously Offensive Things People Tell Asian Women on OKCupid, BUZZFEED (April 18, 2013), which documents the offensive ways non-Asian men try to attract Asian women on OKCupid. Approaches include expressing a desire for submissive women, as well as promises that they will treat Asian women with respect in a way that Asian men are allegedly incapable of doing. As one such male on OKCupid wrote:

Ni hao ma! You’re probably used to men who treat you like crap. Men who believe they own women. You have seen your father beat your mother or force her to do all of the housework while he went off gambling, and you are probably used to boyfriends who made you feel inferior for being a woman, who tried to control you, who forced you to cook and clean and tried to rape you . . . In my culture, that sort of behavior is unacceptable . . . If you are tired of men who mistreat you, please get in touch with me . . .

Id. When the Asian woman he pursued responded and challenged the racism underlying his presumption that Asian men are uniquely sexist, he then instructed her to “go [sic] get raped you dumb ch1nk [sic] whore [sic].” Id.

we know about prevention: poor children who participate in Head Start are far less likely to grow up to participate in crime.102

Assuming arguendo that criminal sanctions are an effective deterrent, there should be little concern that current sanctions do not serve as a sufficient deterrent for non-citizen offenders. Hate crime legislation ensures that all convicted offenders are punished more harshly than those who commit similar acts for different reasons.103

Further, contrary to popular conception, immigrants (regardless of legal status) are less likely to commit crimes than their counterparts with citizenship.104 Immigrants and people of color are also less likely to commit hate and bias-motivated crimes.105 While Dharun Ravi’s decision to broadcast Tyler Clementi’s romantic encounters with another man made major headlines and sparked a national discussion about violence directed toward the LGBT community, cases in which a non-white offender targets a white gay teen are far from the norm. A 2011 report conducted by the National Coalition of Anti-Violence report found that “[h]ate crimes disproportionately targeted LGBT people of color,” and that “[m]ost offenders of these violent hate crimes are white men.”106

To the extent that non-citizens commit crimes due to the cultural misunderstanding that multiculturalists allude to when discussing the need to consider cultural evidence in criminal cases, USC Political Science Professor Allison Renteln explains that “[p]unishment, no matter how severe or light, would provide notice to the ethnic community that the conduct is not permissible. In many cases, the fact that the act is condemned may be sufficient to achieve specific deterrence. The severity of the punishment is inconsequential to deterrence.”107

Lastly, unlike the Chrysler plant supervisor and his stepson who killed Vincent Chin thirty years ago, non-citizens are not a favorable class of persons within the criminal justice system able to avoid criminal liability. Rather, immigrants of color are disproportionately subjected to harsh

104. Deborah Schurman-Kauflin, Immigrants Have a Lower Crime Rate, PSYCH. TODAY (Feb. 13, 2013), http://www.psychologytoday.com/blog/disturbed/201302/immigrants-have-lower-crime-rate. Some social scientists assert that, in fact, an influx of first-generation immigrants “actually make communities safer,” citing the nation’s most populated cities as proof. Joel Rose, Does Crime Drop When Immigrants Move In?, NPR (March 8, 2013), http://www.npr.org/2013/03/08/173642807/does-crime-drop-when-immigrants-move-in. “Police statistics show that Sunset Park is much safer than it was 20 years ago. Homicides are down more than 90 percent. Crime rates have dropped all over New York City since 1990—but especially in neighborhoods that have high immigration.” Id.
106. Id.
criminal sanctions. This is hardly surprising, given the disadvantages immigrants face in navigating the legal system due to their citizenship status, limited material resources, unfamiliarity with the American legal system, and racial or ethnic background. Some scholars worry that the outside interests benefiting from a prison system that generates billions of dollars may lead to “the building of more prisons, the enactment of harsher laws, and the mass incarceration of poor people.” These interests include politicians using a tough-on-crime approach to gain votes, the mass media highlighting local crime to attract viewers, and rural areas turning to prison development to boost local economic development. To the extent these scholars are correct, non-citizens are uniquely vulnerable to feed these interests. When non-citizens commit aggravated felonies and face deportation, the Immigration and Naturalization Service (“INS”) may potentially detain them indefinitely.

III. HATE CRIME LEGISLATION, IIRIRA, AND INFLECTING VIOLENCE ON THE LGBT COMMUNITY

In *The Citizen and the Terrorist*, Berkeley Law Professor Leti Volpp explains that private, hate-motivated conduct bears a relationship with the actions of the state. The state may not explicitly endorse particular practices, but the state’s actions may nevertheless facilitate a climate that encourages these practices. For example, “[i]n simultaneously advocating policies of colorblindness for citizenry while engaging in racial profiling for noncitizens, and publicly embracing all religions while particularly privileging Christianity, the [Bush] administration . . . in the name of democratic inclusion, disingenuously excluded” racial and religious minorities.

We can understand the relationship between hate crime legislation, and IIRIRA as an example of how public actions inform private criminal conduct. The media’s sensational reporting of the Ravi/Clementi case, and the public’s calls to imprison and deport Ravi for his actions send a message: the South Asian community must be more culpable for committing hate crimes, more prone to committing them, or both. As one online commentator exclaimed in response to ICE’s decision to not deport Ravi, “Why the He!! [sic] not? Just what we need is another homophobe

108. See Gehi, supra note 20, at 372–72.
110. Id. (citations omitted).
112. See Volpp, supra note 49, at 1582.
113. See id. at 1583.
114. Id.
that caused another’s death. . . . This totally removes any deterrent [sic] for legal immigrants to be law abiding. I mean, who cares? They apparently get to stay here anyway.” The reader does not, of course, explain why ICE does not deport citizens who committed the same act if it was so important to serve deterrent purposes.

In this Part, I argue that attributing the harm Dharun Ravi inflicted on Tyler Clementi to Ravi’s community and cultural background exposes the LGBT community to more violence, not less. First, I argue that hate crime legislation, when understood in relation to IIRIRA, suggests that sexism, homophobia, and other forms of in-group discrimination are “immigrant problems.” This subsequently permits the homegrown homophobia informing anti-gay hate crimes to go unchecked. Second, I argue that punishing non-citizens more harshly feeds into the misguided notion that the United States is so open, so tolerant, and so liberated that when it invades other countries, it is right to do so and necessarily brings freedom to those countries. I then link U.S. militarism to hate-motivated violence inflicted on immigrants and the LGBT community.

A. Demonizing the Other, the Erasure of Homegrown Homophobia, and Hate Crimes

Commentators have long observed that the crime and punishment model serves to absolve society of our collective responsibility to address the social conditions that trigger criminal conduct by scapegoating individuals. This concern is magnified where persons of Asian descent commit crimes—particularly crimes informed by sexism or homophobia—due to stereotypes that Asian Americans are sexist, homophobic, and representative of their whole communities. Berkeley Law Professor Leti Volpp explains:

[Incidents of sexual violence or gender subordination in the West are frequently thought to be exceptional, as reflecting the behavior of a few deviant individuals—rather than as part of Western culture. In contrast, incidents of violence in Asian or Asian American communities are thought to characterize the cultures of entire nations.]


116. See Golash-Boza, supra note 109, at 302 (“In 1998, Angela Davis pointed out that, ‘[m]ass incarceration is not a solution to unemployment, nor is it a solution to the vast array of social problems that are hidden away in a rapidly growing network of prisons and jails . . .’”). See also Matsuda, supra note 102, at 323 n.25 (1998), where Professor Matsuda explains that “individuals are responsible for their own choice[s] to participate in crime and we are all responsible for the creation of social circumstances that increase bad choices.”

117. Leti Volpp, The Excesses of Culture: On Asian American Citizenship and Identity, 17 ASIAN AM. L.J. 63, 65–66 (2010). See also Volpp, supra note 100, where Professor Volpp explains how presumptions that certain cultures are uniquely bad for women are based on the idea that immigrants are culturally determined, and “hides the forces besides culture that affect women’s lives, elides the way women exercise agency within patriarchy, and masks the level of violence within the United States.” Id.
Although Dharun Ravi has lived in the United States since he was six years old,\textsuperscript{118} and Molly Wei was born in the country,\textsuperscript{119} many nevertheless attributed their actions to their race and culture in a way that rarely happens to other Americans.

Readers who responded to online articles about the Ravi/Clementi case claimed that it was “no surprise that it was two Asian American students accused of bullying Clementi”; that Ravi acted in a way that was “symptomatic of an abusive, straight, privilege[d]” male of South Asian descent; that because “homosexuality is a taboo topic in Indian and South Asian communities,” it “caused Dharun Ravi’s alleged bias;” and that ICE should not only deport Ravi, but his entire family since “[t]hat’ll free up some jobs for the US [sic] citizens who are out of work.”\textsuperscript{120} In contrast, as \textit{Jezebel} contributor Katie J.M. Baker observes, “[w]hen yet another privileged white guy storms into a school or movie theater and kills dozens of people, we assume there’s something wrong with his brain instead of wondering whether his murderous rage has anything to do with good ol’ American macho entitlement.”\textsuperscript{121}

By punishing non-citizens more harshly due to their citizenship status when they commit hate or bias-motivated crimes, the law endorses the view that these forms of discrimination are, indeed, “immigrant problems”—not ones that “we” should be concerned about.

To be clear, Ravi’s decision to view and publicly ridicule a gay roommate’s romantic encounter is an expression of homophobia. It is not simply an “insensitive” prank that has been dismissed by others who share my concerns about overreliance on the criminal justice system.\textsuperscript{122} The LGBT community is vulnerable to discrimination precisely because they engage in sexual activity that some deem immoral and deviant.\textsuperscript{123} But while it may be appropriate to punish Ravi, criminal law scholar Paul Butler

\begin{footnotes}
\item[118] Zernike, \textit{supra} note 12.
\item[119] Roy, \textit{supra} note 8.
\item[122] For an example of a commentator who dismisses Ravi’s actions as a prank, see Sandip Roy, \textit{Tyler Clementi and the Eye of the Webcam}, \textit{HUFFINGTON POST} (Oct 1, 2010), http://www.huffingtonpost.com/sandip-roy/tyler-clementi-and-the-eye_b_746318.html. Roy argues that calling Ravi a homophobe is too simplistic and characterizes Ravi as a kid who was engaging in a prank and did not mean any harm.
\item[123] See Samhita, \textit{Dharun Ravi and Anti-gay Sentiments in the South Asian Community}, \textit{FEMINISTER} (Oct 6, 2010), http://feministing.com/2010/10/06/dharun-ravi-and-anti-gay-sentiments-in-the-south-asian-community/. Samhita explains that “[t]here was something unique to Clementi’s sexuality that made it more salacious for Ravi and Wei to expose it. If he were not gay, if it were not outside the bounds of what is considered ‘normal’ college sexuality, it would not have been as exciting for Ravi and Wei to post the video à la, “omg teh [sic] gay sects [sic] !!!!” Id.
\end{footnotes}
explains that the knee-jerk call to use the blunt criminal justice system helps to mask the homegrown homophobia that informed Ravi’s actions and Clementi’s self-hatred.

Ravi did not invent homophobia. . . . Bias against gay people is embedded in American culture. Until last year people were being kicked out of the military because they were homosexuals. None of the four leading presidential candidates—President Obama, Mitt Romney, Rick Santorum, Newt Gingrich—thinks that gay people should be allowed to get married. 124

Calls to punish Ravi through harsh criminal sanctions and deportation may do little, if anything, to address homophobia. Homophobia extends far beyond Ravi’s irresponsible and insensitive choices. As Butler notes, “Though a national conversation about civility and respect would have been better, as usual for social problems, we looked to the criminal justice system. . . . Clementi died for America’s sins. And now, Ravi faces years in prison for the same reason.” 125

B. Western Exceptionalism, War, and Hate Crimes

Calls to criminally sanction and deport non-citizens for hate and bias offense may actually increase hate-motivated violence directed toward the LGBT community. In this Section, I explain that the relationship between hate crime legislation and IIRIRA feeds into the perception that the West is exceptionally liberal and tolerant, and thus, justified to attack the East, understood to be backwards and primitive. I then link U.S. militarism in the Middle East and Asia to the increase of hate-motivated violence against immigrants, the LGBT community, and LGBT immigrants in the United States.

1. Linking Harsh Enforcement of Hate and Bias Offenses to U.S. Militarism

University of Washington Professor Chandan Reddy notes that, on occasion, efforts to protect LGBT persons have been linked to U.S. militarization. 126 For example, lawmakers passed the Matthew Sheppard-James Byrd Hate Crimes Act—which modified the Civil Rights Act of 1965 to include the LGBT community as a protected class—as an amendment to the 2010 National Defense Authorization Act (“NDAA”). 127 By not passing the Act separately, these lawmakers helped legitimize a bill that appropriated the largest defense budget in the history of the United

125. Id.
127. Id.
States, and that “actively erodes the sovereignty of multiple South Asian and oil-rich Middle-Eastern nation-states.”

Similarly, when the public applauds criminal sanctions applied more harshly to non-citizens who commit hate and bias-motivated offenses, they reinforce ideas of Orientalism and Western exceptionalism, which have long helped to justify war and engender a distrust of foreigners. Professor Volpp explains that “[t]here is an imputing of cultural difference to Asians and Asian immigrants, which reflects a particular legacy, that of Orientalism, which constructs the West as rational, democratic, modern, and progressive, against the idea of the East as despotic, primitive, traditional, and barbaric.” These ideas helped justify the War in Iraq. In their book, “What Kind of Liberation?” political theorists Nadje Al-Ali and Nicola Pratt note that the Bush Administration consciously tied the invasion of Iraq to Iraqi women’s liberation in an attempt to drum up support for the war. President Bush actively asserted that the U.S. invasion in Iraq helped to secure women’s rights. And then Secretary of State “Condoleezza Rice and [First Lady] Laura Bush were deployed to reassure the world that the [United States] was concerned with women’s liberation—Laura Bush being wheeled out for photo opportunities with U.S. organizations such as Women for Free Iraq.”

As Al-Ali explains, the effect of the posturing in Washington “helped to legitimise [sic] the invasion [in Iraq] in the first place... women’s rights [in Muslim culture] are always the one big ‘but’ for anti-war peace activists.” Many in the public came to see the war as a vehicle for women’s rights in the Middle East even though men and women in the Middle East largely opposed U.S. occupation in the region and even though the advancement of women’s rights in Iraq has been mixed, at best.

128. See id. at 277.
130. Volpp, supra note 117, at 65.
132. See Bush, supra note 129; Wajid, supra note 131.
133. Wajid, supra note 131.
134. Id.
135. See Pew Research Global Attitudes Project, How the United States is Perceived in the Arab and Muslim Worlds (Nov. 10, 2005), http://www.pewglobal.org/2005/11/10/how-the-united-states-is-perceived-in-the-arab-and-muslim-worlds/ explaining that Anti-Americanism is high in the Middle East, albeit less so among women, and that this sentiment is driven largely by aversion to U.S. policies, such as the war in Iraq, the war on terrorism, and U.S. support for Israel, in addition to the general
While the United States can tout the establishment of a 25 percent quota for women in Iraqi parliament—which allowed at least six women’s rights activists into parliament who would not be there otherwise—Al-Ali observes that many of the other women in parliament are relatives of the male conservative leaders and vote along the same lines. Al-Ali adds that “the cynical use of women’s rights discourse by the [United States] has led to a backlash against feminist activists in Iraq, who can be easily undermined, or even vilified, by being accused of supporting an American agenda.”

2. Linking U.S. Militarism Abroad to Hate Violence Against Immigrants of Color and the LGBT Community Domestically

Perversely, the asserted desire to “save” vulnerable groups in the Middle East exposes these groups to more violence in the United States. Only days after the September 11 attacks, posters appeared in midtown Manhattan depicting a caricature of the Empire State Building anally penetrating Osama Bin Laden. Beneath the poster, a caption either read, “The Empire Strikes Back” or “So you like skyscrapers, huh, b*tch?” This depiction, among others, demonstrates two ideas that explain how U.S. militarism has encouraged private actors to commit hate crimes against immigrants of color, the LGBT community, and queer immigrants of color.

First, the posters illustrate how “queerness as sexual deviancy [becomes] tied to the monstrous figure of the terrorist as a way to otherize.” Rutgers University Professor Jasbir Puar and University of London Lecturer Amit Rai note that even studies that attempt “to explain ‘how an otherwise normal individual becomes a murderous terrorist’” necessarily presume the notion of a “normal” psyche. Such studies consequently “reduce complex social, historical, and political dynamics to various psychic causes rooted in childhood family dynamics. As if . . . the long, brutal war in Afghanistan boiled down to bad mothering or sexual frustration!” But as California State University Stanislaus political
science professor and then-CIA member As’ad AbuKhalil has explained, “In reality, political—not sexual—frustration constitutes the most important factor in motivating young men, or women, to engage in suicidal violence.”

Second, by perpetuating the idea that the terrorist is a product of sexual deviancy, the posters link masculinity and patriotism to aggression toward immigrants and the LGBT community. Shortly after September 11, Poet Laureate Billy Collins asserted that the United States has now “lost its virginity.” As Puar and Rai explain, images of a sodomized, turbaned bin Laden “promises to emasculate bin Laden and turn him into a f*g. . . . This promise not only suggests that if you’re not for the war, you’re a f*g, but it also incites violence against queers and specifically queers of color.”

The phenomenon through which America’s military enemies are understood as sexual deviants and in which American patriotism is linked to violence toward racial and sexual minorities is not unique to the War on Terror. These ideas have started to play out as fears of a North Korean nuclear attack continue to occupy the public consciousness. For example, the contributors of Urban Dictionary describe the late North Korean Dictator Kim Jong-il, as “[a] small (5 foot 2 inches) Korean with a very small penis and hairy back. . . . Also cannot spek [sic] English [sic] good [sic].” Kim Jong-il is also satirized on the television series “30 Rock.” On the show, Kim kidnaps blonde bombshell Avery Jessup and forces her to marry his son Kim Jong-un. The not-so-subtle punch line is that Kim Jong-un—an overweight East-Asian man who speaks English with a strong Korean accent—is, of course, unable to attract a woman as stunning as Jessup without his father’s coercive means.

As Puar and Rai might predict, media representations of sexually frustrated, evil yellow men have coincided with the emergence of an aggressive form of patriotism that encourages violence against persons of East Asian and Southeast Asian descent. The 2012 remake of Red Dawn—which depicts the triumph of an “all-American” teen guerilla squadron defending Colorado against North Korean villains—prompted many
viewers to express a violent, racist form of patriotism. In one of many tweets that linked patriotism to killing persons of East and Southeast Asian descent, “Kiel Pitzer” wrote, “Kinda [sic] wanna [sic] kill some Asians right now and defend the homeland, thank you Red Dawn for sparking some patriotism in me.”152 “Eva Watson” explained that after watching the movie she “now hate[s] all Chinese, Japanese, Asian, Korean people. Thanks. #reddawn #amazingmoviedoe.”153 And “Nick Gamez” wrote that “Red Dawn was ight [sic].. [sic] But realistically if North Korea ever came to America we’ll [sic] fuck their little Asian nuts.”154

Twitter users expressed similar reactions following the 2013 attack at the Boston Marathon. Well before authorities completed their investigation of the attacks, many users demanded violence against brown and yellow bodies as a disturbing and severely misguided expression of love for the United States.155 “Phil_Campbell,” for example, declared that “if there was actually bombs from them d**n [sic] c**n [sic] Arabs or slanty [sic] g**k [sic] Koreans I [sic] will take many of their lives with my own hands #USMC”.156 Likewise, Jonathan Matthew wrote, “I seriously wanna [sic] fight in this war. I swear to god I’ll murder the Korean moms, kids, dogs, dads, elders, everyone . . . Muslims are to blame too, they can have a bomb in their ‘towels’ . . . FUCK YOU T*W*LH**DS. #FuckMuslins.”157

Twitter user responses also demonstrate how linking patriotism to violence reinforces stark gender roles, making all LGBT persons more vulnerable. Joseph Hoffman, for example, eloquently declared President Obama a “p*ssy” “[i]f we dont [sic] blow up some terrorist fucks country . . and kill some s*nd n*ggers.”158

When understood in relation to IIRIRA, calls to punish non-citizens such as Ravi for hate crimes or bias offenses encourage Western exceptionalism, war, and a political climate more conducive to hate-

152. Phil Yu, Racist Idiots Watch Red Dawn, Tweet About it, ANGRY ASIAN MAN (Nov. 26, 2012), http://blog.angryasianman.com/2012/11/racist-idiots-watch-red-dawn-tweet.html. The writers originally intended that the villains in Red Dawn be the Chinese. Fear of a loss of profits in the Chinese market prompted them to change the enemy to North Korea post-production. Given the overt racist depiction of East Asians as manipulative villains in the film, it should come to no surprise that they were not bothered by the implicit racism in suggesting that all yellow Asian bodies are interchangeable. See Vera H-C Chan, Red Dawn: Where are the Chinese Villains, YAHOO! MOVIES TALK (Nov. 21, 2012), http://movies.yahoo.com/blogs/movie-talk/red-dawn-where-chinese-villains-183937411.html.

153. Yu, supra note 152.

154. Id.


156. Id. See also Robert Reich, Excluding Outsiders or Coming Together for the Common Good: What’s the True Meaning of Patriotism? HUFFINGTON POST (June 26, 2012), http://www.huffingtonpost.com/robert-reich/excluding-outsiders-or-co_b_1627043.html, where Reich warns that people who talk about “preserving and protecting” the nation misconstrue patriotism to mean excluding others rather than working together toward the common good of everyone in society.

157. Id.

158. See id.
motivated violence. Indeed, soon after the Iraq War began, the overlapping Muslim, Sikh, Middle Eastern, Asian, and LGBT communities have each found themselves more vulnerable to hate-motivated violence.\footnote{See Volpp, supra note 49, at 1575; Iyer, supra note 52; Federal Bureau of Investigations, Hate Crime Statistics 2011 (2011), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/narratives/victims.} Hate crimes have disproportionately targeted those living at the intersection.\footnote{O'Reilly, supra note 105.}


IV. AGGRAVATING THE “SUBORDINATING IMPULSE”

Lastly, calls to criminalize and deport non-citizens who commit hate crimes aggravate the already contentious relationship between the LGBT community, immigrants, and people of color. Yale Clinical Law Professor Muneer Ahmad explains that “communities of color, whose own sense of citizenship and belonging is compromised, choose to distance themselves from one another, or more particularly . . . attempt to elevate themselves by pushing the other down.”\footnote{Muneer Ahmad, Homeland Insecurities: Racial Violence the Day after September 11, 20(3) Soc. Text 72, 106 (2002).} This phenomenon is also applicable to the relationship between the LGBT community and racial minorities. To quote Georgetown Law Professor Mari Matsuda: “The long, cold history of subordinated status generating subordinating impulses is well known to both scholars and targets of recycled hate.”\footnote{See Mari J. Matsuda, Symposium on the Renaissance of Pragmatism in American Legal Thought: Comment: Pragmatism Modified and the False Consciousness Problem, 63 S. Calif. L. Rev. 1763, 1777 (1990).}
A. An Already Strained Relationship

When exit polls revealed that 70 percent of African Americans, 53 percent of Latino Americans, and 49 percent of Asian Americans voted to enshrine a ban on gay marriage in the California state constitution, many in the LGBT community were outraged at what they perceived as a betrayal.\(^\text{168}\) Rather than acknowledging the relative failure of the LGBT community to mobilize allies of color to the ballot box or the damage caused by the Advocate’s questionable assertion that “Gay is the new Black,”\(^\text{169}\) some gay men and women were quick to blame people of color, and in particular, African Americans.\(^\text{170}\) Anti-Proposition 8 rallies, purported to celebrate love, turned into demonstrations of hate. One gay black man reported that “it was like being at a klan rally except the klansmen wearing [sic] Abercrombie polos and Birkenstocks. ‘YOU N*GG*R,’ [sic] one man shouted at men. ‘If your people want to call me a F*GG*T, [sic] I will call you a n*gg*r [sic].’”\(^\text{171}\) Underlying this sentiment was the belief that because the LGBT community largely supported the election of the nation’s first African American president, the African American community was required to stand with them.\(^\text{172}\) They did not, of course, discuss how a vote for Barack Obama advanced their own interests.\(^\text{173}\) Newsweek has since dubbed President Obama the “first gay president” for his record on advancing gay rights.\(^\text{174}\)

However, even acknowledging the many complicating factors that contextualize the election results beyond a crude and offensive “minorities are homophobic” narrative, what many were afraid to admit was that homophobia exists in their communities—even if people of color may not be uniquely homophobic.\(^\text{175}\) Racialicious contributor Audrea Plaid explains

168. Latoya Peterson, On Proposition 8, RACIALICIOUS (Nov. 7, 2008), http://www.racialicious.com/2008/11/07/on-proposition-8/. Note that the above numbers have since changed. According to a February 2013 field poll, 64 percent of African Americans, 64 percent of Asian Americans, and 56 percent of Latino Americans in California now support same-sex marriage. Ruben Navarrette, California Wants a Do-Over on Same Sex Marriage Vote, CNN (Mar. 26, 2013), http://www.cnn.com/2013/03/26/opinion/navarrette-california-gay-marriage/.


170. See Kathryn Kolbet, Blaming Black Voters for Prop 8 Loss is Wrong and Destructive, PFAW (Nov. 7, 2008), http://www.pfaw.org/issues/equality-for-all/blaming-black-voters-for-prop-8-loss-wrong-and-destructive; Gross, supra note 169.


172. See Peterson, supra note 168.


174. Id.

175. Spaulding, supra note 171. In fact, “[i]n terms of predictive value, religion, political ideology, and being married with children tell us much more about how someone voted on Prop 8 than race
that “the [people of color] who voted for this hateful policy . . . do not owe a quid pro quo to queer communicates, but they—we—do owe them the common courtesy to ensure an environment to be able to live peaceably with whomever they wish to live with.”

The rift between some in the LGBT community and some people of color allows conservatives to engage in a policy of divide and conquer. Social conservatives invested in “systematic outreach to the most conservative elements of the Black Church . . . spreading the big lie that gays are out to destroy religious freedom.” In exchange for homophobia, some conservatives disingenuously promised African Americans affirmation of their collective legacy of racism. Conservative pundit Ann Coulter, for instance, continues to assert that “civil rights are for blacks,” not gays (or women or immigrants for that matter). Some conservatives also suddenly sought to affirm the moral worth of the African American family—blaming violence in black communities on the gays who dared to demand marriage equality. In so doing, they ignored statements by prominent conservatives such as Fox News TV Host Bill O’Reilly and former vice-presidential candidate Paul Ryan. Both continue to blame racial inequality on the alleged cultural dysfunction of the African American family. These statements consequently minimize how redlining policies, underfunded school districts, or a prison system that disproportionately punishes people of color as true causes for racial inequality.

B. Escalating Tensions

The calls to harshly punish and deport non-citizens who commit bias-motivated crimes further escalate existing tensions to the detriment of both communities. Many in the South Asian community perceived the harsh, results-driven prosecution of Dharun Ravi as yet another example of the
discrimination they face post September 11. After all, “it has been demonstrated that hate crime legislation, like other criminal punishment legislation, is enforced unequally against communities that are already marginalized in our society.”

Many noted that the New Jersey district attorney’s decision to charge Ravi with fifteen criminal offenses was excessive, as were the sentence maximums of ten years in prison followed by banishment from the country via IIRIRA. It is telling that Ravi was prosecuted so aggressively and so publicly for a non-physical act. The Ravi/Clementi case is anomalous for several reasons. As stated, immigrants of color are actually less likely to commit hate crimes. Non-physically violent hate crimes are decreasing, while the number of physically violent hate crimes is increasing. Further, LGBT people of color and transgender women are the most likely targets of this violence, not gay teens on college campuses. These events also unfolded against a backdrop in which internet users, bloggers, and mainstream journalists tacitly suggested that Ravi’s actions were likely informed by “an Indian cultural bias against gays.”

The events leading to Tyler Clementi’s suicide could have served as an opportunity to discuss the domestic homophobia that contributed to Ravi’s acts and Clementi’s self-hatred or the racism and xenophobia informing calls to deport non-citizens. Instead, it became an opportunity for some in the respective LGBT and South Asian communities to engage in what Georgetown Law Professor Mari Matsuda has described as the “subordinating impulse.” Leaders in the South Asian community in New Jersey highlighted the perversity in using hate crime legislation to punish a racial minority. New Jersey’s bias intimidation statute was, after all, only enacted after a rash of hate crimes were committed against the South Asian community. In contrast, however, some in the South Asian community refused to express even a hint of sympathy for Tyler Clementi or the LGBT South Asian teens, which the mainstream LGBT movement has yet to fully include. Instead, the anonymous users who manage the Support Dharun Ravi Movement Facebook page and website (which, admittedly, could be run by people not of South Asian descent) engaged in public scapegoating, excuse making, and victim shaming. They accused Clementi’s mother of

182. Gehi, supra note 20, at 395.
184. O’Reilly, supra note 105.
186. See Matsuda, supra note 167.
188. See Reddy, supra note 22, at 278.
being responsible for her son’s suicide, attacked Clementi’s moral character for engaging in casual sex with someone much older, and suggested that Clementi may have had Asperger’s syndrome. The “movement” also rejected any suggestion that Ravi’s actions constituted bullying, let alone a criminal act informed by homophobia. Rather, they characterized the harm as a mere invasion of privacy—a right they argued should not be expected “in the age of face book [sic] and live video streaming of each and everything around us.” This characterization undermined efforts by others in the South Asian community who challenge the unwarranted government surveillance of mosques, Muslim student unions, and other brown spaces following September 11.

CONCLUSION

I conclude by returning to a question I posed at the beginning of this Article. What would it mean to address violence inflicted on the LGBT community while acknowledging that “it was in fact the violent beating, public harassment, and death of numerous South Asians in the late 1980s and early 1990s, that forced the passage of New Jersey’s first penalty-specific hate crimes law”?

This Article tries to complicate the popular narrative suggesting that criminally penalizing and (potentially) deporting a South Asian teen constitutes a clear win for the LGBT and civil rights communities. In telling this story, I do not mean to suggest that the public should simply ignore the plight of bullied gay teens. Nor do I attempt to follow the lead of those who dismiss Ravi’s actions as a mere prank gone wrong. As stated, broadcasting a roommate’s sexual encounters for public ridicule has special significance for LGBT teens facing family rejection and social hatred precisely because of their (perceived) sexual activity. I tell this story to urge that marginalized communities remain ever vigilant in recognizing how their respective pursuits for civil rights and human dignity are connected to one another, and how their actions might impact those who face multiple layers of oppression.

In the growing number of states where the gay marriage battle has already been won, the LGBT community and its allies must decide what to do with the money and organizational might they developed while fighting
for a cause that does not benefit all members of the LGBT community equally. What would it mean to channel those resources to those with the least to gain from state recognized relationships such as those in the LGBT community who lack any state recognition due to their citizenship status? Can the repeal of IIRIRA be considered a pressing issue of concern to those sympathetic to gay rights because it leads to the deportation of LGBT immigrants and reinforces narratives that justify war and foster a dangerous climate for immigrants, people of color, and the LGBT community?

The calls to criminally sanction and potentially deport Dharun Ravi demonstrate that the concerns of immigrants and people of color have yet to be a central concern of the public’s otherwise commendable and increasingly vocal demand for gay rights. There are reasons to hope this may not always be the case. In 2010, Arizona passed SB 1070 that, among other draconian provisions, required state police officers to check the immigration status of anyone whom they arrest or detain. The law also allowed police officers to stop and arrest someone if they believe that he or she is an undocumented immigrant. Noting that the “LGBT community knows all too well how easily people who ‘look different’ or ‘act different’ can be singled out for harassment and persecution,” Lambda Legal and its allies publicly condemned SB 1070 for granting a license to discriminate against people of color. I only hope that this shift is not an anomaly and that it does not happen too late. Commenting on the public’s recent embrace of gay rights, Pooja Gehi explains that some of the single-issue rights-based initiatives that are the public face of gay rights advocacy may also strengthen institutionalized systems that work against marginalized communities. Such as calls to imprison and deport a South Asian teenager in the name of civil rights.

196. See Gehi, supra note 20, at 392–93.
197. Id. at 394–95.