CRIMINAL LAW — BIAS-INTIMIDATION LAWS — NEW JERSEY SUPREME COURT HOLDS THAT CONVICTION BASED ON VICTIM'S REASONABLE BELIEF THAT BIAS MOTIVATED THE OFFENSE VIOLATES DUE PROCESS. — *State v. Pomianek*, 110 A.3d 841 (N.J. 2015).

In 2010, Dharun Ravi used a webcam to spy on his Rutgers roommate, Tyler Clementi, having sex with another man.[1] The situation garnered national attention when Clementi leapt to his death from the George Washington Bridge.[2] Ravi was convicted under New Jersey's bias-intimidation statute when the jury determined that Clementi "reasonably believed" that he had been targeted because he was gay.[3] Recently, in *State v. Pomianek*,[4] the New Jersey Supreme Court ruled that the same provision used to convict Ravi was unconstitutionally vague.[5] In so ruling, the court declined to follow the reasoning of the state's Appellate Division, which had resolved the case through constitutional avoidance grounded in free speech concerns.[6] Instead, the New Jersey Supreme Court ruled on due process grounds.[7] Although the outcome was effectively the same, the New Jersey Supreme Court's departure from the lower court's First Amendment reasoning may obviate deeper free speech issues in another part of the bias-intimidation statute.

On April 4, 2007, laborers and truck drivers working for the Gloucester Township Department of Public Works were relaxing at an old storage garage.[8] According to Steven Brodie, Jr., an African American laborer,[9] most of the workers were acting "wild" — throwing footballs and roughhousing.[10] Among the "out of control" employees were David Pomianek, Jr., and Michael Dorazo, Jr., two white truck drivers.[11] Dorazo decided to trick Brodie, telling him that their supervisor needed an item from a steel storage cage in the garage.[12] When Brodie entered the cage, Dorazo locked him inside.[13]

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1 Kate Zernike, *Jury Finds Spying in Rutgers Dorm Was a Hate Crime*, N.Y. TIMES (Mar. 16, 2012), http://www.nytimes.com/2012/03/17/nyregion/defendant-guilty-in-rutgers-case.html.

2 *See id.*

3 *Id.*

4 110 A.3d 841 (N.J. 2015).

5 *Id.* at 855–56.

6 *See id.* at 855.

7 *See id.* at 855–56.

8 *See id.* at 844.

9 "The hierarchy in the Parks Division is supervisor, truck driver, and laborer." *Id.*

10 State v. Pomianek, 58 A.3d 1205, 1210 (N.J. Super. Ct. App. Div. 2013).

11 *See Pomianek*, 110 A.3d at 844.

12 *Id.*

13 *Id.*

While Brodie was stuck in the cage, Pomianek taunted him.[14] Brodie heard Pomianek say to the other workers, "you see, you throw a banana in the cage and he goes right in."[15] Other onlookers heard Pomianek call Brodie a "monkey."[16] Brodie thought the taunts were "racial."[17] He was "humiliated" and "embarrassed" by being "locked in a cage like an animal."[18]

Pomianek was charged with harassment by alarming conduct,[19] harassment by communication,[20] bias intimidation,[21] and official misconduct.[22] After a ten-day trial, a jury convicted him of harassment by alarming conduct and by communication.[23] The bias-intimidation statute gave the jury three ways to convict Pomianek. First, the jury could convict him under subsection (a)(1) if it found that his "purpose" in harassing Brodie was to "intimidate" him "because of race."[24] Second, the jury could convict under subsection (a)(2) if it found that Pomianek harassed Brodie "knowing" that Brodie would be "intimidated because of race."[25] Third, the jury could convict under subsection (a)(3) if the circumstances of the offense caused Brodie to be intimidated, and Brodie "reasonably believed" that Pomianek either had harassed him "with a purpose to intimidate" because of his race or had targeted him for harassment because of his race.[26] The jury acquitted Pomianek of the "purpose" and "knowing" charges, but convicted him

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[14] *Id.*

[15] *Id.*

[16] *Id.*; *see also* State v. Pomianek, 58 A.3d 1205, 1211–12 (N.J. Super. Ct. App. Div. 2013) (recounting witness testimony that Pomianek yelled "[y]ou can throw a banana in a cage and lock a monkey in there," *id.* at 1211, and "he looks like a monkey in a cage, let's throw him some bananas," *id.* at 1212).

[17] *Pomianek*, 58 A.3d at 1210. This was not Pomianek's first racially charged interaction with a coworker. *See, e.g.*, *id.* at 1212 (reporting how Pomianek left an African American laborer behind after a leaf-collection job and remarked that the laborer was "a lazy nigger"); *id.* at 1209 (recounting how Pomianek cracked a makeshift "horse whip" at the feet of an African American leaf collector).

[18] *Id.* at 1210. Brodie was in the cage for three to five minutes. *Id.* at 1211.

[19] *Id.* at 1207 (citing N.J. STAT. ANN. § 2C:33–4(c) (West 2005)).

[20] *Id.* (citing N.J. STAT. ANN. § 2C:33–4(a)).

[21] *Id.* (citing N.J. STAT. ANN. § 2C:16–1(a)).

[22] *Id.* (citing N.J. STAT. ANN. § 2C:30–2(a)).

[23] *Pomianek*, 110 A.3d at 845.

[24] *See* N.J. STAT. ANN. § 2C:16–1(a)(1) (criminalizing an offense committed "with a purpose to intimidate an individual or group of individuals because of race").

[25] *See id.* § 2C:16–1(a)(2) (criminalizing an offense committed "knowing that the conduct constituting the offense would cause an individual or group of individuals to be intimidated because of race").

[26] *See id.* § 2C:16–1(a)(3) (criminalizing an offense committed "under circumstances that caused any victim of the underlying offense to be intimidated and the victim, considering the manner in which the offense was committed, reasonably believed either that (a) the offense was committed with a purpose to intimidate the victim . . . because of race . . . or (b) the victim . . . was selected to be the target of the offense because of the victim's race").

under subsection (a)(3).[27] Based on the bias-intimidation conviction, the jury also convicted Pomianek of official misconduct.[28]

The Appellate Division reversed the bias-intimidation conviction and remanded for a new trial.[29] Writing for the panel, Judge Reisner[30] concluded that subsection (a)(3) of the bias-intimidation law would "run afoul of . . . First Amendment principles" if it criminalized Pomianek's verbal taunts just because Brodie reasonably believed those taunts were intended to intimidate him on account of his race.[31] The court traced the statute's legislative history and concluded that the legislature "[c]learly" thought the statute "required proof of the defendant's intent to commit a bias crime."[32] The court then followed "bedrock principles" of statutory interpretation to save subsection (a)(3) from unconstitutionality; in the court's view, the proper construction of subsection (a)(3) required a defendant to "intend to cause the victim to perceive the underlying offense as being bias-motivated."[33] The court therefore reversed in part and remanded for a new trial.[34]

The New Jersey Supreme Court reversed.[35] Writing for the court, Justice Albin[36] declined to follow the Appellate Division's First Amendment reasoning.[37] Instead, the court addressed Pomianek's Fourteenth Amendment claim.[38] Pomianek had argued that "by focusing on what a 'reasonable' victim believes is the defendant's motivation rather than on what the defendant actually intends," subsection (a)(3) "fails to give a person of reasonable intelligence fair notice of the conduct that is forbidden."[39] The court agreed.

The court first traced the statute's history. After the U.S. Supreme Court struck down New Jersey's original bias-intimidation statute in

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[27] *Pomianek*, 110 A.3d at 845.

[28] *Id.* The jury could not convict Pomianek of official misconduct unless it also found him guilty of a predicate offense, a requirement that the bias-intimidation conviction fulfilled here. *Id.*

[29] State v. Pomianek, 58 A.3d 1205, 1221 (N.J. Super. Ct. App. Div. 2013). The Appellate Division also reversed the official misconduct conviction because it had been based on the invalidated bias-intimidation conviction. *Id.* at 1207. The court affirmed the harassment convictions. *Id.*

[30] Judge Reisner was joined by Judges Harris and Hoffman.

[31] *Pomianek*, 58 A.3d at 1217.

[32] *Id.* at 1216.

[33] *Id.* at 1217.

[34] *Id.* at 1221.

[35] *Pomianek*, 110 A.3d at 856.

[36] Justice Albin was joined by Chief Justice Rabner and Justices LaVecchia, Patterson, Fernandez-Vina, and Solomon. Judge Cuff, on temporary assignment from the Appellate Division, did not participate in this decision.

[37] *Pomianek*, 110 A.3d at 843.

[38] *Id.* at 848. Pomianek had raised this claim below. *See Pomianek*, 58 A.3d at 1208.

[39] *Pomianek*, 110 A.3d at 848.

Apprendi v. New Jersey,[40] state legislators introduced a new bias-intimidation bill under which the "purpose to intimidate on the basis of bias" would be "an element of the offense" and therefore "tried to the jury."[41] Later, a "substitute bill" departed from this strict purpose-only language and contained what would become subsection (a)(3).[42] The court found that legislative history offered "no insight" into why the legislature included subsection (a)(3).[43]

The court next addressed the due process question. It noted that in focusing "on the victim's, not the defendant's, state of mind,"[44] subsection (a)(3) is "unique among bias-crime statutes in this nation."[45] The court rejected New Jersey's argument that subsection (a)(3) was no different from other strict liability laws, such as laws enhancing penalties for drug distribution within 1000 feet of a school.[46] Those other laws, the court maintained, involve "an ascertainable fact of which a defendant can make himself aware."[47] Subsection (a)(3), on the other hand, draws a "line separating lawful from criminal conduct"[48] that "moves based on the victim's perceptions."[49] Such a line could not "give adequate notice of what is prohibited,"[50] because a defendant may be "wholly unaware of the victim's perspective."[51] The court therefore found the subsection void for vagueness.[52]

Finally, the court chastised the Appellate Division for "rewriting" the bias-intimidation statute.[53] Applying the constitutional avoidance canon to "engraft a purposeful mens rea requirement"[54] onto subsection (a)(3) was "not minor judicial surgery to save a statutory provision, but a judicial transplant."[55] The "reconfigured" statute was a "mirror image of subsection (a)(1)" — the original "purpose" provision — and was therefore "redundant" and "serve[d] no purpose."[56] Indeed, the Appellate Division's impermissible "judicial transplant"

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[40] 530 U.S. 466 (2000) (holding that provision allowing the trial judge to increase a sentence beyond the one authorized by the jury's verdict deprived defendant of the right to a jury trial).

[41] *Pomianek*, 110 A.3d at 851 (citing S. 1897, 209th Leg. (N.J. 2000)).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 843.

[45] *Id.* at 851.

[46] *See id.* at 847, 853.

[47] *Id.* at 853.

[48] *Id.* at 849.

[49] *Id.* at 856.

[50] *Id.*

[51] *Id.* at 854.

[52] *Id.* at 856.

[53] *Id.* at 855.

[54] *Id.* at 848.

[55] *Id.* at 855.

[56] *Id.*

raised double jeopardy concerns, because Pomianek had already been acquitted of the subsection (a)(1) charge.[57]

State v. Pomianek is a tale of two rationales. The Appellate Division found key free speech principles in cases that "illustrate[d] the constitutional pitfalls inherent in criminalizing speech."[58] It concluded that a conviction based only on Brodie's reasonable belief would "run afoul" of those core free speech principles.[59] But those principles, as the Appellate Division set them out, would not only invalidate subsection (a)(3); they would also raise serious questions about the constitutionality of subsection (a)(2), the "knowing" provision. The New Jersey Supreme Court's due process rationale — intentionally or not — sidestepped those thorny questions. That rationale allowed the court to draw a crisp distinction between subsection (a)(3) and the rest of the statute. The court therefore avoided the potential First Amendment threat to the "knowing" provision posed by the Appellate Division's principles.

The Appellate Division's first free speech principle came from *R.A.V. v. City of St. Paul*.[60] There, the Supreme Court had struck down an ordinance that punished the display of any "symbol . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[61] According to the Appellate Division, *R.A.V.* stood for the principle that an ordinance criminalizing "speech or other expressive activity" may not be justified based on the "effect of the speech on the victim."[62] The Appellate Division suggested that a literal reading of New Jersey's bias-intimidation law would criminalize Pomianek's speech on the basis of its effect on Brodie alone: had Brodie not felt targeted because of his race, then Pomianek would not have been con-

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[57] *Id.*

[58] State v. Pomianek, 58 A.3d 1205, 1213 (N.J. Super. Ct. App. Div. 2013).

[59] *Id.* at 1217.

[60] 505 U.S. 377 (1992).

[61] *Id.* at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)). The Court found that the statute discriminated based on content by not criminalizing fighting words directed against statuses such as "political affiliation, union membership, or homosexuality." *Id.* at 391. Fighting words encompass "conduct that itself inflicts injury or tends to incite immediate violence." *Id.* at 380 (quoting *In re* Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991)). The Court also rejected the city's argument that the ordinance deserved a "secondary effects" exemption from First Amendment scrutiny because it "protect[ed] against the victimization of a person or persons who are particularly vulnerable because of their membership in a group." *Id.* at 394 (quoting Brief for Respondent at 28, *R.A.V.*, 505 U.S. 377 (No. 90-7675)). If a statute aims not at the "content" of speech, but instead at its effects on, say, the surrounding community, then it receives a "secondary effects" exemption from strict scrutiny. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–50 (1986). Instead, the Court reasoned that "[l]isteners' reactions to speech are not . . . 'secondary effects.'" *R.A.V.*, 505 U.S. at 394 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

[62] *Pomianek*, 58 A.3d at 1213.

victed under the statute.[63] Crucially, this effect-based flaw is independent of whether Pomianek *knew* how Brodie would perceive his speech. In fact, subsection (a)(2), which requires knowledge, more closely tracks the state-of-mind requirement in the *R.A.V.* ordinance.

The second principle required a mens rea of *purpose* when criminalizing speech. This principle came from two cases: *State v. Vawter*[64] and *Virginia v. Black*.[65] According to the Appellate Division, *Vawter* held that a bias-intimidation statute is constitutional only if it "requires proof of intent" to harass.[66] Similarly, *Black* held that the state could "outlaw cross burning when performed for the purpose of intimidation."[67] But anything less was insufficient: the simple "fact of burning a cross, without more," could not show "the intent to intimidate."[68] Because subsection (a)(3) does not require a purpose to intimidate, it "run[s] afoul" of this "purpose" principle.[69] But it is not alone; the "knowing" provision also exceeds the bounds of the Appellate Division's "purpose" principle. Though a defendant could *intend* no intimidation based on race — but still *know* his conduct would intimidate based on race — he would violate the "knowing" provision.

The Appellate Division bolstered this "purpose" principle by relying on *State v. Stalder*.[70] That Florida Supreme Court case distinguished statutes barring "offenses committed because of prejudice"[71] — deemed constitutional — from those barring "offenses committed for some reason other than prejudice but that nevertheless show bias in their commission"[72] — deemed unconstitutional. The "knowing" provision targets offenses committed not because of prejudice, but that still show bias in their commission.[73] To drive the prin-

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[63] *See id.* at 1217.

[64] 642 A.2d 349 (N.J. 1994). *Vawter* held that New Jersey could not criminalize the use of a "symbol . . . that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion." *Id.* at 352 (quoting N.J. STAT. ANN. § 2C:33-10 (West 2005)).

[65] 538 U.S. 343 (2003).

[66] *Pomianek*, 58 A.3d at 1214.

[67] *Id.*

[68] *Id.* at 1214–15. The idea that a mens rea of purpose is required when criminalizing speech was derived in these cases from the notion that "true threats" are excluded from First Amendment protection. *Black*, 538 U.S. at 359–60. A true threat is defined by the fact that "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence." *Pomianek*, 58 A.3d at 1214. Thus, states may regulate or criminalize speech carried out with the intent to intimidate.

[69] *Pomianek*, 58 A.3d at 1217.

[70] 630 So. 2d 1072 (Fla. 1994). *Stalder* confronted a Florida statute that punished a defendant whose offense "evidence[d] prejudice based on the race . . . of the victim." *Id.* at 1074 (quoting FLA. STAT. § 775.085(1) (1989)).

[71] *Id.* at 1076.

[72] *Id.*

[73] *Compare id.* (deeming unconstitutional statutes that lack a purpose mens rea but criminalize offenses "show[ing] bias in their commission"), *with* N.J. STAT. ANN. § 2C:16–1(a)(2) (West 2005)

ciple home, the Appellate Division said that the *Stalder* statute would have been "constitutional *only if* it were construed to prohibit selection of the victim *because of race*."[74]

The New Jersey Supreme Court took an entirely different tack, and its decision (intentionally or not) sidestepped the threat to the "knowing" provision. In focusing on the due process question, the court emphasized the distinction between *any* state-of-mind requirement, on the one hand, and *no* such requirement, on the other. Thus, the court could cleanly strike subsection (a)(3) from the rest of the bias-intimidation statute. This crisp break seems to have obviated the apparent First Amendment threat to the "knowing" provision posed by the Appellate Division's free speech principles.

The court first identified a common state-of-mind requirement in the case law. This common requirement allowed the court to distinguish *State v. Mortimer*[75] and *Wisconsin v. Mitchell*.[76] Both *Mortimer* and *Mitchell* upheld statutes requiring an element of intent.[77] But the court decided to fault subsection (a)(3) not for lacking a *purpose* mens rea, but for lacking *any* mens rea: "[u]nlike any other bias-crime statute in the country," subsection (a)(3) "focuses on the victim's, not the defendant's, state of mind."[78] By ignoring "what the defendant actually intends" — his mental state — the subsection fails to give "fair notice of the conduct that is forbidden."[79]

This lack of notice was key to subsection (a)(3)'s failure — and, seemingly, to the "knowing" provision's success. A victim's reasonable belief about the defendant's purpose "will necessarily be informed by the victim's individual experiences."[80] But those experiences "may be

(criminalizing conduct with knowledge that "conduct constituting the offense" would cause a victim to feel intimidated because of bias).

[74] *Pomianek*, 58 A.3d at 1214 (emphasis added). None of this is to suggest that the "knowing" provision actually violates the First Amendment. *Cf.* Elonis v. United States, 135 S. Ct. 2001, 2012 (2015) (rejecting lower courts' construction of the federal threats statute as requiring only that a reasonable person would understand defendant's words as a threat, but leaving undecided the minimum mental state required by the First Amendment for criminal liability). *See generally The Supreme Court, 2014 Term — Leading Cases*, 129 HARV. L. REV. 181, 331–40 (2015). Rather, the point is that the principles elucidated by the Appellate Division, under the Appellate Division's characterization of free speech case law, seem to leave no room for the "knowing" provision.

[75] 641 A.2d 257 (N.J. 1994) (holding that harassment statute was not unconstitutionally vague because barring the commission of a crime "with a purpose to intimidate" provides "sufficient clarity," *id.* at 265 (quoting N.J. STAT. ANN. § 2C:33–4(d) (West 1989))).

[76] 508 U.S. 476 (1993) (holding that Wisconsin statute providing for enhancement of defendant's sentence whenever he intentionally selects his victim based on victim's race did not violate defendant's free speech rights by purporting to punish his biased beliefs).

[77] *See id.* at 480, 490; *Mortimer*, 641 A.2d at 265.

[78] *Pomianek*, 110 A.3d at 843.

[79] *Id.* at 848.

[80] *Id.* at 843.

unknown or *unknowable* to the defendant,"[81] and this lack of knowledge makes subsection (a)(3) unconstitutional. The potential lack of notice also distinguished Pomianek from a strict liability defendant who could "readily inform himself of a fact and, armed with that *knowledge*, take measures to avoid criminal liability."[82] Personal experiences that inform a victim's reasonable perception could be "beyond the [defendant's] *knowledge*."[83] The "knowing" provision makes such knowledge a *requirement*, and therefore does not suffer this flaw. If Pomianek had known the effect his words would have on Brodie, he would have been on notice.[84] The "purpose" and "knowing" provisions together are thus "the twin pillars of the bias-intimidation statute"[85] because they "give clear notice of acts that are criminal in nature."[86] The court's emphasis on knowledge and notice shored up the "knowing" provision from any Due Process Clause–based threat.

In *State v. Pomianek*, two courts took two different constitutional paths to reach the same destination: read literally, subsection 2C:16–1(a)(3) violates the Constitution. Each court's reasoning sends an important signal about criminal laws that focus on a victim's emotional reaction.[87] The Appellate Division's free speech principles not only would strike down the plain meaning of the "reasonably believes" provision; they also inadvertently pointed to dangers to the "knowing" provision. The New Jersey Supreme Court's due process decision, on the other hand, sidestepped these possible dangers. Of course, without settled law on whether a "knowing" mens rea is sufficient to criminalize bias intimidation, a court might deploy the Appellate Division's free speech principles to strike down subsection (a)(2) in the future. But in following the due process route, the New Jersey Supreme Court avoided thorny free speech issues and saved that question for another day.

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[81] *Id.* (emphasis added).

[82] *Id.* at 854 (emphasis added). For instance, a defendant convicted of selling drugs within a school zone had "the ability to determine his location in relationship to a school." *Id.* at 853 (citing United States v. Holland, 810 F.2d 1215, 1224 (D.C. Cir. 1987)).

[83] *Id.* at 854 (emphasis added).

[84] Furthermore, statutes that require notice have deterrent advantages. *Mortimer* explained that criminalizing bias-motivated harassment deters hate crimes: "[T]he statute imposes heavy penalties for such conduct, effecting a deterrent and retributive policy, to discourage its future occurrence." State v. Mortimer, 641 A.2d 257, 267 (N.J. 1994). The *Pomianek* court linked this rationale to notice, stating that "the goal of deterrence surely is diminished when a person . . . is unaware that his conduct or speech [is criminal]." 110 A.3d at 853. Unlike subsection (a)(3), subsection (a)(2)'s "knowing" requirement deters crime.

[85] *Pomianek*, 110 A.3d at 856.

[86] *Id.* at 848–49.

[87] *See, e.g.*, DEL. CODE ANN. tit. 11, § 1312(a) (Supp. 2014) (defining stalking as "knowingly engag[ing] in a course of conduct" that "would cause a reasonable person to . . . suffer . . . significant mental anguish or distress"). *See generally* Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 MICH. L. REV. 607 (2015).