THE PHILOSOPHY OF HATE CRIME ANTHOLOGY

PART II

Annotated Bibliography

by David Brax
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Summary:
The purposes of Dillof’s paper is
1) To critically examine the theoretical foundations of bias crime statutes in order to understand and assess the lines along which they may be best justified.
2) Address some fundamental questions of criminal law. Such as “the relevance to punishment of motives, motivations, and desires; the limits of the interest protectable through criminal law; and the relation between the terms of criminal statutes and the evils they are intended to address.

Dillof argues that the penalties imposed by a criminal justice system at a minimum must be deserved by those they are inflicted on and that desert, in turn, is a function of (1) the gravity of the wrongdoing involved and (2) the wrongdoer’s degree of culpability for that wrongdoing.

Introduction: The Puzzle of Bias Crime Statutes
Bias Crimes, or Hate Crimes, are committed because of race, color, religion of the victim. BC statutes increase the penalties for such crimes. This may seem unsurprising, as the US legal culture is permeated by the ideal of equality. Equal Protection Clause - Equality is a central value in the constitution. Prohibitions of discrimination in a wide variety of contexts. BC’s are arguably instances of discrimination. As crimes, they seem the most extreme, hence most objectionable instances of discrimination. Appear to offend the principle of equality that some have taken as underlying liberal political theory. (People like Ronald Dworkin).
”The criminal law appropriately applies its sanctions to conduct that violates society’s most fundamental principles. From this perspective, bias crime statutes seem appealing.”
But from another liberal perspectives, BC statutes are puzzling. Liberalism is associated with the ideal of freedom of thought, thus rejecting the idea of “thought crimes”. Thought should not be the basis of criminal sanctions. BC statutes do not punish pure thought, only when they underlie criminal acts. But the act is already punished. The addition is imposed as a direct function of the additional biased thought. ”How can thought itself make the crime worse and justify greater punishment? This question exposes a core tension in liberalism between the ideals of equality of treatment and freedom of thought.” (P 1017)

COMMENT: note here that Dillof treats the combination of act and motive as ”mere addition”.

1. Anthony M. Dillof - Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes
Traditional law doctrine seem to offer an easy answer: Mens rea. - “Mental states are relevant to fixing punishment levels. Specifically, prohibited acts committed intentionally are punished more harshly than those committed merely knowingly, those committed knowingly more harshly than those committed merely recklessly, and so on.” So thought is relevant. But analogizing to Mens Rea does not solve, but rather deepens the puzzle of bias crime statutes.

"Intentionally", "knowingly" and "recklessly" are broad, highly general categories for characterizing action on the basis of underlying mental states. Intentional acts, for example, may be based on a wide variety of values or ends. Likewise, if merely told that an individual acted recklessly, one would not know anything about the specific content of the individual’s beliefs or values. In contrast, the mental element required for bias crimes is defined in terms of beliefs or values concerning such specific matters as race, color, and religion. Because of its content specificity, the mental element required for bias crimes appears different in kind from those traditionally relevant". (P1017-18)

We could prohibit "reckless" statements (as this is not a content regulation), but not "racial" ones. Isn’t this just loosing track of the actual justification, though?

Dillof’s paper has two main goals

1) To critically examine the theoretical foundations of bias crime statutes in order to understand and assess the lines along which they may be best justified. "My primary focus shall be on the philosophical or moral issues that are raised by various potential justifications of bias crime statutes.”. A clearer understanding of what bases exist for BC statutes, and what are illusory will give a surer, albeit narrower, footing for society’s battle against the evils of bias.

2) Address some fundamental questions of criminal law. “Besides providing a vehicle for combatting a singularly disturbing phenomenon in our society, bias crime statutes provide a vehicle for examining such issues as the relevance to punishment of motives, motivations, and desires; the limits of the interest protectable through criminal law; and the relation between the terms of criminal statutes and the evils they are intended to address. The inquiry into bias crime statutes also illuminates the grounds for other laws in which bias is an element, such as employment discrimination and other civil rights laws.”

Dillof argues that the penalties imposed by a criminal justice system at a minimum must be deserved by those they are inflicted on and that desert, in turn, is a function of

(1) the gravity of the wrongdoing involved and
(2) the wrongdoer’s degree of culpability for that wrongdoing.

It follows that justifications must take bias to be relevant to either gravity of wrongdoing or degree of culpability, two independent (!) moral categories. Dillof aims to investigate the possible distinctive wrong-doing; a biased reasons for acting may be considered a wrongful feature of the act itself or a proxy for some
wrongful consequence of the act. Dillof argues that considerations of autonomy and personhood preclude recognizing an interest in another’s reasons for acting of the sort that might produce a wrongdoing above and beyond that of the underlying crime. Proxy’s are problematic in general, and useless when what they stand in for is more easily ascertainable. Dillof argues that bias, "whether considered as an intention, motivation, or desire, cannot play the culpability-increasing role required to justify bias crime statutes” “Although racism and other forms of bias are morally flawed views of persons, they fail to connect the bias criminal to his wrongdoing more than other bases for crime.”

I An Overview of Bias Crime Statutes
There is no single formal or historical feature that a law must have in order to be properly called a bias crime statute. There are, however, some common features, such as sharing a common ancestor. In 1981, the anti-defamation league released a model statute establishing the offense of “Intimidation”

Intimidation
A. A person commits the crime of I if, by reasons of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section(?) of the Penal Code)
B. I. Is a misdemeanor/felony (at least one degree more serious than that imposed for commission of the offense)
Critical features 1) it includes an element concerning the actor’s reason 2) imposes a penalty that is an enhancement.
Regarding the critical phrase - “By reason of…..” Different jurisdictions have used different locutions. Most common is "because of race (etc.)” Some include requirement of "maliciousness”. Some refers to "motivations” of different types, or committed with “ill-will, hatred or bias.” In Wisconsin v. Mitchell it was the victim selection model was expressively used. The “By reason of” is subtly different from the victim selection model, but can spawn different interpretations and applications. Courts have not distinguished among them. Dillof focuses on the most common formulation, prohibiting acts undertaken "because of” race etc.

Statutes also vary as to characteristics targeted. Sometimes BC statutes create new offenses, the penalty for which may run consecutively with those for the underlying offense.

II The Wrongdoing - Culpability Framework
The culpability framework provides a theoretical structure for understanding how the elements of offenses and defenses properly may bear on the penalties established by the criminal law.
"Employing this framework to analyze bias crime statutes has three virtues. First, wrongdoing and culpability (…) are explicitly moral concepts. Thus, analysis within this framework will facilitate an examination of the moral soundness of bias crime statutes. Second, the W-C framework exposes the variety of ways that a feature of an act may be relevant either morally or with respect to the criminal law. Thus, the framework should be useful in generating theories concerning how bias crime statutes
might be justified. Third, examining possible justifications of bias crime statutes within this framework will allow these justifications to be considered systematically.”

(P 1024)
The analysis assumes that to the extent that bias crime statutes cannot be justified within the wrongdoing-culpability framework, they are unjustified. (Comment: Some weight is put on the validity of the framework, then.)

A. Three theories of Punishment
So Dillof views the Criminal law from the perspective of morality. There are roughly three basic categories of moral theories concerning the justification for establishing criminal sanctions: utilitarianism, retributivism, and hybrid (or mixed) theories.

Utilitarianism: sanctions are justified if and only if they confer some net benefit upon society at large, such as the protection of citizens from harm. Sanctions can be justified on the ground that they deter (generally or specifically), incapacitate, reinforce social norms, satisfy a desire for revenge, or rehabilitate.

Retributivism: these theories are Desert-based. Social effects are irrelevant. “Sanctions are justified by being an appropriate response to the offense itself. Sanctions respect a wrongdoer’s right to punishment, prevent the gaining of an unfair advantage, or give wrongdoers their due. Alternatively, under retributivism, sanctions may be understood as restoring the moral order that the wrongdoers have breached.”

Hybrid theories combine these requirements - neither social utility nor consideration of desert alone are sufficient to justify punishing individuals. Rather, sanctions may be imposed only where they both confer some net benefit on society and are deserved by the actor in light of the offense itself.

Dillof questions whether bias crime statutes are within the limits established by retributivism. The ability of Utilitarianism to account for the wide range of substantive and procedural rights afforded by our current criminal justice system is dubious. He raises a familiar objection:

"Absent some requirement of desert, utilitarianism, to its discredit, results in individuals being used as mere means to an end.” He continues: “If bias crime statutes are to be justified, then they must be justified under retributive or hybrid theories. These two sets of theories, however, collapse to one on the assumption that the first requirement of the hybrid theories - the net social benefit requirement - is satisfied.”

(P 1026)

B. Wrongdoing and Culpability Underlie Desert
Retributive theories can be objective or subjective: Objective - punishment deserved can be analyzed as a function of the wrongdoing engaged in by the actor and the actor’s culpability for that wrongdoing.
Wrongdoing is violating a moral norm concerning conduct. ”Wrongfulness reflects the moral quality of an act violating a norm. The greater harm, and under some theories, the greater the act’s proximity to harm, the greater the wrongfulness.”

We enjoy freedom bound by norms of conduct. One is punished for something. Under Objective retributive theories, desert is not simply a matter of wrongdoing, there also must be culpability.
"Here "culpability" means something like "accountability" or "responsibility" for the wrongdoing".
The wrongdoing must somehow reflect on the wrongdoer.
"In contrast to norms of conduct, which are first-order principles for guiding for an actor’s behavior, principles of culpability are second-order principles for evaluating the actor in light of her behavior, its conformity with the norms of conduct, and other factors."
Classic culpability (mens rea) states:
First: Intending. Causing a death is a wrongdoing, so an actor will be culpable for doing so intentionally.
Second: Believingly. More generally: assignment of likelihood to a state of affairs.
"The more confident an actor is that his acts involve wrongdoing, the more culpable the actor will be (assuming that culpability is not predicated on intent). For example, an actor who was certain that his act would cause a death is more culpable for the death than the actor who merely thought it somewhat likely that his act would cause a death.
Negligence, carelessness toward consequences. (Including “should have knowns?”)

Subjective versions of retributivism focus on mentally represented, rather than actual, wrongdoings.
Assess the desert of an actor based on what the actor intends to engage in, believe she is engaged in, or should have believed.
"Culpability for this possible wrongdoing is established by whether it was intended, believed in, or merely should have been believed in, in order of decreasing culpability.
O and S prescribe the same punishment when the possible wrongdoing that is the object of the actor’s attitude is the wrongdoing she actually commits.
Strictly speaking, subjective retributivism require no actual wrongdoing for punishment to be deserved.
There may be cases where it is not clear whether it is the act or the actor that is assessed, but these are separate moral categories. One fact could be morally significant for two reasons. Nevertheless, even if it turns out that they share common elements, the categories of wrongdoing and culpability are conceptually distinct and so may be investigated independently."

C. Wrongdoing and Culpability Underlie the Criminal Law
It underlies the normative concept of desert, but also provides a framework for organizing substantive criminal law. "On its surface, criminal law appears to divide into two categories: offenses, that body of law that prohibits conduct subject to punishment, and defenses, that body of law that negates or mitigates punishment. The wrongdoing-culpability framework replaces this dichotomy with the deeper one of norms of conduct (defining wrongdoing) and principles of evaluation (defining culpability)."
Under both objective and subjective versions of retributivism, "the moral concepts of wrongdoing, culpability, and desert neatly map onto and explain the legal concepts of prohibited conduct, legal culpability and liability."

The Model Penal Code requires that to be liable for committing a prohibited act, the actor must act purposely, knowingly, recklessly, or negligently. Defenses, accordingly, either negate the wrongfulness of the act (justifications) or negate culpability (excuses). Excuses do not negate the wrongfulness of the act.

III Bias Crime Statutes Analyzed Within the Wrongdoing-Culpability Framework

Though the support for bias crime statues are broad, the bases for justifying them are narrow. For the increased penalties to be justified BC’s must involve either 1) greater wrongdoing (than similar crimes lacking the bias element) or 2) greater culpability. "The challenge of justifying bias crime statutes is to demonstrate how acting "because of” a specified characteristic increases wrongdoing or culpability in such a way”.

A. Why Bias Crime Statutes Cannot be Construed Conventionally

BCS are, to the extent possible, construed as written and analyzed in terms of the standard canon of concepts of the criminal law. But on this construal, they appear unjustified. The issue is made difficult by the terms "because of". "The “because of” locution is not a common element in the definition of criminal offenses. Acting "because of,” however, appears closely related to acting with a certain type of intention. "Intentions are in the standard stock of criminal law concepts.”

We could then understand "assaulting someone because he was Jewish” as "intending to assault a person who is Jewish”. But this is an ambiguous statement. It must mean intending that the victim be Jewish. In such statements, the characteristic of the victim is included as part of the description of the action that the actor intends to commit. Are some intentions worse than others? Dillof writes "Bias intentions are different from, but not worse than, the intentions underlying nonbias crimes”.

Based on intentions (Dillof understand intentions in a “fine-grained” way - individualized based on whether the person holding the intentions would recognize the meaning of the propositional objects of the intentions to be the same) - the bias criminal will be culpable for exactly the same wrongdoing, as the non-bias criminal. It doesn’t matter who the victim is, or what intended to be. But can the gravity of a wrongdoing always be defined independently of the object of the wrongdoing? Dillof argues that the only relevance is whether the object has some special rights or entitlements. There might be limitations (such as police-officers, possible politicians?) , but exceptions should not be a function of race, color, or religion.

"Paradoxically”, Dillof argues, this is the very principle the Bias Criminal denies (and which proponents often support) - and it the principle protects him from enhanced punishment.
Might people have special moral status for historical reasons? Or for reasons of their vulnerability? And thereby gaining extra strong rights, the violation of which deserves more punishment?

"Under this “affirmative action” theory of bias crime statutes, when these rights to life, liberty, and the pursuit of happiness are intentionally violated, the violator becomes culpable for a particularly great wrongdoing, which justifies the enhanced penalties bias crime statutes impose. Similarly, it may be argued that Blacks are particularly vulnerable to wrongdoing because the same wrongdoing, in some sense, is a greater wrongdoing when imposed on Blacks." (P 1035)

Dillof finds two faults with this argument: 1) It would then be worse just knowingly assaulting such a person. (Mugging and "realizing” the victim belongs to a protected group).
2) Could not account for the enhancement of victimizing any group.
(Comment: Both these complaints can be challenged)

It is, Dillof points out, logically impossible that members of all races and religions have particularly strong rights or be particularly vulnerable. Such an “affirmative action” theory, therefore, even if it were plausible with respect to some groups, could not justify the broad reach of bias crime statutes over crimes committed against those of every race.
(Comment: But note that the group could be defined as the "other", and THAT’s the type of crime that tend to signal a greater wrongdoing. No matter what the particular otherness in the case in question. (This is not how these statutes usually looks, however. It’s neutral within categories. A vulnerability account would restrict the extent of the protection, but need not be specific.)

Dillof believes that this shows that the “because of” element can’t be interpreted as criminalizing intentions of a particular sort or that intentions determine the scope of the wrongdoing for which the actor us culpable.

Footnote 45: “It has been argued even if the primary rationale for bias crime is the greater wrong bias crimes inflict on ethnic and other minorities, the broad reach of bias crime statutes to bias-motivated crimes against nonminorities is nonetheless justified. According to this argument, the Equal Protection Clause’s prohibition on racial and other classifications requires that bias crime statutes not be limited in scope to crimes where the victim is a minority. (See Grannis) If, however, perpetrators of bias crimes on nonminorities do not deserve to have their penalties enhanced, the Equal Protection Clause should not be construed to require it. Not punishing those who do not deserve to be punished seems a compelling state interest. A statute, unlike all existing bias crime statutes, which applied to only bias crimes against minorities would be narrowly tailored to achieve this end because it would punish exactly the group that deserved it - those who commit bias crimes against minorities. Thus justifications for existing bias crime statutes, which apply to minority and
nonminority alike, cannot be backed into through reliance on the Equal Protection Clause.”

Is the traditional model to restrictive, then? Can we offer a novel account, that allow for such additional punishment in certain circumstances?

B. Problems with Theories of Greater Wrongdoing
If wrongdoing is greater for BC’s then, presumably, commissioning it should be worse, to. (Dillof offers an example). There are two wrongdoing-based theories here: BC’s

1) violate a person’s right not to be discriminatorily harmed.
2) result in secondary harms such as feelings of apprehension in the victim’s community.

Dillof rids himself of 2) by noting the proxy problem “The assumption that bias crime statutes rest on a theory of secondary harms, however, renders bias crime statutes susceptible to the criticism that they do not address these harms as effectively as alternative statutes that do not employ bias as an element.”

1) Theories based on the Right not to be Discriminatorily Harmed
The first suggestion brings in the notion of discrimination as the basis of wrongdoing. “The right not to be discriminatorily harmed is a theoretical entity which, if sound, would imply the greater wrongdoing of bias crimes. Such a right would play for bias crimes a role analogous to that which a person’s right not to be physically injured plays for assault. Just as an assault is an instance of wrongdoing because it violates a person’s right not to be physically injured, so a bias crime would constitute a distinctive wrongdoing because it would violate a person’s right not to be discriminatorily harmed.” (1037)

This, then, is something over and above the right not to be harmed. It is not merely derived from it. But the right not to be discriminatorily harmed can only be violated if another right (that of not being harmed) is also violated. Nevertheless, it carries independent moral weight.

Second, it’s distinct from the right not to be offended or humiliated. Such rights might be violated as a consequence of a person’s learning that he has been harmed because of his race or other specified characteristic. It is possible, however, that the victim of a bias crime may not learn that she has been the victim of discrimination and so no offense or humiliation would occur.

Like discrimination in general. But Dillof does not believe there is a good moral basis for recognizing a right not to be discriminatorily harmed. And that this does not threaten civil anti-discrimination laws, because they can be reconceptualized.

A Interest in others’ thoughts
It is mysterious how violating a right discriminatorily can constitute a wrongdoing over and above that of violating the right.
“Acting on a discriminatory basis therefore produces wrongdoing only because it leads to acts inconsistent with basic moral principles. Thus, the putative impropriety of discrimination may be accounted for without recognizing a wrong in biased action over and above that of violating the basic moral principles.” (P 1039)

If there is such a right, it must, Dillof argues, be based on “a protectable interest in the thoughts of another. Under this conceptualization, engaging in a bias assault is like stealing a person’s cane and hitting him with it: not only has the perpetrator violated the person’s interest in bodily integrity, but the perpetrator has done it in a way that treads on another’s interest in controlling his personal property”. (Here, the additional interest is the other’s thoughts (Compare with Kamm’s argument) ”Conceptualizing the distinctive wrongdoing of bias crimes as resting on a protected interest in the thoughts of another is a purely analytic move intended to bring the substantive moral issues into focus. Although there may be other ways of framing the issue, the same moral issues will ultimately have to be faced.”

There are two hurdles to recognizing this as a sound basis of the legislation. First: the “what you don’t know can’t hurt you” objection. Thoughts fall into this category. (They can’t hurt you directly, that is). But criminal law recognizes people’s interests in matter that neither affect them nor are derived from the interests of others who are directly affected. The criminal law prohibits the abuse of corpses, the violation of privacy (which is commonly done through wiretaps that the victim is unaware of) cruelty to animals, and desecration of venerated symbols.

Crimes must of course be discovered before they can be prosecuted, but the discovery is not an element of the crime. So the privacy of thought is not per se bar to recognizing an interest in the thoughts of another.

The other hurdle, Dillof thinks, is near insurmountable: ”In order to establish a protectable interest, a person must show that a matter she is concerned with is properly viewed as her concern, rather than somebody else’s” (p 1041) An interest in the thoughts of others is generally not recognized as such a concern.

These intuitions are supported by Feinberg’s general analysis of the concept of interest. ”It does not seem likely that wants, even strong wants, are sufficient to create interests.”

“If the concern is to be the ground of an interest, it should be capable of promotion by human efforts, particularly by the efforts of the person whose want it is…without that special relation to personal effort that converts a mere want into an objective, it is not likely that the appropriate sort of ”investment” can be made that is needed to create a ”stake” in the outcome.” (P 1041)

**However:** through the tort of defamation, the law recognizes a limited interest in the thoughts of others. (Comment: a person’s reputation is at least in part a set of behavioral dispositions of others, right) A person has some stake in the opinions of others because, through her work to establish her good name, she is indirectly responsible for them. But ”With respect to bias, the victim lacks a significant stake,
and so interest, in the attitudes of the bigot. Few individuals can claim responsibility for the reputation of their group. Although society as a whole through its efforts to eliminate prejudice, may have some interest in the thoughts of bigots, this interest also cannot trump the interests of the bigots, who take ultimate responsibility for their views.”

He then notes that any conception of bigotry that places the responsibility for it elsewhere would undermine the conception of bias crime involving punishment for discriminatorily causing harm. If the bigot is not responsible for it, he should not be punished for it.

(Comment: this is a section that is ripe for argument, I beleive)

Pure thoughts do not violate the interests of others, neither do thoughts leading to actions that do not impose harms.

"With respect to bias crimes, the crucial question is whether the victim should somehow gain a protectable interest in the perpetrator’s thoughts because these thoughts lead to a harmful act against the victim.”

He continues “It is instructive that tort law declines to view an interest in thoughts as being created in this way. Damages in tort may be compensatory or punitive. The compensatory damages a plaintiff is entitled to reflect the extent to which her interests have been impaired. In core torts, compensatory damages do not depend on motivation. For example, a person who received a black eye as a result of another’s negligence would be entitled to the same compensatory damages as a person who received the black eye as a result of an intentional battery”.

When it comes to punitive damages, they “are appropriate for conduct based on malice, evil motivations, or outrageous circumstances. As a matter of positive tort law, bias motivation would seem an appropriate ground for punitive damages. Thus, in tort, bias motivation, like intentionality generally, does not reflect the existence of a distinct interest the violation of which is to be compensated, but rather it reflects an assessment of the appropriate punishment of the tortfeasor based perhaps on some notion of heightened culpability”.

Note that we are here moving away from the wrong-doing side of the argument.

Dillof continues:

"Our intuitions about whether we should recognize an interest in bias motivations that cause harm are not completely settled. There are admittedly conflicting possible conceptualizations of the place of motivations in bias crimes. Under one conceptualization, a bias crime is seen as involving only the perpetrator’s act entering the victim’s sphere of interests with the perpetrator’s thoughts staying outside and behind with the perpetrator. Under a second, a bias crime is seen as involving a perpetrator’s thought entering with his act into his victim’s sphere of interests where it is properly subject to objection by the victim.” (P 1044)

Dillof thinks that with respect to the generic bias crime, the balance of considerations seem to favor the view that the perpetrator’s motivations remains in the perpetrator’s sphere of interests.
“Even when racism, anti-Semitism, and other forms of bigotry have impinged on our lives, we should recognize that we still have no claim on the bigot’s thoughts. This respect is not based on the value of bigotry, but the value of the bigot as a person whose moral beliefs, though profoundly wrong, are still his. Sanctity of thought prevails” (P 1045) (Comment - we clearly have a stake in it, even if it can be defeated by other considerations)

b. Civil antidiscrimination laws
Bias Crime statutes and civil antidiscrimination laws are closely related. “Civil antidiscrimination laws share the defining feature of bias crime statutes: the prohibition of conduct engaged in “because of” (or alternative locution) a specified characteristic. Furthermore, the Supreme Court has recognized the similarity of the two types of laws. In Wisconsin v. Mitchell, the Supreme Court cited the analogy between presumptively constitutional civil antidiscrimination laws and the challenged bias crime statutes as a ground for upholding the latter. Similarly, those who have defended bias crime statutes have appealed to civil antidiscrimination laws as evidencing our society’s recognition of a general interest in not being the subject of discrimination.” (P 1045)

Dillof argues that a general interest in not being subjected to discrimination would imply an inappropriate interest in the freedom of thought of others. He offers two theories of antidiscrimination laws that do not rest on a general right not to be subject to discrimination. They illustrate that objecting to BCS does not require rejecting AD laws.

They can rest on a general interest in employment if sufficiently qualified. All instances of unreasonable hiring and firing appear to violate harm-avoiding norms of conduct of the type the law traditionally enforces. It is being deprived of the legitimately expected employment opportunity that necessarily accompanies being the victim of racial discrimination. (Focus is on high-profile bad reasons like racism, as such cases are more likely to be genuine, and possible to prove).

“In sum, pursuant to the account I have been sketching, the difference between bias crime statutes and other antidiscrimination laws, such as Title VII, is that bias crime statutes enhance a penalty for an act that is already punished commensurate with its wrong. The penalties that civil antidiscrimination laws assign to acts of discrimination are appropriate given the wrongful nature of the acts, but the acts are not wrongful by virtue of the discrimination.” (P 1047) (Comment: this is a key issue, and intuitions on the grounds of AD laws may differ).

Bias Crime Statues would be analogous to AD only when 1) general penalties for all crimes are artifically lowered so that there was general “underpunishment” of crime relative to desert. 2) BCS merely enhanced the penalty for crimes to a level appropriate for the punishment of the underlying crime. 3) There was an enforcement-based rationale, as opposed to a desert-based rationale, for why bias
crimes, and not other crimes, were being punished at the appropriate level. (Comment: this distinction tracks the distinction between utilitarian vs retributivist theories).

An alternative way is to admit that interests can be created or transferred. One such mechanism for acquiring interests is through promises. "The general obligation to obey the law, for example, may be thought to rest on such a tacit or hypothetical promise. On such a view, the acceptance of the benefits of society constitutes the acceptance of an agreement to obey the laws. In this light, the Equal Protection Clause’s prohibition on state action based on racial animus is easy to justify: individuals may be generally free to discriminate, but by accepting the power of government office, they tacitly or hypothetically waived their freedom to exercise this power discriminatorily." (P 1048)

But crime, besides being an anti-social activity, is also an asocial activity. It’s unintelligible to think of criminals as entering into agreements with either their victims or society at large to perpetrate crimes only in a nondiscriminatory way. Unlike the activities regulated by civil antidiscrimination laws, BCS apply to activities in which no amount of freedom of thought has been waived. (Comment: not even implicitly, by participation?)

2. Theories Based on Secondary Harm
Frederick Lawrence argues that hate crimes cause heightened sense of vulnerability, depression or withdrawal. They may ignite intercommunity tensions that may be of high intensity and of long-standing duration. "These harms may be called secondary harms because they ordinarily could not occur without the primary harm produced by the underlying crime. On the basis of these secondary harms, Lawrence argues that the principle of proportionality justifies punishing bias crimes more severely than underlying crimes."

The central difficulty is that BCS do not directly enhance the penalty for crimes involving that wrongdoing. Rather than directly requiring that a secondary harm occur, BCS enhance penalties when the underlying crime is committed because of a specified characteristic. Acting because of a specified characteristic is thus employed as a proxy (or surrogate) for the occurrence of the secondary harms that are advanced as justifying the penalty enhancement of BCS’s.

A) Proxies in the criminal law
The causing of the harm justifying the punishment is generally an element of the offense - the relevant harm is explicitly stated in the either incomplete or entered into underlying offense. (For intent-based retributivists, it is sufficient that the harm merely be intended by the perpetrator. For harm-based retributivists, the harm is made more proximate by the attempt, agreement, or other act triggering the inchoate offense. In both cases however, the relevant harm can be found by examining the face of the relevant offenses”. (P 1051)
There are borderline cases when some element is not directly relevant, or a proxy. Like the role of age in the criminal law. Age functions as a proxy for lack of maturity or responsibility. Things like desecration of a venerated object, are also understandable as at least in part depending on secondary harm. When proxies are used, their validity is often questioned. Strict liability offenses, such as adulteration of food, statutory rape, and selling alcohol to minors, are often construed as employing circumstances as proxies for intent or recklessness. Possession offenses also have been viewed skeptically. “State courts have struck down a variety of laws that criminalize behavior that is not intrinsically harmful but is perceived as correlated with social harms.”

The criminal law’s presumption against employing proxies rests on the related grounds of over- and underinclusiveness. (P 1053)
Overinclusiveness - prima facie inappropriate because, all things equal, a person should not be punished based on a harm that has not occurred.

"Furthermore, where an offense is not defined in terms of even risking the justificatory harm, a person could be subject to punishment even if the likelihood of that harm had not been increased."

"Persons whose wrongdoings fall within the scope of the statute may raise objections based on fairness: why should they be subject to sanctions where others similarly situated with respect to the justificatory harm are not? Although this latter objection may not be strong enough to justify not applying the statute at all, it is nevertheless an objectionable feature of the statute"

"Criteria are needed to determine when it is appropriate for the criminal law to use proxies". (P 1053)

In the case of assaults, most jurisdictions employ aggravated assault statutes that are drafted expressly in terms of "serious bodily injury" - the underlying harm. The reason that classes of wrongdoing should not be assigned sanctions based on the average wrongfulness of the class members is that the wrongdoing-culpability theory of punishment is a theory of punishment for individuals, not classes.

"In determining whether a proxy is validly employed, we should ask, at a minimum, whether its use results in outcomes with less over-inclusiveness and underinclusiveness than the outcomes that would be generated by employing statutes explicitly drafted in terms of the object of the proxy. Examples of statutes explicitly drafted in terms of secondary harms rather than bias motivations include those that enhance the penalties where "(o)ffender acted with intent to inflict psychological injury on victim," or "(o) recklessly created terror within a definable community," or "offender acted in manner likely to provoke retaliatory crimes". These statutes could also be drafted more broadly in terms of negligently risking the causing of secondary harms." (P 1054)

Another possibility - if the defendant knew or should have known that a victim of the offense was particularly susceptible to the crime.
Sentencing guidelines provide for cases where the victim is both known to be more vulnerable - and so potentially within the scope of the provision, and where the perpetrator acts because of the victim’s race. “In such cases, the perpetrator’s sentence is enhanced according to only the bias crime statute, which is a greater enhancement than that provided by the vulnerability provision. (...) This result is consistent with understanding bias crime statutes as using bias as a proxy for greater vulnerability of the victim. The greater enhancement under the bias crime provision may be explained based on the fact that the perpetrator of a bias crime must select thus victim intentionally, whereas the vulnerability provision is satisfied by merely knowing of vulnerability”.

B. Relative overinclusiveness and underinclusiveness
In overinclusiveness, secondary harm statutes have a slight edge over bias crime statutes. - There will be cases where a crime is committed based on bias, but no secondary harms ensue. When, for instance, the bias motivation is not apparent. In some cases, the victim cares little about the motivation of the attacker, and the nature of the attack receives little publicity.
None of these would be risked on secondary harm statutes. “Those who violate such statutes will, by definition, have caused, or risked causing, secondary harms”.
Two under-inclusiveness categories - ”In the first category are cases of persons who intentionally cause or risk secondary harms, but do not commit any underlying crime, and so will not be liable for committing a bias crime. Examples of such cases include a hatemonger who spreads rumors that a nonbias crime was committed from bias and so fans the flames of hostility in a community”. (Also - causing and risking, but without bias).

Second category: Resulting from jury error: In such cases, the underlying crime was motivated by bias and secondary harms ensued, but the existence of bias cannot be proven. The complexity of proving motive has been described as the “fundamental vice” of all bias crime statutes”. (See Riggs “Punishing the Politically Incorrect Offender…”
(P 1057)

Reasons to prefer such direct Secondary harm statutes: Juries are often presented with evidence of motivation in order to infer other facts. This raise difficulties, though: Juries undoubtedly are unaccustomed to ascertaining such diffuse facts as whether a particular community felt vicariously victimized by an attack on one of its members or whether a particular crime wore away at the fabric of its society.

(Rebuttable presumptions are preferable to proxies, as they at least are somewhat responsive to evidence).

Would employing an “intent-to-cause-secondary-harms standard” be more effective of identifying those responsible for such harms? Greenawalt seems to suggest that bias
motivation is the “proxy”, and for such intentions. Where these are too difficult to prove.

No data available about the effectiveness of BCS to target secondary harms. Insufficiently justified.

C. Other considerations
First - we begin by identifying the wrongdoing that we seek to address, then confront potential proxies, or by default employ the wrongdoing itself to avoid arbitrariness. Second - When proxies are used, the criminal law on its face, and in its correct operation, punishes some who do not deserve to be punished. Third - criminal law also serves an educational function. Society’s most strongly held values underlie the criminal law. Criminal statutes are the most direct and public expression of these values (see Feinberg - the expressive function of punishment). This is undercut when the law use proxies instead of incorporating the wrongs that underlie the prohibition in the face of the statute”. (Comment: but we GAIN another expressive function - that of taking a stand against prejudice).

Bias crime statutes, as currently formulated, send the message that acting because of certain reasons is so improper as to be punishable. As argued in the previous section: this is not the best moral theory. Although the race or other specified characteristic of a person generally should not be relevant to how a person is treated, acting on such a basis should not be considered a form of wrongdoing. To maintain otherwise would be detrimental to our respect for the autonomy and sanctity of thought. Thus, the antidiscrimination message that bias crime statutes convey, while a worthy message, is conveyed too powerfully. It overpowers other equally important social norms.” (P 1062)

Appeal to secondary harm might just be a rationalization for more intuitive objections to Bias Crimes. “Lawrence, for example, admits that "(t)he rhetoric surrounding the enactment of bias crime law suggests that most supporters of such legislation espouse a thoroughly deontological justification for the enhanced punishment of racially motivated violence.”.
Might there be a more forceful case for the independent wrongfulness of discrimination?

C. Problems with Theories of Greater Culpability
Wrongdoing-based theories of bias crime rely on questionable claims to others’ thoughts or the contingencies of secondary harms. "Culpability-based justifications for bias crime statutes offer an alternative approach to justifying bias crime statutes. We believe the murderer should receive a harsher sentence than the drunk driver who kills not because the murderer has caused more harm, but because of the murderer’s greater culpability for the harm.”
“Bias criminals have acted based on particularly repugnant beliefs or values. This fact, it may be argued, leads to an enhanced culpability justifying greater punishment” (p 1063)

Dillof offers some reasons why this might be plausible. Section 2 suggests that bc statutes may be understood as criminalizing “motivations concerning race and other specified characteristics, and explicates the concept of motivation in terms of belief and desires.” Sections 3 and 4 examines two theories of how acting based on bias motivation might lead to greater culpability for the wrongdoing at issue. Although motivations may be relevant to culpability in some cases, bias motivations will generally not be relevant to culpability. They are judged to be unsatisfactory.

1. The Appeal of Culpability Based Justifications
Two prima facie reasons for thinking that culpability-based justifications of bias crime statutes would be more successful than those based on wrongdoing.

“First, thoughts, such as intentions and beliefs, are traditionally understood as bearing on a person’s culpability for a wrongdoing. We usually identify the wrongdoing at issue by employing a description of the act that excludes the actor’s thoughts (beyond those implicit in a movement being an action). Without reference to Jim’s thoughts, we may say that Jim moved his fist through the air until it contacted and broke John’s nose - a wrongdoing”.

"These descriptions with implicit subjective components concerning thoughts, beliefs, motives, and so on, are the ones relevant to assessing culpability. They indicate whether the act was intentional, excusable, accidental, or made under duress. Whether a person acts “because of” a specified characteristic is, loosely speaking, a matter of the person’s thoughts. Accordingly, it is plausible to think that the thought-based “because of” element of bias crime statutes is relevant to assessing culpability.”

Second - placing bias on the culpability side (rather than on the wrongdoing side) avoids the problems of wrongdoing based justifications.

“With culpability-based justifications, bias may be understood as directly relevant to desert - rather than merely being a proxy - without implying an interest in the thoughts of another. Thus, the problem of thought-crimes does not arise.” (P 1064)

Putting emphasis on “Culpability” addresses the judge, rather than the perpetrator. “In general, by telling courts to punish wrongdoings committed intentionally more harshly than those committed recklessly, and telling courts not to punish at all wrongdoing committed while insane, the government is not instructing citizens to engage in their wrongdoings recklessly rather than intentionally, and ideally while insane. Thus, thoughts of one type (reckless or insane) are not promoted over those of another type (rational and deliberate). By making thoughts relevant to culpability, the government is trying merely to punish persons fairly, not to assert an interest in thoughts.

2 An Analysis of Motivation
In order to evaluate such justifications, however, a reasonably precise understanding is needed of what type of thought acting “because of” involves. Bias crime statutes do not define what acting “because of” is. Nevertheless, it is natural to describe them as criminalizing motivations because those who act “because of” race or other specified characteristics may be said to be motivated by considerations of race or those specified characteristics. The relevance of motivations to the criminal law, however, is controversial.

(This section explicate the concept of motivation, and the trivial way in which motivation is relevant in the criminal law.)

There are different traditions here. According to one - motivations are interlocking desire-belief pairs that cause actions. (According to another, they are simply a species of intention.)

“Furthermore, for an actor to perform an act A because of a motivation, not only must the actor have the appropriate interlocking beliefs and desires to perform A, but A must also be caused by those beliefs and desires.”

If G, in drinking a beverage, both desired to quench thirst and believed that drinking would, we would NOT say that she was motivated by these if 1) G is an actor who desires to follow the script calling for her to drink and 2) but for these beliefs and desires concerning the script, would not have drunk the beverage.

“Motivations, defined in this manner, are distinct from intentions in two respects. First, in contrast to our intentions, our beliefs and desires are not a result of a direct act of will or free choice. When we choose what acts to perform, we thereby establish our intentions. Thus, although our intentions are not the immediate objects of our choice, they are created by the willful act of choosing. In contrast, beliefs and desires ordinarily cannot be created simply through an act of will.”

P 1066 (Comment: this distinction between intentions and motivations is key).

In footnote 122, Dillof writes - “We may act in ways to influence the development of our beliefs and desires (…) such a process, however, has an instrumental, rather than a direct effect on beliefs and desires.” Comparable to causing an elevator to rise.

(Comment: This is not entirely convincing, however.)

Second contrast to our motivations - our intentions may not be in direct conflict. I can desire to stay at home or go out, but not intend to do so. “Desires discounted by our belief that they will be fulfilled are the weights that are put on each side of the scale when determining what our intentions shall be. Intentions, In turn, are the outcome of the weighing.” (P 1067) (Comment: this is an interesting claim, but a much simplified picture of motivation).

Intentions are formed based on motivations and are the immediate causes of actions. Thus, there is a close connection, but not identity, between motivations and intentions. Although a motivation to do A may result in an intention to do A, it need not. The motivation may be suppressed or overridden. (P 1067)
Central idea here: The uninteresting sense in which motivation is related to culpability, then, is via intentions. 

"Because intending a wrongdoing undeniable creates culpability for the wrongdoing, the motivations that make the wrongdoing intentional also create culpability, albeit indirectly." (P 1067) We could formulate criminal offenses in terms of motivations rather than intentions.

But this analysis does not answer the question whether bias crimes involve greater culpability for a wrongdoing than similar crimes that do not involve bias. If motivation is only relevant insofar as they give rise to intentions, what then? "For a culpability-based theory of bias crime statutes to succeed, it must show how the perpetrator of even a crime of intentional wrongdoing, such as assault, can be more culpable when he acts from bias than he would be otherwise. A theory of bias-enhanced culpability is needed."

3. Bias Motivations do not produce particularly firm intentions
Bias motivation might influence culpability through the "quality of intentions" that they can give rise to. "Although the intentional character of an act is generally not regarded as a matter of degree (an act is either intended or not), the weighing process leading to the formation of the intention may either firmly or weakly recommend the act". - So here there is a possibility to grade - whether the crime was done "wholeheartedly" or not. Hastly or well-considered. But "there seems to be no reason to believe that bias motivations give rise to firmly held intentions of the type discussed above."

Footnote 126: "Our inclination to recognize culpability-increasing and culpability-mitigating forms of intentionality may be based on the desire for punishment to fit the criminal as well as the crime. We may have doubts about the appropriateness of sending a person to prison for many years on the basis of an out-of-character, spur-of-the-moment, regretted, but nonetheless intentional, act. It is possible that an intentional act will not be representative of the full personality of the criminal; nevertheless, this full personality will bear the weight of the punishment. There are, as always, possible utilitarian justifications for practices such as punishing premeditated murders more harshly. These possible justifications, however, do not exclude culpability-based ones." (P 1068)

No reason to believe that Bias criminals act on particularly well-considered desires and beliefs.

"Bias itself is a deep-rooted motivation. But the criminal intentions that it gives rise to are qualitatively as varied as the intentions to commit nonbias crimes. Thus, bias does not produce intentions with qualitative characteristics that justify enhanced penalties on culpability grounds." (P1069)

4. Bias Motivations Do Not Particularly Connect to Wrongdoing
Examples where motivations mattering apart from intentions they give rise to. 2nd theory why these matters and 3rd applies it to bc - but even under this theory they do not involve greater culpability. 4th deals with possible counter-arguments.

A) Where motivations increase culpability
Basic example: Mercy-killing. 1) Motivated by ending uncles suffering. 2) Motivated by coming into inheritance quicker. Shows merely the relevance of motivations "in defining the scope of the intended consequences that will be relevant to assessing desert". "Motivation is only relevant because it defines the intentions relevant to determining desert".
Further hypothetrical, illustrating how motivations may be relevant over and above the consequences they make intended.- What if the will says that the one who provides the mercy killing will inherit? Then we have the same intention (right?) but difference in culpability.

2 Why motivations increase culpability
Intrinsically desiring a wrongdoing or rightdoing matters.
"The moral relevance of the distinction between intrinsically desiring a result and merely intending a result (i.e. Instrumentally desiring the result) can be illuminated by comparing it with the moral distinction between knowingness and intentionality. This latter distinction has been most fully investigated in the context of the Doctrine of Double Effect (DDE)." (See footnotes to this section).
There are four conditions to justify an act foreseeably resulting in harm to another 1) the intended final end must be good. 2) the intended means must be morally acceptable. 3) the foreseen harm must not itself be intended and 4) the good end must be proportional to the foreseen harm. 3) is the critical point.
It is acceptable to bomb a munitions factor, and risk killing some civilians. It’s not okay to kill civilians to break the morale of the enemy. But DDE is a controversial principle.
Many attempts at getting at this moral distinction (using as a means, intending an evil etc.)
"To the extent these explanations of the moral distinction between intended and merely foreseen results have force, they apply equally to the distinction between intrinsically desired and merely intended results. When a person intrinsically desires a wrongdoing not only is evil a guide marker for the person (as it would be for a person who merely intended the evil as a means to some other end) it is actually her target.
Dillof does not claim that intrinsically desiring a result is a condition that substantially increases culpability over merely intending a result. (The model penal code only irregularly assigns a higher penalty level to crimes of intentional wrong than to crimes of knowing wrongs).
Here comes the central claim:
"I believe it is reasonable to understand motivations as increasing culpability for a wrongdoing over that associated with merely intending the wrongdoing when the motivation includes the intrinsic desire for the wrongdoing. Thus, we have a plausible theory of the theoretical relevance of motivations to the criminal law." (P 1075)
Footnote 148 - some have argued that wrongfulness implies choice, and that motivations are not chosen. (This is not at issue here, though) "It may be relevant to desert whether a wrongdoing-related factor, such as the vulnerability of the victim, was chosen. It is not, however, relevant to desert whether a culpability-related factor was chosen. A factor over which an actor has no control may properly be relevant to the actor's culpability for a wrongdoing. Sanity/insanity, for instance. "...To be culpable for an intended wrongdoing, a person need not choose to intend the wrongdoing (whatever that might mean). Principles of culpability are not norms to be followed if one "can," but principles for assessing desert based upon the violation of norm. Thus, it is irrelevant for culpability that motivations might not be chosen". This may not be entirely obvious.

C Intrinsic desire and bias

"When narrowly interpreted, bias crime statutes require the presence of a particular type of intrinsic desire. Professor Lawrence has distinguished between a racial animus model and a discriminatory selection model of bias crimes." "Although racial animus comes in many shades, it is roughly the desire that ill befall those of the target race or that those of the target race be absent from the racist’s sphere of interest." (P 1075)

Under the DSM, RA is not required. - Only that the victims race play some role in the decision to commit the crime against the victim.

Are these within the scope of most bc statutes that employ the "because of" formulation?

Depending on the interpretation a bc statute receives, the specified characteristic will be required to enter into the perpetrator’s reasoning at the level of intrinsic desire or merely belief.

In the DSM, no wrongdoing need be intrinsically desired. But even on the racial animus model BC’s “would not always involve heightened culpability because the intrinsic desire involved is not of the right sort”.

"All acts, hence all crimes, are ultimately motivated by some intrinsic desire. Not all crimes, however, involve increased culpability based on intrinsic desires. As discussed above, the type of intrinsic desire that increases culpability is the intrinsic desire to engage in wrongdoing. Some perpetrators of bias crimes undoubtedly act because of the intrinsic desire to harm a member of a particular race." (1076)

But some with racial animus may have instrumental reasons for harming. No intrinsic desire to harm, just “clear the neighbourhood” or what have you.

"Thus even bias crimes based on racial animus do not necessarily involve an intrinsic desire for wrongdoing”.

Dillof argues that BC’s still do not appear to warrant the enhanced penalties. Others may commit crimes with intrinsic desire to harm victims too. "Many crimes are based on personally directed hate and hostility. Persons who commit such crimes generally intrinsically desire the harm they have caused." (P 1077) Should it be left to the judges to decide such matters?
"Because the standard regime of penal provisions can accommodate intrinsically desired crimes in general, there appears to be no need for statutes establishing enhanced penalties for criminals acting on bias-related intrinsic desires in particular. In sum, the problem with attempting to justify bias crime statutes on a theory of greater culpability is that to the extent that greater punishments are warranted in cases of racial animus, it is because of the “animus,” not the “racial.”

D) Untangling bias and culpability

“When examined closely, bias appears unlike factors relevant to culpability. Intent and awareness of consequences are paradigm examples of culpability-determining factors. Closely associated factors, perhaps expressed at a higher level of abstractness, include strength of commitment, appreciation of results, and degree of free agency. Concepts like “race” and “religion” have no unique position among these factors. Specifically, acting from bias does not seem to connect one to a wrong in the way these other factors can.”

(P1077)

If an actor has set a fire “because of race,” there is no additional connection between the setting of the fire and the actor, compared to an actor who has set the fire for another reason”

An alternative response is simply that the notion of culpability employed is too narrow. Rather, the presence of, reliance on, and manifestation of an immoral view is the basis of culpability. When the view is particularly morally abhorrent, such as in the case of racism and other forms of bigotry, the culpability is increased proportionately. "(This is Lawrence view - the motivation “violates the equality principle”). Racism is not alone in this, though. Racism is a mistaken view insofar as it hold that the worth of individuals - a profoundly important moral matter - is tied to their race. Yet any form of egoism in which the actor believes that he is more entitled to property, respect, or consideration than others is similarly mistaken about the worth of others. "Along the continuum between general disrespect for all others and specific disrespect for a single individual, racism and other forms of groupbased intolerance occupy no position making them uniquely abhorrent” (p1079)

Deeper still - “Engaging in wrongdoing from racial animus (or analogous motivations) is virtually inconsistent with having an excuse for the wrongdoing.” But this is not enough, and does not point out BC’s exclusively. Another - are we just conflating the view with its contingent consequences? Bias crimes reflect slavery, genocide et. "Furthermore, there is little, if anything, good to associate with bias. In contrast, other sources of crime, such as greed, when not taken to excess, may have socially useful aspects”

Other reasons for harm - jealousy, short-temperedness, short-sightnedness, peer pressure etc. Blend into the background of the human condition.
"Bias thus appears to unite a category of crimes into a particularly salient class, the paradigm members of which are among the greatest evils in human history. In punishing persons, we should ideally assess their punishment based on the harms they caused, intended or risked. We should not punish them based on the harms caused by other acts that may be similar, but not in a morally relevant way (...) an assault should not be punished more harshly because it happened to be committed with a weapon used in a previous assault.” A german-american not be punished more because germans were responsible for the holocaust.

"Based on similar reasoning, we should avoid the temptation to punish more harshly those who act based on anti-Semitism simply because anti-Semitism produced the Holocaust”.

"The conclusion that bias itself does not increase culpability does not leave us silent and still before it. Punishment is only one form of response to that which we view as morally repugnant. An assault based on race arguably reveals a particularly corrupt character. Yet it is generally conceded that bad character itself is not a ground for criminal liability.”

(P 1080)

We don’t punish dispositions. Bad character is ground for criticism, but not punishment.

CONCLUSION: THE PLACE OF BIAS CRIME STATUTES

"Bias crime statutes raise profound questions for moral and legal theory. The acts that bias crime statutes sanction are distinguished by the thoughts that underlie them. Having criminal sanctions triggered by thought is a disquieting notion for a society, such as ours, committed to freedom of thought. We are thus led to investigate the ways in which thought properly may be relevant to the criminal law. The concepts of wrongdoing and culpability inform our intuitions concerning desert and our understanding of much of the positive criminal law.” (1080)

So are BC statutes justified on the ground that these are intrinsically or contingently more harmful than similar nonbias crimes?

"In order for bias crime to be intrinsically harmful, persons would have to have an interest in not being discriminatorily harmed. But such an interest implies an interest in the thought of another. To recognize such an interest would be incompatible with our respect for individual autonomy, and so improper.”

A theory of contingent harms is more plausible, one that appeal to the secondary harms of these crimes. Bias is then used as a proxy. But using proxies is only justified if it results in less overinclusiveness and underinclusiveness than using statutes drafted in terms of the harms at issue.

"In the case of bias crime statutes, the uncertainties concerning relative fit are so great that presumptions against employing proxies may be decisive.”

Regarding culpability - "Mental states are traditionally considered relevant to culpability. The mental state triggering bias crime statutes may be construed as a type of intention, a motivation, or an intrinsic desire. Culpability, however, is a matter of an actor’s attitude toward the morally relevant features of an act, its consequences, or
its circumstances. Bias is an attitude toward a person’s race, religion, or other specified characteristic. These characteristics, however, are generally morally irrelevant. One person has as much right to be free from assaults, harassment, and other crimes as another. Thus, acting based on bias will not be relevant for determining culpability. We may conclude that the place of bias crime statutes is limited, existing only where factors concerning relative fit make them the most appropriate means of addressing secondary harms.”

The best we got is a contingent justification of bc statutes, then. Bigotry and bias do not necessarily violate the interests of other.

“Simply because the harmfulness of bias is contingent, however, is no reason not to condemn it, or more importantly, strive to purge our society of it. The contingent reality of bias is all the justification that is needed to combat it without restraint through noncoercive means such as education, protests, organizing, and personal acts against bias as it may be encountered in our daily lives. With respect to coercive means, however, the punishments we use to combat bias must not exceed the limited justifications that our world provides. But by whatever means we battle it, the most effective means require recognizing bias for what it is: a source of evil consequences, rather than an instance of evil itself.”
Summary:

Divide within political and legal theory concerning the justification of hate-crime legislation in liberal states. Opponents argue that enhanced punishment cannot be justified within political liberal states. Hurd argues that criminal sanction which target character dispositions unfairly target individuals for characteristics not readily under their control. She also argues that "character" based approach in criminal law is necessarily illiberal and violates the state’s commitment to political neutrality.

Al-Hakim tries to show the difficulties and absurdity that follows from Hurd’s characterization of hate-crimes. Punishment for undesirable character traits is consistent with western conceptions of criminal law. He then constructs a positive argument for the justifiability of punishing for character traits and for the enhanced punishment associated with hate-motivated crimes.

Introduction

Starts with contrasting two cases - first Sandouga - charged and convicted of arson against a Jewish synagogue - expressed anger against eh Jewish community for events in the middle east. Should the sentence be aggravated?

The specific question that has divided academics and lawyers alike is whether enhanced punishments for hate crime can be justified in liberal democracies.

Advocates of enhanced punishments advance several arguments.

- Some - primarily justified on grounds of social harm. Societal harm caused by HC exceed those of the same crimes committed on other grounds. (Lawrence, for instance).

- Others - because of the specific nature of HC - the extra punishment is consistent with a range of traditional aims of punishment - such as retribution, deterrence, and rehabilitation - and so punishment theory itself requires greater sanctions for those who commit hate or bias motivated crimes. (Such as Wellman).

- Still others - grounded in political liberalism, arguing that conceptions of the good which are comprised in part by hatred of particular ethnic, religious, or racial
groups are exactly those conceptions of the good which must be excluded in free, equal, and democratic society.

Critics - two compelling arguments, interrelated - a) unconstitutional as it infringes on individuals’ freedom of thought (and expression) and b) “violates fundamental liberal commitments; in particular it violates state neutrality or, put differently, the liberal state’s commitments not to arbitrate between competing conceptions of the good.” (P 342)

The general difference is that 1) is grounded in a fundamental concern about the nature of supposed hate crimes, second relates to political implications. Infringing on individuals ability to act on racist worldviews.

Opponents argue that extra punishment unfairly targets an individuals worldview and, moreover, attempts to punish such individuals for their personal beliefs, opinions, and dispositions - in short, their character.

Some particular arguments in Hurd’s article “why liberals should hate “Hate-Crime legislation”. A significant flaw in Hurd’s criticism pointed out - seems to conflate the concept of character with concept of a conception of the good. (And character centered theories need not necessarily be viewed as illiberal in nature. Might be compatible. Second difficulty - odd implications of the claim that HC reveal character dispositions and are more difficult to bring under the volitional control of the agent. If we accept this - would require that HC be treated as a mitigating rather than an aggravating factor in sentencing. (Is this actually so strange?). In the final section he employ insights from capacity-based to character-based theories of responsibility and offer some arguments why HC should be punished more severely. (P 343)

What are Hate Crimes?

As a legal term - relatively new (1985 “Hate Crime Statistics Act” - collection and publication f HC statistics by US dep of Justice. Has become more popular in legal scholarship and mainstream media. ”Statutory definitions of hate crime differ across states but they tend to do so more in their inclusion or exclusion of certain categories than in the general definition itself.”

Two general features - 1) the victims of HC are selected on grounds of what they are as opposed to who they are. An individual is selected because of a central, or at
least centrally important, characteristic or feature. Must be rooted in a socially recognized identity (See Michael Blake - to rule out acts committed against individuals for trivial characteristics (Geeks and monsters)).

It does not seem to be necessary that the individual be right about his victim’s social identity. 2)Victims must be relatively replaceable by any other member of the same group. (Of course, one may pick out a prominent figure from the community in order to send a stronger message or harm the community more)

In the 2008 HC survey (Human Rights First group - HC are on the rise. Addressing the issue has become high priority for states - they clearly pose more than potential threats to individual citizens belonging to particular groups - they undermine social stability by creating civil strife between groups and further marginalizing groups. Related to the development of multicultural liberalism and identity politics.

HC threaten the realization of the ideals of multicultural liberalism, as they target individuals specifically for their group-based identities.

The philosophically interesting question is whether additional punishment should be given when crimes motivated by bias or prejudice against others are committed.

Al-Hakim focus on Canada - a federal institution - will take into consideration as potential aggravating circumstances any “evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin (…..) or any other similar factor”.

**Heidi Hurd and Hate Crime Legislation**

Challenge of the soundness of enhanced punishment.

A key difference between regular crimes and HC and, more importantly, what is is that we punish defendants for Criminal acts such as assaults, vandalism, murder and so on - the criminal courts must establish two criteria for purposes of conviction and punishment - actus reus and mens rea. A forbidden act and intentionally, knowingly or recklessly. We punish for acts in a certain state of mind. “Hate crimes, on the other hand, are thought to include an additional feature that warrants the extra punishment; in hate motivated crimes, the courts are, as before, interested in establishing the actus reus and mens rea but are now also interesten in the individuals character.”

The extra punishment, according to Hurd, is aimed at the individual’s possession of a character trait.

Hurd pints out that we can choose how to act, but we do not have that type of control over our character. Punishment may not be warranted, or justified, in a liberal
state. And why single out bigotry etc? To widen the domain to jealousy etc. Would be problematic.

"Finally - criminalizing hatred and bias is thought to move us from an act-centered theory of criminal punishment to a character-centered theory". This is moving in a distinctively non-liberal direction.

Al-Hakim grants Hurds characterization for the sake of the argument, and in order to provide internal critique. Let’s grant, then, that HC leg is fundamentally interested in emotional states and ultimately standing character traits. Focus on the remaining two claims - that our character is not readily under our voluntary control and that punishing individuals for standing character traits is in conflict with the values inherent in political liberalism.

Controlling characters

The mental states in question are not ‘occurrent states of mind’ but instead ‘dispositions possessed over time’. (We can’t momentarily feel hatred or prejudice). They are not emotions at all, but disposition to a range of more specific feelings or responses. Disposition tied to a host of mistaken beliefs about the inherent worth of other individuals: that triggers hatred and possible hatred.

Two implications of this psychology of HC - 1) we are punishing for bad character. Solely. 2) These traits may not be readily under an agent’s control.

"It seems less clear to what degree people can will away, or choose not to have, particular character traits, and specifically, particular emotions and beliefs”.

Hurd suggests that volitional control over our character traits, while not outright impossible, is still difficult to exercise. We can do so only indirectly. Criminal legislation that targets emotions and (dispositional) beliefs targets things that are not fully or readily within defendants immediate control. Return to this below.

Novel mens rea.

Political Implications

Drawing on a Rawlsian conception of political liberalism - "Political liberals traditionally license the state to enforce the Right, but not the Good”. How individuals decide to organize their individual lives is not the business of the state. Unless it is considered an unreasonable doctrine. (In a footnote, he mentions that
Some Problems with Hurd’s View

Aim to show that Hurd’s characterization leads to philosophically absurd conclusions.

HC leg is best explained as under a character theory of criminal law - the proper goals of criminal law is to punish vices and cultivate virtues. Distinctively non-liberal.

This, Al-Hakim points out, is problematic - it rests on the assumption that punishing character is necessarily the same as punishing an individual’s conception of the good. It also assumes that punishing undesirable character traits is necessarily non-liberal.

Hurd’s mistake is conceptual - character traits and conceptions of the good are two very different things.

So does punishing character also punish conception of good? And is a character-based approach in conflict with political liberalism and the way our current criminal justice system works?

Much in our criminal justice system aims to punish individuals for undesirable character traits

Character and Conceptions of the Good

Current literature on criminal responsibility focuses on three distinct theories: choice theories, capacity theories, and character theories. Choice - criminal responsibility require that there was a choice. Capacity - must have some kind of capacity in relation to the action. Character - action properly related to character.

The last type, following Hume, believe that the proper object of moral appraisal is ultimately the agent’s character and not his actions per se.

We cannot always infer bad character from bad acts. John Gardner points out - one who acts in a dishonest way on one occasion does not necessarily show that they have the characteristic of dishonesty. Bayles defense of this approach and attempt to show its compatibility with current understanding say - Discharing a gun in a crowded room is a dangerous act, but may not indicate a dangerous or undesirable character trait. If it ws accidental. If it was on purpose (etc.) then, a justification being absent, the act does warrant inferring an undesriable character. "The various mental
states indicate different attitudes towards harm. Blame is greater the more undesirable the attitude" (p 349)

Actions are interesting as evidence (especially if traits are dispositions). Sometimes prohibited actions are done without bad character. All of the exculpatory defenses (self-defense, necessity, duress, mistake) concern such cases. (For more of this view, see Duff and Pillbury)

Al-Hakim wants now to clarify the distinction between character and conceptions of the good, by way of the starting case.

- The facts raised important issues of moral culpability and aggravating circumstances - Sandougas actions and choice of victim were motivated by ethnic hatred. They were motivated by revenge, and involved considerably more advance planning and deliberation than is characteristic of an outburst of anger resulting from alcohol consumption (which he claimed at the trial). The choice of victim was not random and the act of violence not spontaneous.

(But was it a HC? He choose because of group, but because group were the same as those responsible for Palestine. This is not entirely clear-cut). Court pinpointed motivation and expressed clearly the view that the degree of his culpability is much greater than that of an act motivated by a different emotion or attitude. (Here is a problem though, not any prejudice will do. So how do we distinguish the relevant class without evaluative terms? We don’t).

Mr Sandougas conception of the good is not considered. Just aspects of his character that disposed him to act in a particular manner towards the Jewish community.

(Comment: So any prejudice that could be connected to the crime in some sense would do, no matter valence? This might help, since the relevant evaluation would then follow from the harm or some such of the act (it is a crime, after all) and not directly from the sentence. But it seems clear that there are degrees, and that these are evaluative. That, after all, is why hate is a Worse motive than others)

We need to know more about his attitudes, and how they connect with the rest of his life, in order to settle on conception of good. That’s a separate issue.

Al-Hakim illustrates the distinction by showing that one can have a conception of the good that goes against ones character (if the latter is understood as disposition).

Comment: While this is true, it raises a question - Would we really punish someone for a trait that does NOT reflect their values/conception of good? Surely it’s
worse if it does reflect such values. It’s the unconscious dispositions, those type of
prejudices that it’s problematic to punish, even though we should work against them.

Rawls describes conceptions of the good as normally consisting of a determinate
scheme of final ends which specify "a person’s conception of what is of value in
human life or, alternatively, of what is regarded as a fully worthwhile life." (He
doesn’t mention emotions, preferences, dispositions? Hm).

Al-Hakim thinks Hurds view argument can be rejected here, we are not punishing
conception of the good. But does that render a better account of HC?

_Hurd’s Reductio ad Absurdum_

Al-Hakim thinks that if Hurd’s characterization of HC is sound, we might need to
punish them less. (And this is not entirely absurd, mind. If we treat them as on a par
with mental infirmities etc).

Maybe the anti-semitic who acts out his hatred have little choice in committing this
crime. (Jacobs and Potter have this idea somewhere - otherwise it is strangely enough
ever discussed.). J&P say that a prejudiced offender might plea that he is less
culpable than a cold-blooded profit-motivated criminal.

**Comment:** Hurd would surely reply that actions are still under our control, and we
should also be able to realize the wrongfulness of our motivations in these cases. Al-
Hakims argument is not very strong here - there is no determinate relation between
motivation (reason) and action.

**Structure of Criminal Responsibility and Enhanced Punishment**

The problem runs deeper - Hurd’s view misunderstand the structure of
responsibility and fails to differentiate between two levels of responsibility and the
role that capacity and character play at each level. Al-Hakims suggestion is that
character and capacity need not be incompatible in the way implicitly suggested by
H.

*Structure of Responsibility: Two Level Model*

A distinction form Antony Duff (Law, language, and Community: some
preconditions of criminal liability)

*Preconditions* and *conditions* of responsibility.
Preconditions - condition which must be satisfied if the trial, as a process which aims to determine whether or not this person is criminally liable, is to be legitimate at all.

Conditions - which must be satisfied. If a defendant is to be duly convicted, with which a criminal trial is concerned. Responsibility to be determined before a criminal trial takes place? Includes mental capacity, sanity, volitional control, means-end reasoning, reasonable foresight, and so on. (Exempt children and mentally insane)

But we are not yet founding liability on character. It has not yet entered the structure of responsibility. These capacities are not features of what we would normally call character. Al-Hakim wants to suggest that we can rule out one possibility from the list of preconditions, namely the need for an agent to have control over their character traits (including emotionally charged ones). Our character traits are not “good in a shop” made ready for our choosing. (...) The point here is not that we need to submit to whatever character traits we have, rather the point is that we cannot require that individual have control over the character traits that they find themselves with.”

(Comment: Here it’s good to point out that hate may be expressed, and that is what makes it bad, rather than just having it as a reason)

There is a difference between claiming a) ‘we are responsible for our character’ and b) we are responsible for the actions that stem from our character.

We are our characters, and are for that reason responsible for the actions which flow from them (Duff, 1993). We move on to the condition level.

Character theory - at the condition level, we can sensibly ask whether some responsible agent, C, is in fact responsible for committing the hate crime in question. Character theorists can look to the actions as an indicator of whether a bad character trait exists. “Given that an agent's action was motivated by bias or prejudice that is tied to their character then we can punish for that character trait.” Once we rule out volitional or direct control over our character as a feature of responsibility, we can begin to see that punishing hate-motivated crimes - even if the source of such an act is centrally tied to character - is within the domain of criminal law.” (P 355)

(Comment: Note here that it is responsibility not just for an act, and not for the prejudice, but for acting for that reason).

Punishing on the basis of character is consistent with liberal principles and also in our practice. (Footnote - punishing for actions that are out-of-character).
Actions are evidence for traits. Exculpatory defenses - aimed at effectively blocking the normal inference from act to character. *In all other cases, the inference from conduct to character is warranted and is perfectly consistent with western criminal legal systems.*

Here he claims that punishing character is not illiberal, even when they are not under our immediate control.

The structure of responsibility is a two-leveled structure one. Only on single level do we run into Hurd’s problems. A one-level structure makes capacity and character incompatible. But they are not. At the *precondition* level, we can factor in capacities without mentioning character. (If we did, no one would ever be responsible for anything). But on the condition level (still not sure here). If the agent did commit the act, and no justification or defense is available, then it makes sense to find the agent responsible as well as punishable for the undesirable character trait. Hence, it makes sense to punish for hate crimes even if our character is not voluntarily under our control. (What?) But why enhance punishment? So far we have climbed back from mitigation (or exculpation) to explaining why it is consistent with our legal system to punish for character traits.

*Enhanced Punishment*

Western legal systems readily punish for character traits (this is not established, is he making a compatibility claim?) and hate crimes, despite being associated with undesirable character traits, are also by extension punishable without inconsistency with liberal goals, then the path is open. We do punish, and assign blame when no such inference is conclusively made, provided the normal inference is not actually blocked by an excuse or justification.

"The enhanced punishment is further associated with the values, commitments and overall harm associated with hate crimes in liberal multicultural states.” - The interest is because of harmful effects. Four broad forms of harm is associated with HC - impact on individual, on targeted group, on other vulnerable groups and impact on the community as a whole. HC legislation and enhanced punishment is an explicit statement - these crimes will not be tolerated.

We can explain the "consistency of punishing for undesirable character traits with liberal commitments. All that is left to consider is whether liberal multicultural states can justifiably punish more harshly for certain undesirable character traits. The Answer presumably is yes. Liberal states can in fact justify enhanced punishment as
an expression of equality of diverse groups and protection from social harm, and can legitimately do so by targeting through the means of the criminal law undesirable character traits of bias and prejudice. Hate crime legislation might just be the proper route of accomplishing such a goal.” (P 357)

**Comment:** But is this the proper function of the law? Even if we agree that prejudice should be counteracted, and strong legal measures should be in place. Is this the way to do it? Or are we using the criminals improperly in order to make a point? Also, note that he does not address Hurd & Moores bigger, better article, and in particular the ”proxy” point.)

**Conclusion**

Criticizing two aspects of Hurd’s argument - First - the difference between character traits and conceptions of the good. A liberal democratic criminal justice system may be in the business of punishing undesirable character traits without addressing, let alone punishing, individual’s conceptions of the good. A liberal democratic criminal justice system may be in the business of punishing undesirable character traits without addressing, let alone punishing, individual’s conception of the good.” Second - to understand HC as Hurd portrays them -as actions not readily within the control of agents (NO - this is NOT what she says!) then they might merit lesser punishment.

Considering the structure of criminal responsibility. On H’s account, we are stick with a one-leveled structure on which character and capacity are incompatible. A two-leveled structue distinguish preconditions from conditions gets us out from the problem (I don’t see how).

**Limitations:**

Given the importance of the concept of ‘hate’ in political and legal literature, more attention should be given to understanding exactly what ‘hate’ is, from not only the point of view of the philosophy of emotion, but also from psychological to sociological disciplines.
3. Alon Harel and Gideon Parchomosky, On Hate and Equality

Summary:

Introduction

Bias or Hate Crime legislation enhances punishment for crimes carried out because of the victims race, gender, religion, or sexual orientation. The legislation has sparked substantial political controversy, rekindled by the murder of Matthew Shepard. The academic community seem to be more divided on this issue than the general public. The disagreement is due, in large part, to the fact that the existing justifications for this legislation has the premise that

"the rationale supporting bias crime legislation must be found either in the greater gravity of the wrongdoing involved in such crimes or in the perpetrator’s greater degree of culpability. Advocates of bias crime legislation strive to demonstrate that bias crime are more wrongful than identical not motivated by bias, or that bias crimes implicate a greater degree of culpability on the part of the perpetrator of the crime.” (P 508)

Opponents try to show that Bias Crimes are not more wrongful, nor do they involve greater culpability (See Dillof, Hurd and Moore). The discussion of whether this legislation is desirable or necessary has been mostly focused on the wrongfulness of the act and the moral blameworthiness of the perpetrator. The assumption is that these constitute the “only grounds upon which penalty enhancement for bias crimes can be justified.”

This assumption is grounded in a more comprehensive theory: a dominating non-utilitarian discourse of criminal law, that assumes that these are the only two grounds that may justify disparate treatment of offenses. The criminal offender is believed to have control over conduct and their mental state. This paradigm assigns no independent importance to the crime victim. The harm to the victim is merely one factor out of many that may affect the wrongfulness of the act.

Harel and Parchomovsky’s theory - The Fair Protection Paradigm

"This essay challenges this paradigm and proposes an alternative theory in support of bias crime legislation. The primary flaw of the wrongfulness-culpability paradigm is
the exclusive role it assigns to factors that are intrinsic to the criminal encounter in
determining the content of the prohibitions of criminal law and the severity of its
sanctions. It neglects, therefore, broad societal concerns that are extrinsic to the
criminal encounter, such as the relative vulnerability of potential crime victims and
their likelihood of being attacked. Furthermore, it completely ignores society’s duty to
provide equal protection from crime to different potential victims.” P 509 (my italics).

**Comment:** the “paradigm” is presumably based on the view that problems that
may not properly be addressed using the criminal law may nevertheless be addressed
by policy.

They point out that if we focus merely on the actual harm inflicted on crime
victims, we are precluded from considering the relative vulnerability to crime of
various victims in determining criminal punishment. “The wrongfulness-culpability
paradigm provides no basis for fair distribution of protection against crime to various
potential victims”. (P 509) (My italics and emphasis)

The essay challenges some of the conventional normative foundations that
underlie discourse about criminal law. It argues that acknowledging the role of the
victim is essential in understanding bias crime legislation and its normative roots.
Thus **The Fair Protection Paradigm**. It’s predicated on the proposition that the
criminal law is a principal means by which society provides protection against crime
to potential victims. “On this view, protection against crime is a good produced by
the criminal justice system, which, like many other state-produced goods, should be
distributed in an egalitarian manner.”

The **Fair Protection Paradigm** requires the state to take into account disparities
among individuals in vulnerability to crime when determining their entitlement to
protection. Victims who are particularly vulnerable to crime may have a legitimate
claim on fairness grounds to greater protection against crime. Bias crime legislation,
on this view, is aimed at protecting individuals who are particularly vulnerable to
crime because of prevailing prejudices against them.

**Comment:** This may very well be true, but doesn’t much speak in favor of
punishment enhancement. Protection is in all likelihood better served by the police
making bias crime a priority. They attend to this very briefly below.

With “vulnerability to crime” they mean ”the expected harm from crime for that
individual - that is, the probability of harm multiplied by its magnitude”. There are
two main reasons to attend to this: Some people may have a greater sensitivity to
harm and/or a greater likelihood of becoming a victim. (So “extra sensitive” and
”high-risk”. (Comment: Being at risk may in itself be construed as a harm)
The state may address this problem in two ways:

1) Impose harsher sanctions on those who commit crimes against vulnerable victims

2) It may devote more resources to identifying and persecuting individuals who attack such victims

**Comment**: surely, there are others, more long term strategies to make these groups less vulnerable. These are only the two ways involving criminal sanctions. They suggest that 1) is the better option. For one thing, they think it’s cheaper.

The principle of equalizing protection against crime should be constrained in certain ways. It does not require absolute equality of the expected cost of crime. Such a radical egalitarian view won’t work. Not all such factors should be taken into account by the state. But neither should the state be blind to differences in vulnerability among victims. H&P argue for an “intermediate” position - require the state to annul certain disparities in the vulnerability of different victims while allowing other disparities to remain.

“**We take the position that, at a minimum, a liberal state must redress disparities in vulnerability to crime that result from certain immutable personal characteristics of the victim**” (p 510).

**COMMENT**: Why limit to “immutable”? Vulnerability exists on basis of “mutable” characteristics as well.

The duty of the state does not depend on the magnitude of the disparity in the vulnerability, but rather on the reasons underlying that vulnerability. “**Thus, even slight differences in vulnerability attributable to racial factors may justify punishment-enhancing legislation, while greater differences attributable, for instance, to the victim’s choices require no action on the part of the state**”. (P 511)

**COMMENT**: It seems a much stronger case can be made on basis of vulnerability alone.

Distributive justice theories are often put under criticism as being alien to criminal law. But, H&P argue, the FPP provides a theoretical basis for many of the doctrines of criminal law, and its explanatory power ranges beyond the context of bias crimes. (For instance, why crimes directed against extra-sensitive victims are often punished more severely)
COMMENT: But a mere harm principle can do that as well, so the FPP does not outperform the traditional alternative here. It has no unique explanatory power. Except, perhaps, in the BC context. The fact that it is consistent with the rest of criminal law does speak in it’s favor, but does not settle the matter at hand.

Bias crime legislation, H&P argue, is part of a larger scheme of providing fair protection against crime. Recognizing the interest of victims makes it clear that bias crime legislation is consonant with the goals of criminal law. - A step toward a more egalitarian provision of protection against crime. They agree (with critics, and perhaps even with supporters like Kahan) that the wrongfulness-culpability paradigm fails to provide an adequate justification for bias-crime legislation.

Traditional Justifications for bias crime legislation: the wrongfulness-culpability framework

As a rule, criminal law disregards motives. ”Criminal law regulates conduct by punishing socially undesirable behavior. The severity of the punishment is calibrated to the undesirability of the behavior; motives are largely irrelevant”.

- In ”Criminal Law” LaFave and Scott writes: “Motive, if narrowly defined to exclude recognized defenses and the ’specific intent’ requirements of some crimes, is not relevant on the substantive side of the criminal law”. (Martin Gardner makes a similar claim in ”The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present”.)

”Bias crime laws constitute an important exception to the general rule. The motive of the perpetrator is the focal point of bias crime laws. Unlike other criminal legislation, bias crimes enhance punishment of ordinary crimes that have been motivated by a racial, ethnic, sexual, or religious prejudice. The departure of bias crime laws from the general scheme of criminal law calls for justification. After all, it is not self-evident that an assault motivated by prejudice is worse than an assault otherwise motivated. Yet the former, being a bias crime, may be punished two or three times more severely” (p 511-2)

In the traditional approaches, rationales for this focuses either on culpability of offenders or wrongfulness of the acts (reflected in its impact on the victim and third parties). The idea is that the distinctiveness of bias crimes inheres in the very nature of the acts.

A. The Greater Culpability Justification

Moral blameworthiness varies with the mental state with which the crime is committed. The four traditional mens rea purpose, knowledge, recklessness, and
negligence). "The same act" can thus be punished differently. Some proponents argue that hate offenders are more blameworthy. (See Crocker Hate Crime Statutes; Just? Constitutional? Wise?)

The weakness of this justification is that it depends on the premise that prejudice is more morally reprehensible than all other criminal motives. (Comment: in fact it doesn’t - it might involve that other motive should be counted to, and some of them may be even worse. See Hurd and Moore). “Unlike mens rea, motives cannot be readily ranked by their degree of culpability”. It is a hard sell to say that prejudice is worse than greed, spite or sadism (See Jacobs and Potter). Jeffrey Murphy suggests that “perhaps almost all assaults, whether racially motivated or not, involve motives of humiliation and are thus evil to the same degree”.

COMMENT: they don’t venture further into this argument here)

B. The Greater Wrong Justification

The other strand of the traditional model is suggesting that hate/bias crimes involve greater wrong-doing.

1. Greater Wrong to the Victim

Hate crimes are more harmful to the victim than other crimes. They inflict more severe harm. There are three types - greater physical harm, greater mental harm, and discriminatory treatment (“discriminatory harm”, perhaps?).

- Hate crimes are more frequently excessively brutal (See Levin and McDevitt). There are two major flaws in the validity of this claims: It lacks empirical support, and it would only justify enhancement of punishment for brutality. (Comment: This is basically the proxy argument).

- Psychological injury - (Origin - Wisconsin v. Mitchell - the Supreme Court stated that BC’s are “more likely to inflict distinct emotional harms on their victims.” (See also Weisburd and Levin ”On the basis of sex - Recognizing Gender-based bias crimes” - See separate commentary). Again, the evidence is weak, and the evidence appealed to (at this point, n.b.) was not compared to victims of other crimes. (Barnes and Ephrooss found no such differences (19??)

- Discriminatory treatment - The “extra harm” consist in being harmed in this particular way. They appeal to Dillof (see below) - this treatment does not exacerbate the wrong committed by the perpetrator of the crime. In order to establish a protectable interest, a person must show that a matter she is concerned with is properly her concern rather than someone elses. Discriminatory treatment is not an
additional wrong, disassociated from the violent crime itself. If it were, it would mean that people have a protectable interest in the perpetrator’s thoughts. (Comment: This is not an entirely convincing argument.)

2. The Impact of Bias Crime on Third Parties

Bias Crimes have “external” effects on third parties, within and outside the victim’s community. Greenawalt (1992-3) points out that bias crimes “can frighten and humiliate other members of the community and reinforce social divisions and hatred.”

But bias crimes are not unique in this sense (See Jacobs and Potter). As Paul Slovic (and others) have shown - in general it is visibility and proximity that determine impact. H&P thinks that the data shows that third parties are affected more by brutality and frequency than by the motives of the offender.

What about “trigger” effects, the risk of retaliation etc.?

“In essence, this view maintains that criminal sanctions must take into account not only the actual harm caused by the offender but also the potential for future harms that are causally linked to her act.” (517)

There are three flaws with this argument - Not all Bias Crimes have this effect/risk. And it’s not the only types of crimes that give rise to retaliation. In addition, the risk of “possible retaliation” is at odds with the principles of sentencing and fundamental notions of fairness.

The Limits of the Wrongfulness-Culpability Framework

“Traditionally, the primary concern of criminal law scholars has been to ensure fair treatment to criminal offenders. Under the prevailing view, fairness to criminal offenders demands proportionality between the seriousness of the crime and the severity of the penalty.” (P 518)

The paradigm consists of three distinct claims:

- We must exclude from consideration all factors that do not bear upon wrongfulness or culpability. “The considerations excluded by this principle are often grounded in important values, which the state has a legitimate interest in promoting; yet, under the wrongfulness-culpability paradigm, it is illegitimate to take these considerations into account in determining criminal sanctions.”

- We must take into account all the considerations that bear upon wrongfulness and culpability.
- We must assign weight to each of the relevant factors and calibrate criminal sanction to reflect the cumulative weight of these considerations.

The Wrongfulness-Culpability Framework (WCF) is not a complete theory of sentencing - it’s a framework. It provides no guidelines as to which factors determine the wrongfulness of an act or the culpability of the perpetrator.

The WCF “rests on the moral intuition that only aspects intrinsic to the crime itself should determine the magnitude and severity of criminal punishment”. Taking other considerations into account violates the Kantian principle that the criminal perpetrator must not be used as a means to promote societal ends. “This appeal is magnified by the fact that the wrongfulness-culpability paradigm is capable of accommodating different theories of punishment with radically different understandings of the concepts of culpability and wrongfulness” (p 519-20).

It’s dual character seems to facilitate a dual concern for both the perpetrator of the crime (via its emphasis on culpability) and the victim (via its emphasis on wrongfulness). It’s not infinitely flexible, however. It cannot accommodate utilitarian theories of punishment because it includes fairness as an absolute (Comment: but note that Utilitarian principles might be necessary to determine wrongfulness!)

In fact, it cannot accommodate all fairness-based concerns, either. It cannot accommodate victim-related fairness concerns that are not directly associated with the criminal act.

“Specifically, it cannot accommodate a concern for fair distribution of protection against crime among potential victims.” (P 521)

The social distribution of protection among potential victims is not, under this paradigm, a relevant consideration in determining the sentence (Comment: see discussion in Hurd and Moore (2005)). The concern for fair distribution of protection is related neither to Wrongfulness or Culpability.

“No particular offender is responsible for the fact that the victim was particularly susceptible to crime due to the disposition of other criminals to prey on her.” - (P 521)

High-risk victims pose a problem for this paradigm. One can challenge this claim, though: High-risk victims are more vulnerable. “Committing a crime against a person who is more likely to be a victim (and therefore in greater need of protection) is more wrongful than committing a crime against a person who is less likely to be a victim”.

43
But, H&P argue, this argument does not take seriously the distinction between extra-sensitive victims and high-risk victims. There is no special harm to take into account in the high-risk case.

COMMENT: If we do not move to a "perception of risk" interpretation, but insist on actual risk being the key ingredient here. And, as I’ve noted before, objective risk can be understood as a harm as well).

Parents have an extra obligation to protect their own children. States to protect citizens over non-citizens. But in our case, we cannot "help ourselves" to the concept of extra obligations. Expanding "wrongfulness" to include fair protection would change it fundamentally. So, the question is this:

"Do high-risk victims really have a right to greater protection? And if they do, can this right justify the imposition of differential sanctions according to the vulnerability of the victims?" (p 523)

Criminal Law and the Fair Protection Paradigm

"The fair protection paradigm is premised on the insight that one of the primary aims of criminal law should be to distribute protection in an egalitarian manner. Consequently, it maintains that criminal sanctions should be crafted in accordance with this goal”.

COMMENT: This can not be THE primary aim, as it could equally be accomplished by increasing the risk for other groups.

While the principle of equality is heavily featured in moral and political philosophy, there is disagreement about its independent value and the ramifications it has for shaping political and social institutions Dworkin and Rawls think that it has independent value, Raz thinks not. (Of course, it is recognized as having great instrumental value - and helps satisfy the greater needs of those worse off).

COMMENT: But recognizing its value in policy is not to recognize it (on the consequence side) in the criminal law. Equality before the law might result in unequal protection for potential victims. This is important.) If two people are starving, is it better to give the only available bread to the one who belong to a group whose members have been more deprived earlier? Btw can discrimination laws be expressed without appeal to equality? Or is it always civil damages?)
This essay claims being neutral on this question. The FPP can be grounded in providing equality of protections, but also as granting priority to the greater need for protection of vulnerable victims.

COMMENT: The difference is of importance, as the latter does not allow fixing it by increasing crime on the privileged.

They goes on to show that their paradigm forms a theoretical basis for many of the accepted practices of the criminal justice system.

A. The Fair Protection Paradigm

To offer equal protection belongs to the obligations of the state. It’s not discriminatory (or only in the same sense that caring for your kids is). The WCF does protect victims equally. It distributes protection in a just manner because meting out different punishments to offenders because of the identity of identical criminal acts against different victims differently would convey the message that certain citizens are more worthy than others, or at least that crimes committed against certain victims are less condemnable and therefore more “legitimate” than others.

They offer a “smokers and drinkers” analogy, suggesting that more common crimes should be punished more. (Elaborate) Is this right, though?

How should we compare degree of protection granted to different potential victims? Via vulnerability - “The vulnerability of a person to crime depends on the expected costs of crime for this person.” Multiply the probability of crime being committed against you with the size of the harm caused.

COMMENT: wouldn’t this rather support more protection for the criminally encumbered?

“Once one established the basic means of measuring the degree of vulnerability to crime, it is necessary to design a principle of distributive justice to guide the fair distribution of protection among potential victims of crime. To this end, we will compare two contrasting views of the principle governing the distribution of protection.” (P 527)

The first is “Radically egalitarian”: Equalize expected costs of crime for all potential victims. Regardless of source. (Not sustainable - see my comment above). Some factors, such as relative willingness of the victim to take precautions do not justify intervention by the state. “The state cannot reasonably be expected to annul all the disparities in the vulnerability of different potential crime victims”.

45
So what factors influencing vulnerability should be annulled by the state? In footnote 55 this is connected to disparities not attributable to the victims own choices. Of course, choosing to be something does not mean choosing to be a likely victim. If, for instance, putting yourself at risk here by choice involves something socially valuable. Like exercising freedom of speech.

The drinkers - smokers analogy again: The vulnerability brought about by numbers is important, but not that brought about by smokers ”teasing” drinkers). They don’t answer this challenge.

Now, to show that the FPP is compatible and uniquely explains some contemporary practices.

B. The Fair Protection Paradigm and Contemporary Sentencing Practices

Some sentencing practices - ”If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels”.

The traditional interpretation of this is that it enhanced sanctions of the more criminally depraved. (But also - in support of those less able to defend themselves.) This, they think, comport better with the fair protection paradigm. (YET it says NOTHING about the high-risk cases.) The harm inflicted by a crime against a vulnerable victim is not necessarily greater than the harm inflicted by a crime against a less vulnerable victim.

”The inability to defend oneself increases one’s probability of becoming a crime victim. Yet such a person need not be a particularly sensitive victim. Sometimes the very factor that makes a person a high-risk victim may also make her a low-sensitivity victim.” (P 530)

Unfairness on behalf of the perpetrator? (Then it falls under culpability?).

But, H&P argue, this is a dubious analogy between criminality and sportsmanship. Rather - ”the primary justification for enhancing the punishment of criminals who assault vulnerable victims is the greater need for protection of these victims and the greater responsibility of society to invest in protecting victims who face greater risks.” (P 531)

The FPP interprets this concept of vulnerability like some philosophers writing about distributive justice. Some think disparities among individuals can be justified
when they can be attributed to their choices. (COMMENT: Well yes, but it involves the choices of others, too). Others only if they can be attributed to their preferences.

"One’s view as to whether the state should annul the disparity in the vulnerability of different victims depends, therefore, on one’s convictions as to which kinds of disparities the state has an obligation to annul.” P 532

Bias Crimes and Fair Protection

A. Can the Fair Protection Paradigm Justify Bias Crime Legislation?

"By imposing harsher sanctions on bias crimes, such legislation does not simply reduce the frequency of bias crimes; it also reduces the exposure of the members of different groups to bias crime in a differential manner.” ”The greater the group’s exposure to bias crimes, the greater its benefit from bias crime legislation” (p 532)

COMMENT: First - it’s far from certain that punishment enhancement has this effect. It has not been empirically demonstrated. As far as I know. Second - if true, there should be a scale according to likelihood of being targeted AT ALL. For ALL crimes against these people, not just the bias crimes.

The neutral language of these statutes is a virtue - “it allows social reality to determine the practical effects of bias crime legislation”. The group most in need of greater protection at any given time will actually receive it.

The FPP explains some features of Bias Crime legislation. It fits with the discriminatory selection model (see Lawrence) - the race of the victim somehow figures in the offenders decision. Even when if is for instrumental reasons (rather than because of racial animus). This is hard to square with the WCP. (See Dillof).

COMMENT: But should we punish those who selects on reasons other than animus more? Not obviously. And should we punish those less who select victims not usually targeted?.

B. Objections to the Fair Protection Paradigm

”The most powerful objection is that, although bias crime legislation promotes the objective of reducing the disparity in the vulnerability of different victims, that is not the primary intention of the legislation.” (P 535) (Comment - they do not address the objection that BC legislation does NOT promote this objective. See Hurd, for instance)
1. Bias Crime legislation, as opposed to the “vulnerability” account above, require that the victim be selected because of gender, race etc. Not just that the victim belongs to that group.

2. It’s not essential that the group be “more vulnerable”. ”A racially motivated attack by an African American on a white person is no less a bias crime than a similarly motivated attack by a white against an African American”.

”If the primary aim of bias crime legislation had been to promote equality of protection against crime, it would enhance only the sanctions of perpetrators of crime who attacked vulnerable groups, irrespective of the motives underlying the attack.” (See my comment above)

There is no grading on basis of vulnerability.

Their Reply: Bias crime is rooted in cultural prejudices that change over time and space. A statute enhancing the sanctions of perpetrators of crimes against any specific racial group may therefore fail to attain the goal of promoting equality of protection. Attempting to protect only vulnerable groups is bound to fail in a diverse and dynamic society. The legislation need to be flexible. And then bias motivation works well

COMMENT: As a proxy? An argument is lacking here that it does in fact ”work well”. Otherwise the criticism stands.

”Moreover, the centrality of motives to bias crime highlights the societal concern for disparities in the vulnerability of victims that are attributable to race or sexual orientation, but not disparities in the vulnerability of victims that are attributable to other factors such as wealth inequality.” (P 536)

Bias crime legislation must employ motivation in order to address the disparities that it intends to annul. Does this exclude prevention for crimes attributable to other factors, such as poverty?

”All we claim is that such intervention is justified when increased vulnerability stems from a certain personal characteristic of the victim, such as race, gender, religion or sexual orientation”.

There are two ways in which the state can remedy this inequality.

1) By differentiating sanctions imposed on perpetrators.

2) Vary its enforcement efforts in accordance with the identity of the victim.
(Resulting in Higher probability of detection and prosecution for those preying on the vulnerable).

As noticed above: They think it is easier and more efficient to use differential sanctions. But it all comes down to efficiency.

They add: “Arguably, enhanced sentencing for bias crimes should be implemented through the Sentencing Guidelines rather than through the criminal law.”

One justification for the current practice is to highlight the commitment of the legal system to equal protection. **Criminal law is a much more politically visible scheme of regulation than is enforcement policies.** “Enhancing sanctions through the criminal law, therefore, guarantees greater visibility of equal protection concerns.” (P 538)

COMMENT: Requires than an **expressive function** be granted to the criminal law.

Relatively small impact, considering the small extent of bias crimes. (Many more non-bias crime hits blacks, for instance, more than whites). Reducing poverty is probably the best way to combat vulnerability issues.

**Conclusion**

This is an attempt to provide a sorely lacking theoretical justification for bias crime legislation. To establish an important connection between criminal law and theories of distributive justice.

"Perceiving the criminal law as a system for distributing protection against crime has important descriptive and prescriptive ramifications. Descriptively, it helps explain certain salient features of the criminal justice system.Prescriptively, it allows consideration of important societal concerns in determining the content of the norms of the criminal law. ” (P 539)

END COMMENT:

**Short Summary:**

Based on the case of Sophie Lancaster. Attacked because of her hair, make-up and clothes (difference, Goth). The judge, Anthony Russell QC labeled it a hate crime. A victim need not be member of one of the ‘established’ and generally recognised hate crime victim groups, that have a history of marginalisation and discrimination. Enough that they be singled out because of actual or perceived *difference*. Subcultures. Can they be bracketed together. Argues that it may be time to develop a definition of hate crime that is not predicated on the victim being a member of a historically marginalised and disadvantaged group, but instead prioritises the reasons behind their victimisation.

**The hate crime framework**

HC as the prejudicial victimisation of minority communities, more established in US than in the UK. Traced to the civil rights campaigns. Little agreement about what constitutes a HC. Some (Gerstenfeld) claim it is because the victim is targeted because of their group affiliation. Usually "stranger danger" occurrences, not knowing the victim as a person at all. They therefore damage the self-worth, confidence and feelings of security of the victim more than ‘ordinary’ crimes because victims are targeted due to their intrinsic identity: something that is central to their sense of being and that they cannot alter (see Iganski, 2008).

Another important facet: enacted to subordinate not just eh victim but their wider grouping, ”message crimes” designed to intimidate and frighten whole communities that are different, in some way, from the norm. (See Perry). To maintain society’s hierarchical power relations (is this necessary, though?). Reflecting broader social attitudes and values that reproduce and maintain this inequality. Recreate their own identity.

Perry’s notion is broad and structural. Suggests that offenses are commitses in order to reinforce their own dominant social position. Punishing “identity performance”, and ”policing” boundaries.

**Goth Subculture**
Established as a “way of life”, more resistant to trends than other youth oriented subcultures. Strong and well-developed sense of group subcultural identity. Tolerance of difference as a shared value. See themselves as part of a unified and long-standing culture that stands apart from the norm. Easily identifiable.

The murder of Sophie Lancaster

Judge using ”Hate crime”, ”against these completely harmless people targeted because their appearance was different to yours”. But that’s not a category, is it?

The attack share some of the characteristics of those crimes commonly viewed as hate crimes. Social outgroup, repeatedly targeted for abuse. Longer process. No personal relation (“stranger danger”), ferocious nature similar to violent homophobic hate crimes. Deep psychological effect on the victim. Evidence that is part of distinctive nationwide pattern of victimisation of goths.

The victimisation of goths

Campaign to get attacks like these recognised as hate crimes, and included in wider hate crime legislation.

Comparison with other forms of hate crimes

Frequency of verbal abuse, perpetrators acting in gangs. Often overlap with the homophobic, as goths often are perceived as somehow effeminate. Especially impactful on the group. (Although rarely physical abuse?)

Conclusion

Should the label be restricted to those already stigmatized and marginalized (are goths “vulnerable” in any other sense).

Would inclusion trivialise or belittle the history of the other groups? One reason is that subcultural style is adopted by someone, rather than them being born that way. (This ”objection” given by the UK government). ”These are not intrinsic characteristics of a person and could be potentially be very wide ranging, including for example allegiance to football teams - which makes this a very difficult category to legislate for.”

(But same criterion, surely?).

Garland: crimes against these ”hurt more” just as other hate crimes.
Perry asserts that ‘hate-motivated violence is used to sustain the privilege of the dominant group and to police the boundaries of the group by reminding the Other of his or her place’. Does the victimisation of goths fit into this structural idea? Isn’t it rather the fear of difference and the despised ‘other’, and not perpetrated by the powerful, but by people from socially and economically deprived backgrounds (goths being predominantly middle class).

Perhaps Perry’s structural view masks HC’s most fundamental aspect, which is that the victim is targeted solely because of their group affiliation. Targeted because of who they are (or ”what”?). Not necessarily about keeping someone in their subordinate place, but usually more a base and unthinking instinct: the fear or hatred of difference.

(Of is the importance limited to the harm caused? Yeah, but then HC wouldn’t be distinct as a group - if this is the case, then some academic definitions of hate crime may need to be rethought.)
5. Susan Gellman - Stick and Stones can put you in jail, but can words increase your sentence? Constitutional and policy dilemmas of ethnic intimidation laws


Summary and commentary:
(This is an essential text. The key to this text is the constitutionality of punishing motive in section)

Introduction
Ethnic intimidation crimes - violent or harassing offenses motivated by racism or other forms of bias - seem to counter the schoolyard dictum that "names can never hurt me". In response to this, a wide array of statutes has been enacted, criminalizing such conduct, "or enhancing penalties for certain criminal conduct when it is bias-related or bias-motivated. Supporters tend to be actively concerned with the elimination of bigotry and supportive of civil rights.

Those critical agree that bigotry is a serious problem, and also tend to come from the ranks of the most civil-rights conscious thinkers and activists. Their criticism stems from defense of constitutional liberties under the First and Fourteenth Amendments. The laws come dangerously close to criminalization of speech and thought, they impermissibly distinguish among people based on their beliefs, and they are often too vaguely drafted to provide adequate notice of prohibited conduct.

COMMENT: This is a nice summary of the issues. The controversy surrounds precisely these issues: criminalizing speech/thought, taking sides on "conceptions of the good" and certainty.

Critics also question whether it’s wise to enact such laws. "Even if they can be drafted in a way that does not offend the Constitution, they may ultimately undercut their own goals more than they serve them" (p334)

The debate, thus, is to some degree located on a side. "It is as if everyone involved in the debate over the permissibility and desirability of ethnic intimidation laws were actually on both sides at once"
COMMENT: This is not that uncommon in matters where it’s regrettable that a law is needed.

Gellman believes that it’s not possible to find an answer that’s agreeable to everyone, not as it’s currently framed. (I.e. Concerning the constitutionality of ethnic intimidation statutes). The paper offers an analysis of this constitutionality, and it questions whether “super-criminalization” of bias-motivated offenses is a wise and effective approach to the elimination of either the offenses or the bias motives.” (P 334)

Gellman argues that “criminal sanction is a last resort of government to control actions and beliefs that are not effectively shaped by education and social evolution; resort to special criminalization of bigotry-motivated behavior in fact indicates that as a society we have become so frustrated and cynical that we are ready to give up on the true elimination of bigoted belief, a position we may not be willing to adopt” (p 334)

COMMENT: This worry is sincere, but is it justified? It’s quite common for government to combine the introduction of legislation with policies in education etc. Indeed, it’s usually not seen as a “last resort” but as part of a more general strategy to counter-act prejudice/hostility etc. There’s no indication that states with such laws are more desperate than those without, for instance.

The article focuses on the Anti-Defamation League (ADL)’s Model legislation.

1. Overview of the History and Development of Ethnic Intimidation Laws (This will be kept short)

Gellman points out that the debate of the balance between free expression and protection of those harmed by other’s expression is as old as the First Amendment itself. A good starting point is the case of group libel in Beaubarnais v. Illinois case. Group libel criminalizes the public exhibition of any publication which portrayed “depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion” and which exposed “the citizens of any race, color, creed or religion to contempt, derision, pr obloquy” or which was “productive of breach of the peace or riots”. (P 335)
The law was upheld. Because of the history of racial tension in Illinois, the state had a legitimate interest in ensuring the peace and well-being of the State" in this manner. (There were some dissenting voices, calling it censorship. Others believing that an invasion of freedom of speech can only be justified where the risks are clear and present).

The dissenters views prevailed in later cases, even though Beauharnais has not been expressly overruled. In New York Times v. Sullivan (1964) limitations on libel actions by public officials where imposed because of First Amendment’s free speech and free press guarantees. In Brandenburg v. Ohio, the Court reversed a conviction of a Ku Klux Klan leader. The Court then held that even expression advocating violence was protected "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action". (P 336) The Ohio statute did not distinguish between advocating a theory and inciting violence.

In the late 70s, the problem of ethnic intimidation “flooded the public consciousness”. A neo-nazi group (NSPA) announced a march in Skokie, Chicago. The Village enacted three ordinances specifically intended to cover Nazi marchers. One or them stated that the assembly were not allowed to portray criminality, depravity (etc) or incite violence, hatred or abuse by reason of reference to religious, racial,ethnic, national or regional affiliation. The district court declared the ordinances unconstitutional, and thus refused to apply Beauharnais. It rejected the second ordinance "because it was a content-based restriction not permitted under any recognized exception such as incitement to riot under Brandenburg or "fighting words" under Chaplinsky v. New Hampshire." (P 338)

The court rejected the argument that the march would lead to infliction of psychic trauma on resident holocaust survivors and other Jewish residents.

"The court recognized that such harm could possibly form the basis for a constitutionally permissible civil action for intentional infliction of emotional distress."

But added that it’s a different matter to criminalize protected first Amendment conduct in anticipation of such results. The Court appealed to Street v. New York - any shock effect must be attributed to the content of the ideas expressed. Under the Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearer” (p 339)
Would it be possible to draft a law that would restrict groups like the Nazis from marching, but could not also be used to stop civil rights demonstrations in Alabama.

The ADL at this point (1979-) started to collect data on antisemtic incidents and noticed a sharp increase. It started to support legislation to combat racist and antisemitic crime. (Thus the model legislation)

The original ADL bill included two components: an institutional vandalism statute and an intimidation statute (which enhances penalties when crimes are committed by reasons of the victim’s actual or perceived race, sex, color, religion, sexual orientation, or national origin”. (339-40)

II The Purpose of Ethnic Intimidation Statutes

"Without question, bigotry-motivated crime, like all bigoted action and expression, causes real and serious harm to its direct victim, to other members of the victims’ groups, to members of other minority groups, and to society as a whole. Whatever policy and constitutional problems ethnic intimidation statutes may have, these statutes are the reflection of legislatures’ recognition that these harms are real and significant” (p 340)

Gellman argues that before evaluating the constitutionality and the wisdom of these laws, we must understand the problems they are intended to address. Proponents of these laws argue that bias-motivated crimes cause "substantial damage beyond that created by the same criminal conduct without the bias element.” In addition, it affects other members of disempowered groups.

Richard Delgado described some of the particular harms that follow from racial insults an epithets (in "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling, 1982)). Racial stigma "injured the dignity and self-regard of the person” The listener learn and internalize the message and it also colors our society’s institutions and the views of succeeding generations. Because race is an immutable characteristic, race-based stigma is held to be more severe than others (like alcoholism or poverty)

COMMENT: it should be noted here that this claim seem unsubstantiated. Indeed, there’s a moral dimension to characteristics that seems to be based on choice (but need not be) which can make things
worse. At any rate, the "immutability" has not been established as a crucial variable.

The effects occur on many levels. "Psychological responses include humiliation, isolation and self-hatred. These responses may affect intergroup relations and even relationships within the group". It can contribute to mental illness and psychosomatic disease etc. Gellman points out that "the continued existence of bigotry is evidence that our society has failed to live up to its professed ideal of egalitarianism. Failure of our legal system to provide at least a civil form of redress to victims of bigotry-related harm sends the message that our commitment to that ideal is not so strong as we might like to believe." (P 341)

Especially in the face of public/legal support for freedom of speech (such as demonstrations) that further target these groups.

Indirect victims may also belong to other disempowered groups. And bigotry-related crime affects society as a whole "by distancing non-bigoted majority group members from disempowered groups". (P 342) (fear of being viewed as sympathizers).

However, the dispute over the constitutionality and wisdom of ethic intimidation laws is not rooted in disagreement over the existence or severity of the societal ill addressed. The debate is not over whether government ought to take action to eliminate bigotry and its effects, but whether specific types of criminal ethnic intimidation laws are an appropriate means to that end. (P 342)

The answer, Gellman states, depends on 1) are these laws constitutionally permissible? and 2) are they wise as a matter of policy?

III Can we Specially Criminalize Ethnic Intimidation? Constitutional Considerations

"Even if a law is desirable as a policy matter and effectively meets its goals, it cannot stand if it offends the federal constitution or the state’s constitution"
COMMENT: This, of course, makes the matter somewhat local. Every legislation has some foundational restriction on what the law is allowed to do, but not all are as rigid as this, and most, perhaps, would allow the foundations to be re-evaluated at critical points.

Most ethnic intimidation statutes operate either 1) Based on the ADL’s model - via a "penalty bump-up". The offense may even change from a misdemeanor to a felony. Thus it adds penalty for the actor’s unacceptable bias motive. This operation is the topic of the current article.

2) the combined effect of the criminal conduct and the bias motive is greater than the sum of its parts.

"According to this view, the presence of the bias motive makes a qualitative change in the conduct itself; thus, a completely different act has been committed, with different and more far-reaching effects." (342-4)

This approach involves penalty enhancement laws and laws describing very specific behavior (burning cross, nazi swastika on listed types of property).

A possible third approach (not reflected in legislation, and not much dealt with in the text) is the creation of a new class of unprotected speech under the First Amendment.

COMMENT: Again, as the "counterparts" of First Amendment in most European Countries are less strict, the third approach is much more viable there. (See various "incitement" laws)

A. The ADL Model Statute and It’s Progeny

There’s a specified list of existing criminal offenses, and an increase in penalty where the offender is motivated by bias. The revised ADL model intimidation statute is formulated in terms of "by reason of the actual or perceived" group membership (with a specified list of protected groups). Some states specify how much worse such a reason makes an offense. Several of these statutes have been challenged on constitutional grounds.

In State v. Beebe, the statute, drafted in terms of "by reason of" and the Court "invalidated the statute on equal protection grounds, on the surprising theory that the statute improperly distinguished not among different offenders, but among
different *victims*” (p 345) - it gives greater protection to a victim who is assaulted because of his race (etc) than to another person who is assaulted for some other reason.

COMMENT: This reasoning has some merit, but it would seem to apply to offenders as well, via the same line of thought. It would then be unfair to punish A more than B, just because of difference in type of victim.

The court of appeals disagreed and argued that *anyone* may be a victim of bigotry. The statute merely distinguished between acts of harassment which are motivated by racial, ethnic or religious animus and acts of harassment which are not so motivated. The court discussed the permissibility of penalty enhancement. The reasoning was that "the legislature is entitled to exercise its judgment with respect to the relative severity of crimes committed under various circumstances” and the court’s only was to “determine whether the distinction made in the severity of the crime bears a rational relationship to a legitimate legislative purpose.” As the court noted that bigotry motive affects the victim’s entire ethnic group etc. The distinction was rationally based and the penalty enhancement thus constitutionally permissible.

The NY ADL-type statute has survived similar challenges (See People v. *Grupe* - which, btw, also raised the question of proportionality). The court noted that a defendant could violate the statute "while remaining entirely mute” and that any expression involved would be "fighting words” under *Chaplinsky v. New Hampshire*. The First Amendment liberty restrained only incidentally.

In response to the equal protection challenge, the court replied that the increase in bias-related crimes in New York as well as the emotional impact of those crimes provided a rational basis for differential treatment of bias offenders.

One Michigan court was not persuaded (*People v. Justice*) and held that state’s ethnic intimidation statute unconstitutional on both vagueness and First Amendment grounds - based on the *addition* of punishment, which is not related to the conduct in itself (which is already punished). The statute was also found to be overbroad (the defendant made the remarks *after* the arson, and while drunk). The statute was also found to be fatally vague, as it did not adequately define "intimidate" or "harass”.

One particular vagueness pointed out in the Ohio (*State v. Van Gundy*) statute is that "by reason of” was not adequately defined. Another was that the statute did not "set forth an acceptable culpable mental state. Another that it was unclear if
the group membership had to be that of the victim or someone else. Finally, the court said that "the ethnic intimidation statute invited arbitrary enforcement and selective prosecution". The "chilling" effect on First Amendment speech and association rights was also mentioned. "In effect, this statute would enhance the punish a crime based upon the thoughts of the defendant, a hideous concept and inimical to American jurisprudence".

COMMENT: The "vagueness objection is of particular philosophical interest, as a law must give an objective standard to guide a citizen as to the actions proscribed. This is a basic flaw in some statutes, and making it more clear would be preferable for a host of reasons, on of which is that it would be easier to tell the actual criteria for inclusion, and whether the punishment is meted out for motive or specific intention, say. (As to constitutional vagueness - it’s notable that undermining ethnic intimidation laws on account of vagueness but not undermine other equally vague laws would be to examplify unconstitutional vagueness)

The court of appeals affirmed, and noted that the Ohio statute did not give fair warning of the prohibited conduct "because it is unclear upon whose sensitivity a violation must depend". The court noted that as the spoken word is often the only evidence of bias, the statute in effect punishes protected speech.

COMMENT: This is odd, as it’s admitted to be evidence of what’s actually punished (and then whether THAT is admissable is a further question)

In State v. May the statute was ruled "unconstitutionally vague" as, again, the "by reason of" language did not describe any statutorily cognizable mental state, as required by Ohio law (p 1991). (Also, it did not clarify whose ethnicity was at issue).

The US Supreme Court has granted certiorari in In Re Welfare of R.A.V. (Minnesota case challenging a city’s "hate crime" ordinance - regarding a cross burning) The case was of the more specific "cross-burning" type, rather than offense level bump-up, but the decision will be important for penalty-enhancement type statutes as well. The trial court dismissed the charge as the ordinance was overbroad and censored expressive conduct. The Minnesota Supreme Court reversed the decision and noted that the st. Paul ordinance had "a requirement of
specific intent to create alarm or resentment” and thus it would amount to targeting fighting words, and thus survive the constitutional challenge.

**B. Constitutional Infirmities of the Model Statute**

Gellman argue that ethnic intimidation statutes are "well-intentioned responses by legislatures to the revulsion and apprehension we feel in response to bigotry-related crime” (p 354) But we should not overlook constitutional infirmities. Fourteenth Amendment vagueness and overbreadth issues; First Amendment freedom of thought, expression, and association; and equal protection under the Fourteenth Amendment. These provide strong reasons as well.

1. **Vagueness**

Vague statutes offend due process. (Supreme Court in *Grayned v. City of Rockford*: "the law give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"). The ADL model statute raises several vagueness concerns. First, it turns on the group of "another individual or individuals”. This includes cases in which the direct victim of the offense is of a different ethnicity than the offender. "It is probably also intended to include cases turning upon the ethnicity of a third party having some relationship to the victim, the offender, or both, or to the incident”. (Such as a white man angered by the sight of another white man kissing an African American woman and threatens the man.)

> It seems far less likely that the statute is intended to reach the case in which A, a white woman, hearing B, another white woman, calling C, an African American child, a racist name, threatens B in an attempt to protect C. (P 355-6)

COMMENT: This is a very good point and it clearly calls for more carefully drafted statutes. It also calls for better defined criteria as to group inclusion etc.

"The model statute also fails to specify a culpable mental state. Although the underlying offenses may each carry their own culpability standard, it does not necessarily follow that the offense of ethnic intimidation would or even could have a culpable mental state that varies depending upon which underlying offense was committed.” (P356)
Gellman points out that most jurisdictions have a sort of "default" culpability statute (a minimum culpable mental state for any offense that does not specify one). Recklessness may satisfy the culpability requirement of such an offense. But the only such element in the ADL model statute is "by reasons of" something. Gellman asks

"Can one "recklessly" have a reason?" (p 356)

COMMENT: Yes, one certainly can. To "recklessly have a reason" seem to be the default state of anything driven by heuristics and biases. As prejudices are frequently implicit, this is a very nice way of putting it, despite Gellman's apparent rhetorical question.

Gellman believes that the "knowingly" standard is more rational. "But even if one has knowledge of his or her reasons, it does not follow that he or she is capable of controlling them. Unlike a "purpose" which one can change at will, belief and motive are not so clearly volitional. "If belief is seen as beyond the believer's immediate control, as in the case of "status offenses," then there are additional constitutional problems to criminalization: it offends due process to penalize that which cannot be avoided.

COMMENT: this is a common objection, based on responsibility. Of course, we need not be able to "control" our reasons. We must just be able to control what reasons we ACT on, and if we KNOW we have these reasons and know they are prohibited, we can be held responsible for not discounting them when choosing among available actions.

Gellman points out that the ADL model statutes is also vague with respect to mixed motive situations. It does not specify if the person's ethnicity must be the sole reasons, the predominant reasons or merely a substantial, significant reasons, a contributing reasons, a barely existing reason or a objectively possible reason.

"The statute fails to specify the extent to which the ethnicity of another must have motivated commission of the offense. Consequently, the statute provides inadequate notice of what its only independent element proscribes."
COMMENT: But the ADL provide a model. Presumably the idea is that legislations should have something along these lines in them, not lift the text wholesale. Specifics may be subject to contextual factors.

While all these points may be cured by more precise drafting, another problem is more elusive, Gellman argues.

Statutes that enhance penalties for offenses which are already criminalized on the basis of motive must steer a treacherous course between the Fourteenth and the First Amendments. (P 357)

When vagueness is removed, and the statute do nothing more than enhance penalty for motive, it criminalizes pure thought.

COMMENT: Of course, it doesn’t criminalize thought in isolation. But this is a topic of debate.

"On the other hand, it can be argued that the presence of the bias motive changes the qualitative character of the underlying crime so drastically that it becomes an entirely different act. In that case, however, the statute may be held void for vagueness, because we can no longer rely upon the understood meaning of the predicate offense for notice of proscribed behavior." (P 357)

If the statute does not criminalize pure motive - sum of the act plus the motive is greater than its parts - that "sum" is not defined by the statute, and the statute is unconstitutionally vague.

COMMENT: This is a good argument, but why would this be more problematic than adding punishment for intentions, yet not punishing "pure thought"? This is a matter under debate, but no in principle reason is given why a motive could not "qualify" an action in precisely the same manner as an intention can.

In a footnote (115), Gellman argues that one way to stay clear of both thought crime and vagueness is to enact statutes criminalizing only specifically terroristic acts (presumably by making it a specific intent crime?). But that approach sacrifices the bread reach evidently intended by the ADL (and others).
2. Overbreadth: Chill of Speech, Thought, and Association

A statute should be broad enough to be effective but not reach "unconstitutional overbreadth". A law should not target a protected activity and there must exist a satisfactory way of severing the law’s constitutional from its unconstitutional applications. This is why the Supreme Court has invalidated statutes that sought to punish offensive expression. ("…Persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." (Gooding v. Wilson)).

Gellman holds that although the ADLs statutes include illegal conduct, they may also "sweep with their ambit constitutionally protected expression, association, and thought". (P 359) The reason is that the enforcement must inevitably, and probably exclusively, rely upon defendants’ speech and associations for evidence of the motive it seeks to punish. Thus it threatens to penalize the speech and associations themselves.

COMMENT: This is slightly odd. As mentioned above, we probably rely on such evidence in many cases, yet do not punish it. Speech and associations may be explained away, for instance.

Gellman points out that this "evidence as element" problem arose in Tygrett v. Washington. The judge held that "The first amendment’s Free Speech Clause cannot be laid aside simply on the basis that the speaker was penalized not for his speech but for a state of mind manifested thereby". And Gellman holds that the ADL model statute has the same problem. "With respect to pure thought, the distinction reaches the vanishing point: motive is an element of the offense.

COMMENT: This is true, and should be the issue under discussion here. It’s not that speech is evidence of though, it is that thought is (believed to be) punished that’s objectionable.

"The Supreme Court has consistently resolved this "evidence as element" problem in favor of protecting First Amendment rights." (P 360)
Gellman notes that in addition to words spoken in connection to the underlying offense, all earlier remarks, books read, speakers listened to, or associations held “could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense”.

"Awareness of this possibility could lead to habitual self-censorship of expression of one’s ideas, and reluctance to read or listen publicly to the ideas of others, whenever one fears that those ideas might run contrary to popular sentiment on the subject of ethnic relationship” (p 360-1)

COMMENT: It can be questioned whether this is likely to be the case. At any rate, such self-censorship would not have more impact in this area than it would avoiding appearances of motive allowable as evidence in other types of crimes. Similar reasons to refrain from being in a position where one would benefit from the death of a person, for instance..

Gellman admits that self-censorship might not be altogether undesirable, but questions whether the law should impose it in this manner. "Repugnant or not, racist ideas are indisputable viewpoints on a social and political issue.”

"It is no answer that one need only refrain from committing one of the underlying offenses to avoid the thought punishment. Chill of expression and inquiry by definition occurs before any offense is committed, and even if no offense is ever committed. The chilling effect thus extends to the entire populace, not just to those who will eventually commit one of the underlying offenses” (P 361)

Gellman continues that selective enforcement might follow, which is discriminatory. ”Where the actor is suspected of being a racist or an antisemite, a police officer could be more likely to investigate and arrest, and a prosecutor to pursue, questionable complaints of an underlying offense, because of the possibility of an additional charge of ethnic intimidation”. As a result, the model statute might actually inflame, rather than improve, ethnic relations.

3. Creation of a Thought Crime
A related danger: that ethnic intimidation statutes direct toward motive criminalize pure thought and opinion. Additional penalties for motive violates the "bedrock principle unerlying the First Amendment (...) that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable” (Supreme Court in Texas v. Johnson (1989)

A. Can the Government Constitutionally Punish Motive?

As the underlying offense is already punishable, the additional penalty is for the actor’s reasons for his or her actions. "The model statute does not address effects, state of mind, or a change in the character of the offense, but only the thoughts and ideas that propelled the actor to act” (if another interpretation is given, i.e. If the motive somehow changes the act, the vagueness challenge of failure to give due notice comes into effect). The thoughts is not punishable independently of the act.

Gellman notes that there are other "thought-related” concepts which are properly elements of offenses or penalty enhancements. (P 364)

"Intent and purpose both affect culpability analyses based on mental state and are used as aggravating factors in penalty imposition.”

All criminal codes include such mental states, so why not include "motive” as well?

"Motive”, "intent” and "purpose” are related concepts in that they all refer to thought processes. They are legally distinct in crucial respects, however. Motive is nothing more than an actor’s reason for acting, the "why” as opposed to the "what” of conduct. Unlike purpose or intent, motive cannot be a criminal offense or an element of an offense. (P 364)

COMMENT: Gellman appeals to "Black’s Law Dictionary (6 ed. 1990), in support of this distinction. This is a useful distinction, but it does not entail that motive should not be able, just as intent, to qualify an action. Can motive/reason be used as a mitigating circumstance? It seems that it can. We then need a further reason to explain the lack of symmetry.

Gellman quotes Lafave "Motive is not relevant on the substantive side of the criminal law”. Specific intent and motive is distinct. Lafave: "Intent relates to the
means and motive to the ends, but where the end is the means to yet another end, then the medial end may also be considered in terms of intent”. Gellman:

“Intent” thus refers to the actor’s mental state as it determines culpability based on volition, “purpose” connotes what the actor plans as a result of the conduct (LaFave’s “medial ends”) and “motive” is the term for the actor’s underlying, propelling reasons for acting, which may have no direct relationship to the type of conduct chosen. (P 364-5)

The distinction becomes clear when we consider altering the intent/purpose and when we alter the motive. The latter does not change the nature of the act.

COMMENT: This argument begs the question against bias crimes.

Gellman mentions that a contract murder is worse than other murders, not because the motive is money. Rather, the aggravating circumstance changes the killing into a different act than other murders.

COMMENT: Why could not the same be said about ethnic intimidation? It’s not entirely clear that it must be transformed into a specific intent crime in order to allow for such change to take place. It’s a principle, true, but we have yet to see a rationale for it.

There’s a distinction between motive and purpose too. If the purpose was not to deprive another of property, it would not be theft. The purpose transforms what the actor is doing, not why he or she is doing it. (And motive is irrelevant). Self-defence or necessity change the fundamental nature of acts that they provide defense to liability for what would otherwise be crime. Gellman refers again to Lafave, who states that therefore these defenses are not instances in which good “motive” serves as a defense.

COMMENT: it is not entirely clear that this is the case. And if it is, if it only holds for laws, or also for sentencing guidelines.

Gellman continues: State of mind refers to culpability; it affect exactly what was done, not why it was done. “Mental states form a continuum of culpability of which motive is not a part. Thus, they provide no basis for criminalizing bias motivation” (p 367)
Discrimination does not provide a precedent for criminally penalizing motive either. Discrimination is an illegal act, bigotry is a constitutionally protected attitude. (Discrimination can occur without racist motivation, and it’s the action that’s prohibited). "Racial or other animus is not even necessary for liability under those statutes." The case for discrimination laws can be made by showing the impact on different groups, and the consequences of employment practices (not the motivation).

B. Is Bigotry Beyond the Scope of First Amendment Protection?

Not all expressions are protected by the First Amendment. (See Chaplinsky v. New Hampshire) - the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words. "Those which be their very utterance inflict injury or tend to incite an immediate breach of the peace". "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value a a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality".

Gellman notes that the Chaplinsky definition includes two definitions of fighting words: those "which by their very utterance inflict injury" and those which "tend to incite an immediate breach of the peace". In practice it seems only to have applied to words "likely to provoke the average person to retaliation, and thereby cause a breach of the peace". And even in that interpretation, courts have been reluctant to uphold convictions, and the Supreme Court has never done so. In addition, intimidating words are something less than fighting words (indeed, semantically almost opposite).

Gellman argues that it’s doubtful whether the definition "which by their very utterance inflict injury" can be used to show that expressions of bigotry is outside the scope of the First Amendment.

Barring extension of the fighting words doctrine, bigotry is a protected class of expression, unlike obscenity or libel. As the Supreme Court has stated, "We must not confuse what is ‘good,’ ‘desirable,’ or ‘expedient’ with what is constitutionally commanded by the First Amendment" (P 371)

No authority has declared bigotry an unprotected class of speech or thought. This has led some scholars to urge the creation of a new class of unprotected "hate
speech.” Adherents “contend that sanctions on “hate speech” actually serve ultimately to promote free speech, because racist speech silences its victims by causing them to fear harm if they speak up for their rights.” (P 371)

Gellman thinks the problem is that the government should not take the position that certain speech is “wrong” - and this is precisely what the First Amendment prohibits. Matsuda, a proponent for this kind of legislation argues that “if the harm of racist hate messages is significant, and the truth value marginal, the doctrinal space for regulation of such speech is a possibility”. This, Gellman argues, would be reasonable if the point of the 1 where to facilitate the social quest for truth. But this is not the case. There is more than one value underlying the First Amendment - like liberty interests.

The First Amendment is not simply a device to facilitate the search for truth; it exists to protect the expression of ideas by a minority, including those ideas which may ultimately prove to be “wrong” and harmful, from the pressures of the majority (p 373)

COMMENT: If this is true, it’s still an open question whether protecting expressions of bigotry serves this purpose, or if careful regulation could out-perform it.

(Matsuda argues that there are competing values of liberty and equality at stake, and that a blanket refusal fail to recognize this fact).

Others argue that even “expression not within one of the traditionally recognized unprotected classifications should be subject to content-based restriction when competing interests outweigh the liberty interests at stake. To do otherwise allows liberty to trump equality every time, no matter how slight the liberty interest and how great the equality interest, to the point where equality interests are treated as "beneath doctrinal acknowledgement". Gellman counters that this approach would require and "exception to the strict scrutiny standard for infringing upon First Amendment interests” (and this is beyond the scope of the present discussion).

Though bigotry is protected, infringement on expression can be made if it’s narrowly tailored to further a compelling state interest. Nevertheless, courts have
refused to withdraw the protection from the expression of antisocial attitudes on the ground that those attitudes themselves harm others.

The Supreme Court has consistently adhered to the principle that "the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." (P 375)

Under *United States v. O'Brien*, "the government may further important interests through regulation which is directed at conduct, but which incidentally infringes upon First Amendment interests, so long as the governmental interest is "unrelated to the suppression” of belief or expression. Could this be applied to ethnic intimidation laws? Gellman thinks not - the state is not regulating conduct despite its expressive elements, but is because of its expressive elements.

The argument Gellman furthers is that in order for intimidation laws to avoid vagueness, it must be stated as punishing motives, but this is unconstitutional. But what if it is "criminalizing an entirely separate act -

That is, that the whole of a crime committed in conjunction with the uttering of bias-motivated slurs is greater than the sum of its parts?"

This brings us back to the vagueness problem

"The most compelling argument for this view is that while both ethnic intimidation and other harassment by definition threaten their direct victims, ethnic intimidation has a profound threatening effect on other members of the victim’s group as well. The "targeted” nature of the crime alarms others in the victim’s group who understandably may see themselves at risk more than when a crime has nothing to do with the ethnicity of the victim.” (P 377)

Gellman questions whether this is true, and argues that we also feel fear when we hear of *entirely random* attacks. "The impact on others does not necessarily follow some continuum of victim specificity. (All crimes have indirect effects).

What about the "distinct harm” argument? The problem here is the nature of the distinguishing element. "That additional impact is in essence nothing more than the offender’s beliefs and thoughts, or the effect of their content upon the victim” (p 378)
Can this additional impact constitutionally be punished, even though thought is protected by the First Amendment, and even though beliefs, unlike conduct, are beyond the offender’s immediate, volitional control?

COMMENT: This, again, can be challenged on grounds mentioned above: what’s under control is conduct based on reasons. We can be held responsible for treating certain beliefs as reasons (especially when the particular impact is known, possibly even intended).

Gellman points out that “bonus” penalty already exist for bigotry, as it awakens attention of police and prosecutors and jurors. She believes that the ADL model statute seeks to prescribe orthodoxy in matters of opinion (she re-iterates that the extra punishment is for the “thought”).

4. Equal Protection

Penalty enhancements infringes upon fundamental constitutional rights guaranteed by the First Amendment: it treats offenders differently based on the beliefs they hold and express. The statute is ”presumptively invidious” and must be strictly scrutinized to ascertain whether it is ”precisely tailored to serve a compelling governmental interest” (p 379)

It is important to distinguish between the government’s legitimate interest in eliminating violent or destructive acts and an interest in eliminating racial hatred and bigotry among private individuals. Criminal conduct is punishable; hate is not. (P 380)

COMMENT: Gellman here speaks about certain views being ”despicable to the majority of the populace or the current administration”. This is a very weak assessment of bigotry. Is it not rather that bigotry is at odds with the values addressed in the constitution? It’s not a whim.

Gellman admits that combatting bigotry is a laudable goal which should be pursued by other means. ”The model statute does not survive strict scrutiny
because it is overbroad and of questionable utility, and thus not narrowly tailored
to serve a state interest in combating bigotry” (p 380)

COMMENT: It would seem, then that a carefully drafted and clearly
useful statute might survive strict scrutiny?

IV Should We Specially Criminalize Ethnic Intimidation? Policy
Considerations
Is enacting these statutes in society’s best interest? Gellman doubts it.

A Costs to Society as a Whole
Laws which limit or chill thought and expression detract from the goal of
insuring the availability of the broadest possible range of ideas and expression in
the marketplace of ideas.

COMMENT: This, as we have seen, is debatable. There is no duty do
promote obviously false and morally abhorrent ideas. Gellman is,
however, correct, that regulation would seem to involve denying that
people will reject bad ideas if left to exercise their own judgment.

It also puts the state "in the position of arbiter of worthiness of ideas” (p 382).
Gellman also voices concern of the "slippery slope" - "any limitation of expressive
interests, even when desirable and permissible, represents a small but real sacrifice
of some part of our liberty” (p 382)

COMMENT: Of course, there is a slippery slope argument that runs
the other way as well, from allowing hate speech to allowing discrimination
and harassment etc. The limitation on freedom applies to the regulation of
drug use (etc) as well, allowed because of the considerable costs involved.

Gellman demonstrates the slippery slope by claiming that Beauharnais would not
have been allowed without Chaplinsky, and both these have been important in the
argument for ethnic intimidation laws.

There is a "who decides?" problem inherent in "any situation in which narrow
and value-laden distinctions must be drawn.” What biases? What types of
behaviors? Only interethnic, or intraethnic situations as well? People reasonably differ on all these questions.

COMMENT: Gellman is, of course, right that these issues must be determined, and it’s desirable that they should be so in a principled way.

She continues: there’s a cost to society as a whole whenever expression, even expression arguably valueless in terms of its contribution to the societal search for truth, is not tolerated. "A society’s ability to tolerate dissent from even its most basic principles is a sign of that society’s strength and of the enduring acceptance of those principles”. (P 383)

COMMENT: This is not obvious. And if it where, why should this not apply to all types of policy measures? One could say that a society’s response to unfair targeting of vulnerable groups is a sign of that society’s strength.

"When we become complacent about truth, we become flabby in our ability to defend it against a future challenge” (p 383)

COMMENT: Gellman actually seem to argue here that we need harassment to remind us about why it’s wrong.

She ends the section by noting that even constitutionally permissible intrusions of liberties involves a cost for society generally. (Such as random sobriety checks of motorists).

B. Costs to Disempowered Groups Specifically

There’s a risk that "additional burdens will be borne by members of the very disempowered groups that these laws are designed to protect.”

Gellman argues that these laws carry an implicit patronizing and paternalistic message. It presupposes a "special sensitivity and vulnerability” on the part of the targeted group. This "recognition of special vulnerability imposes a stigma: it says both that Jews can be hurt more easily than others, and that they are dependent upon the state to protect them from others.”

COMMENT: it presupposes no such thing. It does presuppose that Jews are more likely to be targeted for the group membership and thus are at
greater objective risk. Gellman may be right that the recognition reinforces the belief of weakness. But does this follow? Could it not rather be that the legislation recognize the plight of victimization and discrimination which these groups have been suffering for so long, and thus recognize their resilience?

"(T)he suggestion is that members of the protected group are weaker than everyone else"

COMMENT: See above. This "suggestion" is spurious.

"Moreover, there is the additional implication that a disempowered group has not been able to win respect from the community at large on its own, and is not expected to be able to do so in the foreseeable future"

COMMENT: Who is talking about the "community at large"? This interpretation is only valid on some accounts of the basis of hate crime (such as Perry’s). It’s also notable that Gellman offers no evidence in this (or indeed any) section.

Gellman presents the analogy of affirmative action. This leads to complaints about reverse discrimination, the disadvantaged complain that they are perceived as underqualified tokens. There are clear drawbacks (even if it would be the best choice).

Gellman also mentions the danger that the laws will be used against leaders of the protected groups whenever they inconvenience or criticize the government. "Minorities may be convicted with disproportionate frequency if predominantly majority-member juries tend to find them more "intimidating" than members of their own groups." (P 387)

Being "menacing" is defined in terms of the victims subjective response. Hence there is a risk when the victim perceive a threat because of the offender’s ethnicity.

**Efficacy of Ethnic Intimidation Laws**

When the paper is published, only a few courts have ruled on the constitutionality of ADL-type ethnic intimidation statutes. "There has been no showing of a decrease or slowed increase in bigotry or bigotry-related crime in jurisdictions where such laws exist. Even in the absence of empirical data showing a direct correlation between the existence of ethnic intimidation laws and a
decrease in bigotry or bigotry-related violence, though, there is something about having such laws "on the books that is reassuring and beneficial”.

"The state’s affirmative recognition of the special harms of these crimes and its effort to combat them represents a societal value that is perhaps as important to us as the values of tolerance and freedom of thought and expression” (p 388)

COMMENT: This may be true, but again, Gellman does not refer to any evidence. Note also that other laws are in effect that have no impact on prevalence. While "sending a message" might not persuade would-be offenders, it may limit the impact of these crimes.

This is the idea that these laws send a "message”, and we want the government to take a stand and make such a statement. But there is a danger that this symbolic functions distract us from taking action that would be more than merely symbolic. It might satisfy our desire to do something.

There’s also the risk of increased resentment toward disempowered groups. (If the special protection is seen as an undeserved privilege).

"...Non-criminal approaches to eradication of bigotry that may well prove more effective than criminal sanctions may be ignored if we pin our hopes to criminal sanctions” (p 389)

Social pressure may work better. But "If we didn't fear getting a ticket, many of us would (and do) drive as fast as we please. The imposition of those sanctions is premised on the belief that in these areas, people cannot be trusted to use their own judgment in a fair, honest, or proper way. ” But people look for loopholes to get around such laws, without embarrassment or social censure. No one would want to do pro-social things if the government were forcing them.

The choice not to impose sanctions in these situations is based on a corollary premise to the one underlying the choice to impose them in the income tax and speed limit contexts: we know that real patriotism, benevolence, piety, intellectual curiosity, and civic responsibility are discouraged, not encouraged, by the threat of criminal sanction for failure to express them. ( P 390)
If the ends of ethnic intimidation law is to limit bias, it's more akin to these "pro-social" projects.

COMMENT: Again, the object may be to limit impact, rather than bigotry. And, again, the idea is usually not just to have a law. (Even though Gellman’s concern is reiterated by Jacobs and Potter (1998) (see separate commentary) who speaks of hate crime laws as a “cheap” and shallow “solution”.

Gellman points out that criminalization is the state method of persuasion of last resort.

Resort to criminalization of bigoted motives indicates that we are ready to give up on the possibility that, without the threat of criminal prosecution, people will eventually come to realize that bigotry is wrong. (P 391)

COMMENT: This begs the question against, for instance, the idea that these laws actually just want to limit the occurrence and impact of a certain kind of crime, and mete out punishment in proportion to culpability/wrongdoing. I.e. It presupposes that Gellman’s earlier arguments have been successful.

Gellman argues that reliance on government control can be far more dangerous than trusting the instincts of society. (Minorities has fled to the US because of the commitment to equality, not for "special" protection”. In addition, if hate speech is silenced, we loose it as a "barometer" of people’s true feelings about disempowered groups.

In light of criminal ethnic intimidation laws’ high costs, both to society as a whole and to the very groups intended to be protected by those laws, and their predictable low efficacy in serving the goals for which they were enacted, it appears that noncriminal approaches may be preferable, albeit imperfect (p 393)

Gellman believes the ADL ethnic intimidation model statute does too much and too little: it introduces into protected areas, and it is at best only a weak tool for combating bigotry. There are better ways to do that.
Conclusion

Because the majority in any era "may desire to oppress a part of their number...precautions are as much needed against this as against any other abuse of power" (citing Bollinger, quoting Mill). (P 394)

COMMENT: This may very well be true, but we should of course also take precautions against being limited by such precautions set into effect at a specific point in time.

Gellman refers to observation that both bigotry by individuals and repression by society are natural instincts - and "as we wish civilization to carry individuals beyond bigotry, so should we seek to civilize ourselves as a society and a state beyond repression. Moreover, they are not just two instincts of a kind, they are the very same problem" p 395)

As Gellman began, this is a debate between one side and itself.

We began by noting that those supporting and those opposing ethnic intimidation laws each saw the other's viewpoint clearly, and in fact sympathized with is as well. (…) Both "sides" of the debate are expressing not opposite or even slightly divergent values, but the very same one: the value of tolerance. The difference is only in the level of focus.

Gellman argues that proponents of ethnic intimidation laws are focusing on individual intolerance and the critics are focusing on societal intolerance. Gellman argues that there may be "an approach that does not require us to trade one view off against the other, a way to target both levels of intolerance at once, rather than compromise or even sacrifice one level".

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6. Heidi M. Hurd: Why liberals should hate ”Hate Crime Legislation”

Summary:

Hurd points out that there are two justifications offered for increased penalty clauses in hate crime legislation:

1) Hate Crimes victimize whole communities of people, therefore constitute greater wrongs than otherwise motivated crimes. It’s the number affected that constitute the greater wrong.

2) Hate Crimes reflect “significantly greater culpability on the part of their perpetrators”. Worse in the same way premeditated murders are worse (and therefore receive harsher punishment) than negligent homicides. “Bigotry is far more culpable than, say, greed”.

Hurd’s paper focuses on 2, leaving the empirical question whether crimes perpetrated as a result of hatred do cause more secondary harm to communities than others crimes. She also leaves to aside the question whether such secondary harms are of a sort that should merit special legal concern, and whether current drafts of Hate Crime statues meet that concern. (For an investigation into this, See Hurd and Moore 2003?). So the focus is on the

”Legitimacy of justifying Hate Crime statues on the basis that hatred and bias constitute uniquely culpable mental states that merit increased punishment”. (P 216)

Hurd points out that If hatred and bias are construed as mens rea elements, they are alien to traditional criminal law principles. And this is so for profound moral and political reasons: ”to criminalize hatred and bias is to move from an act-centered theory of criminal punishment to a character-centered theory, and so, to move from a liberal theory of legislation to a perfectionist theory”.

Comment: it seems Hurd argument is that mens rea requirements criminalizes mental states in themselves. Which can be put into question. But more importantly: if so, isn’t this just as objectionable in the traditional mens rea cases? What’s relevantly novel with hatred and bias as mens rea elements?

I. Three differences between hate/bias crimes and all other crimes
If HC legislation construes hate and bias as mens rea requirements, then there are three important differences between these and virtually all other crimes:

1) Hate/Bias Crime laws are concerned with defendants *motivations* for action.

2) The motivations are *emotional states that attend actions* (rather than future states - for which the action was an instrumental means).

3) The emotional states are *standing character traits* rather than occurrent mental states (such as intentions, purposes and choices).

This means that any additional penalties for hate/bias are, in fact, punishments for bad character.

A - *The doctrinal novelty of Hatred and Bias as Mens Rea Elements*

The Standard means of measuring culpability in criminal law has been via a very spare set of mental states. Namely

- Did the defendant *purposefully* commit the actus reus? Did the defendant *knowingly* commit it? Was he/she consciously aware of a substantial and unjustifiable risk - i.e. Was he/she *reckless*? Should he/she have been aware - i.e. was the defendant *negligent* with regard to it?

None of these require, or permit, consideration of the *reasons for which the defendant acted or the background motivations with which he performed his actions.* That means, if it’s allowed, we’ve got an altogether novel *mens rea* for fact-finders to discover.

**Three possible precedents** -

Hurd mentions three possible precedents for using motivation as an aggravating factor.

1) If a defendant acts on good, or exculpatory, motivations, this enters into the analysis of the defendant’s responsibility at the level of the defenses. If provoked into passion in circumstances in which a reasonable person might be inclined to act rashly - this reduces liability from murder to voluntary manslaughter. I.e. Well-motivated or understandably ill-motivated conduct.

In contrast - Hate/Bias Crime statutes require courts to consider *bad or inculpatory* motivations as bases for enhancing penalties for wrongdoing. And this is disanalogous
(Comment: presumably this is because we are not allowed to punish someone\nMORE than they deserve. There is no such restriction on punishing LESS. )

2) Two doctrines(?) - Defendants who premeditate and deliberate about killings,\nare punished more than those who kill impulsively

- Does establishing this involve inquiry into motivation? In fact: No. "A finding that\na defendant premeditated a killing is ultimately of a different sort than a finding that\nhe killed for a particular reason or while in a particular emotional state" (p 218)

3) “Specific intent crimes” - require defendants to commit prohibited actions with\ncertain further purposes. Burglarly, for instance, require the and intent further than\njust breaking and entering. Thus we ask why the criminal did it.

But specific intentions take as their objects future states of affairs - states of affairs\nthat in turn constitute reasons for actions. In contrast, hatred constitutes an emotional\nstate within which a defendants acts, and bias constitute a disposition to make and\nact upon false judgments about others. Hurd argues that these are differences that\nmake a moral difference. (But compare with Paul Robinson - who claim that specific\nintent crimes is an adequate precedent. )

B. Hate and bias are emotional states, not reasons for action

Hurd considers the specific intent notion some more: Specific intentions constitute\ngoals, and this is not necessarily to act on an emotion. Hate is an emotional state\"within” which a defendant acts. Emotions are “motivating actions” - not as ends to\nwhich actors seek means (Comment: This is an important point). Indeed Emotions are\noften appealed to to explain why practical reasoning might not have worked. Bias, it\nshould be noted, does not require hatred.

Hurd argues that "It is because prejudices constitute sets of dispositional beliefs\nthat we think of them as "motivational.” They induce discriminatory actions by\nmoving actors to make certain(false) factual assumptions about others within the\ncourse of practical reasoning”. (P 219)

Two responses 1) Hate/Bias Crimes might seek to bring about future state of affairs\n- no Muslims in the neighbourhood, say. (Hurd refers to Greenawalt “Reflection on\njustifications for defining crimes by the category of the victim” here). There’s nothing\nconceptually amiss about this, but "it seems to me that this argument grossly over-\nintellectualizes emotions and dispositional beliefs” (p 220).

(Objection/comment: But it need not do that in order to make place for a\ncategory of crime here, compare the "political” goal in terrorism. Perhaps we
should **draw a line here, and some "hate" crimes, without this intention, be less severely punished?** Intriguing questions about how to re-write/analyze motives. This might be needed in order to make something in the hate crime a proper *reason for action*. *This is important, too: what sort of reason? Goal or mechanism? Probably both*)

"The question is whether we have reasons to attribute intentions about such future states to persons who do not subjectively experience them". Hurd thinks the felt differences between emotions, dispositional beliefs and specific intentions are morally relevant. We may have better control over one category of mental states than over others, and be less culpable for harboring one than the others.

2) - Many hate/bias crime laws are formulated in a way that does *not* invoke hate-bias, but the "because of" locution. This is the victim-selection model (see Lawrence). Hurd thinks this does not get at the occasions and purpose - if that is to punish defendants in proportion to their culpability. There are some instances of victim selection that wouldn’t be of the kind we are looking for. (Like choosing victim who are unlikely to fight back). These does not necessarily reflect hate or prejudice against any group.

Hurd thinks that if the victim selection model is right, virtually all rapes would be hate crimes. (Without noting that this case has actually been made, and is clearly not a reductio ad absurdum) If, in practice, legislators doesn’t intend to cover such cases, and they don’t invoke them in statutes. Then the intention is to punish defendants for hate and bias.

**C. Hatred and Bias are Standing Character Traits, Not Occurrent Mental States** *(p222)*

"While one can form a purpose or fix on a desired goal in a moment’s time, it is hard to conceive of what it would mean to hate or be prejudiced against a group only momentarily" Character traits are both dispositions toward certain sorts of actions and dispositions towards certain sorts of mental states. Hurd compares this to cowardice. It’s possible to feel hatred toward a particular person, without being a "hateful" person. Also to jump to unjustified conclusions, without therefore being a "biased" person.

"…Hatred and bias towards whole groups of persons (particularly groups defined by such morally irrelevant criteria as race, ethnicity, gender, age, religion, or disability) *does* appear dispositional." To be racist is to be disposed to believe that members of another race are inferior, and to act in ways that subjugate such persons.
So while one’s intentions are often a product of certain aspects of one’s character, one may form an intention to commit an act, without being disposed to do such an act (comment: this, of course, needs further qualification). But one cannot hate or be prejudiced against a group without being disposed to believe and do certain acts.

**Punishment for specific intention**, thus, would not punish bad character, but hate crime legislation does. This is what makes it morally and politically troubling.

**II. The moral and political implications of criminalizing vicious character traits**

Hurd asks three questions about this notion of hate/bias crime, and the profound implications its introduction has for American criminal law.

**A. Can We Choose Our Emotions or Will Our Beliefs?**

We can choose to act, but not (as clearly) not to have character traits, particular emotions and beliefs. If we can, it’s not a very convincing trait, emotion, belief. We can perhaps *indirectly* alter such aspects.

"Perhaps by punishing people particularly harshly when they do bad deeds out of hatred for, or bias against, their victims’ race, ethnicity, religion, sexual orientation, etc., we will motivate people to take actions that will indirectly alter, over time, their emotional responses to such characteristics.” (P225) (Comment: This would be the rationale on an utilitarian theory of punishment, for instance. Not endorsed by Hurd).

If this is the rationale, we are saying that these criminals deserves to be punished, not because they chose their character “but because they failed to will actions that might have caused their character to be other than it is”. But our ability to affect our characters is clearly imperfect. and indirect, at best. Hurd thinks we cannot simply abandon these features, as we can with our goals.

Thus, she says, "criminal legislation that targets emotions and (dispositional) beliefs targets things that are not fully or readily within defendants’ immediate control. And if law ought not to punish us for things that we cannot autonomously affect, then hate and bias crime legislation is suspect for doing just that.” (P 226)

**B. Are Hatred and Prejudice Worse than Other Emotional States that Often Accompany Criminal Actions?**

Hurd is sympathetic to the view that moral culpability is largely a function of character. "But hatred and bias towards particular groups are but two of many
culpable dispositions”. Are they the worst? Compared to greed, jealousy, revenge, sadism, or cowardliness? In a very central section, she writes

"If hate and bias crimes are going to remain unique among crimes in picking out emotional and dispositional motivations as bases for increased punishment, then it must be possible either (1) to defend the claim that, say, racial hatred or gender bias is morally worse than greed, jealousy, and revenge, or (2) to advance some reason to think that such hatred and bias are uniquely responsive to criminal sanctions in a way that greed, jealousy, and vengeance are not” (p 226)

Hurd thinks both these claims are unlikely to be true.

Hurd argues further that the difficulty with a cardinal, or ordinal, ranking of motives is that its highly fact-sensitive, just like determining whether someone is negligent. Therefore its "difficult to say that particular motivations, say racial prejudice or religious hatred, are categorically worse than other motivations, say pedophilia or sadism: as between some persons they probably are; as between others they probably are not”. (P 227)

As for (2) - there is an argument that racism is learned (whereas jealousy and greed might not be) and therefore can be unlearned. This is not at all certain, and besides: is enhanced punishment the way to go here? Are there not more effective measures in this regard?

Two alternatives remain: 1) Admit and defend that Hate/Bias Crime legislation arbitrarily picks out for extra punishment a set of mental states that are a subset of a larger class of equally vicious states or 2) generalize it by radically revising traditional culpability doctrines and dish out punishment in proportion to the culpable emotional and belief states that motivated the defendant. (P 228)

1) Is obviously not acceptable: like cases are not treated alike. Equally culpable criminals who commits equally wrongful acts are not punished equally. This is illiberal. And it means that, given that the person is not punished more than he/she deserves, it means that the others are punished less.

The revolution in mens rea concepts is the better route for Hate and bias Crime Legislation supporters. These (Hate/bias) crimes ought not to be uniquely singled out. But then a further question arrises:

C. Should the Criminal Law Punish Persons for Bad Character?
The “Character theory of criminal law” - punishing vice and cultivating virtue. These are non-liberal goals.

"Political liberals traditionally license the state to enforce the Right, but not the Good. They maintain that the state must limit the use of its power to constructing and protecting a fair framework of cooperation, defined as a system of rights that allows all citizens maximal equal liberty to pursue their own unique conceptions of the good life". (P 229)

Reasonable people may disagree here, and yet agree to a institutional means by which to disagree.

"Inasmuch as state action is both theoretically unjust and practically impotent unless it can commend the agreement (if only hypothetically) of reasonable persons, state action is illegitimate if it pursues a particular conception of the good life” (see, for instance, Rawls).

Also: vice and virtue are only indirectly responsive to choice. Liberals typically predicate moral and legal responsibility on matters of choice.

"Until the enactment of hate/bias crimes, our criminal law was testament to the fact that we could meaningfully assess actor’s culpability without resolving inevitable disputes over the sorts of traits that people should cultivate." (P 230

We do not disagree about whether purposeful harms are more culpable than harms committed only knowingly, and these more culpable than those committed recklessly or negligently. So these may be part of the legislation, then.

(Comment: But are the haters among reasonable conceptions of good?? Isn’t this where the argument goes astray: some conceptions of the good are not among the reasonable ones. And may we not, indeed, must we not, make this distinction? How else are we to arrive at any substantial notion of the right? Or is it contractualism all the way down?

And is it true that HC leg is driven by a conception of the good, rather than the right? (And if so, isn’t it already? See Kahan and Nussbaum).)

Contemporary liberalism: the state limits its scope to matters upon which we can agree - and this means that hate/bias crime legislation exceeds the proper bounds of state actions.

Character theories belongs more with perfectionist political theories. “View the inculcation of virtue and elimination of vice as legitimate state goals”. (Perhaps even they must permit vicious choices to freely arrive at virtuous ones. Contributing to the
"marketplace of ideas"? (But then again, it’s not hate speech we are talking about here).

Are hate crime laws intolerant in an objectionable way?

"No longer is character immune from criminal sanctions; no longer is virtue and vice outside the scope of state action. The law now regulates not only what we do, but who we are." (P 232) Rethorical question: perhaps for the better? If it is effective? “The burden remains on those who would operate on people’s personalities with the state’s most powerful instrument to assure us that they will excise only what is diseased”. (P 232)
Summary:

The article gives a detailed examination of the justifications advanced for the "national and international rush to enact hate and bias crime legislation as an answer to the tragically brutal expressions of racial animosity, bigotry, homophobia and misogyny, that continue to remind the Western world of its inability to protect its citizens from those who do not share its egalitarian ideals."

The paper offers a critical evaluation, which seeks to demonstrate that the literature has sadly failed to provide either an adequate moral justification or an acceptable doctrinal framework for this politically popular form of state action. Hurd and Moore’s main interest is in normative and doctrinal justifiability of legislation that contains sentencing enhancement provisions.

There are four rationales for this legislation -

Part I. The "wrongdoing hypothesis" - Hate crimes are worse than other, parallel crimes, because offenders perpetrate greater wrong upon their victims. (This is a requirement on desert-based theories of punishment). Wrongdoing is often treated as a function of harms caused by an actor. So do HC’s cause more harm? Even if the empirical claim is vindicated, such claims would not justify the blanket sentence enhancements of existing hate/bias crime legislation. "For as we shall demonstrate (...) hate/bias crime legislation would then be using a defendant’s mental state as an indirect proxy for harms that are themselves directly, and more easily, provable; and in so doing, it would violate the principle of desert upon which the wrongdoing thesis is thought to rest."

From a deontological perspective - the greater wrong committed is due to the fact that hate crimes violate more stringent obligations of morality, even if no greater harms are caused. (Hurd and Moore offers a catalogue of obligations that might make for such greater wrong doing, but conclude that none of these plausibly exist.)

Part II. The "Expressivist Thesis" - hate/prejudice expresses disrespect for members of the social community in a way that invite denunciation by the state. Two different forms - 1) the offensive message is an additional wrong. 2) Punishment is justified if and only if it denounces conduct that is morally abhorrent to the majority of the community.
The first, they claim, is redundant. The second depends for strength of the expressivist theory, and that collapses into either utilitarian or retributivist theory.

Part III The "Culpability Thesis" - hate and prejudice constitute uniquely culpable mental states, and crimes committed with such mens rea are appropriately punished more. M and H argue that the criminal law must be radically altered in order to allow for this. Hate/prejudice is unlike all other (classic) mens rea. Unlike intentions or goals, which can be abandoned by choice alone, hatred and bias are not directly responsive to the will. "They are, rather, emotional states and enduring character traits that can, at best, be altered only indirectly and only over time." To punish persons for bad emotions or bad character is to move from an act-centered theory of punishment to a character-centered theory, and so from a liberal agenda to a perfectionist one.

Part IV The "Equality thesis" The criminal law as an instrument of distributive justice. This is either conceptually incoherent or morally indefensible and thus fails as a promising alternative.

Part I The wrongdoing analysis

A. Hate/Bias Crimes as a source of Greater Harms (and therefore of greater wrongs)

There are four sorts of harms that these crimes are believed to cause

1. Greater physical injury to the principal victims of hate/bias crimes

(Quoted from Frederick Lawrence) "dramatically more likely to involve physical assaults. And more serious injury. (Similar position in Weisburg and Levin.). "Harm (…..) lies at the heart of measuring the seriousness of a crime".

This is a puzzling sort of crime, Hurd and Moore thinks. Consider the case of enhanced penalties for crimes done by people with bad tempers. Should the bad-tempered always be more severely punished? Surely not. The bad temper is not itself a harm, it’s just a proxy. "Yet there is no justification for using such a proxy. Proxies are almost always both over- and underinclusive of the phenomena for which they are proxies: Bad-tempered people do not always commit crimes involving assaults, nor do their assaults always produce greater physical injury, and normal-tempered people do sometimes assault others, and their assaults sometimes produce quite
serious injuries. Moreover, proxies involve averaging sentence severity cross a class of offenders rather than individualizing sentences to each offender’s desert.” (P 1086)

To use such a proxy would only be justifiable if no better evidence existed. But it does. People should be punished for aggravated assault, not for belonging to a category that is likely to commit aggravated assaults. (We should not substitute a cruder and less provable fact - the defendants motivation).

2. Greater psychological trauma to the principal victims of hate/bias crimes

This is also central to Lawrence’s argument - Hate Crimes attacks the victim at the core of his identity, which leads to a heightened sense of vulnerability. Hate crimes involves stigmatization - which brings humiliation, isolation and self-hatred to the victim. Offenders are more blameworthy because they have done greater wrong, they caused more harm - the psychological traumatization of victims. Now, is this true? Of course, traumatization occurs even in non-hate crimes (Barnes and Ephross - ”the impact of hate violence on victims”). Do hate crimes cause more trauma? Jacobs and Potter in there classic critical assessment reviewed some studies that claimed to establish this, and concluded that these are defective in that they fail to compare the trauma of hate/bias crime victims with the trauma of comparable crime victims. (In so far as they do, the it fails when controlling for the trauma of worse physical attack with which bias is associated). (Note that Iganski and others have provided better evidence since).

The best answer, however, is that ”the law governing aggravated assaults adjusts punishments to the relative degree of violence and injury (including psychic trauma) perpetrated by aggressors. Part of what makes aggravated assaults worse than simple assaults is the greater psychic trauma accompanying more severe attacks and more severe physical injuries.” (P 1088) the factors has already been taking into account in setting the punishment, adding for hate would be ”double counting”. (Comment: this is not entirely true. The actual harm caused is not the only basis of wrong doing. There is also the harm risked. If there is a general tendency that hate crimes, due to some important feature, cause more harm, you risk more harm when you commit one. Compare assault with a deadly weapon).

There are other problems: the proxy problem - the motive is not itself a physical injury, and not itself a psychic trauma. Those who justify hate/bias crime legislation
on this basis thus are proposing that the defendant’s motive function as a proxy for what really heightens the gravity of the wrong, namely, the victim’s psychic trauma. (Comment: But what if it is the expressed motive, rather? It’s not trivially connected). Motive, Hurd and Moore adds, are bad proxies because it is the perception of hatred and bias that hurts. The law should be concerned with that (Comment: In fact, it occasionally is. And, again, there is a non-trivial connection).

Hate/bias-motivated offenders who do not cause the psychic harms that, ex hypothesi, attend the perception of hatred and bias would not be subject to enhanced punishment for a wrong they did not commit; and offenders who are not hateful or biased in their motives, but who know or are reckless with regard to the to the fact that they will be taken to be hateful or biased, should receive an enhanced sentence, by virtue of the grater wrong that they do in causing such a perception.” (P 1089)

Again, hate is an unacceptable proxy. It’s over- and under-inclusive. Better then to have a new form of aggravated assault, one that explicitly adds the element of the victim’s extreme emotional distress to the actus reus of the offense

3. Vicarious injuries to members of the victim’s larger community

Citing Lawrence again, they consider the argument that members of the target community experience the crime in a particular way. ”This additional harm of a personalized threat felt by persons other than the immediate victims of the bias crime differentiates a bias crime from a parallel crime and makes the former more harmful to society”. One may doubt the relevance of this harm in gauging the degree of wrong done by the offender. It’s serious wrong to murder another, no matter whether the one was much-loved or a despised old hermit. This seems reasonable. Should this sort of impact be considered in sentencing?

”Our view is that such collateral harms are generally relevant to assessing the wrongfulness of an offender’s actions and may be taken into account either in the definition of the actus reus of more serious grades of offenses or in the appraisial of victim impact statements at sentencing.” (P 1090)

Compare with assassination of public officials.

But - is this true? Is this kind of suffering caused to a greater degree than in otherwise motivated crimes? The proxy problem resurfaces.

”If severe collateral trauma is caused by an offender’s crime (whatever its motivation), that harm can be taken into account through victim impact statements at sentencing provided by representative members of the community that is harmed.” There is, in other words, no need to enhance sentences of all offenders.
Only the ones that do cause such harm should pay the price. So neither the factual premises nor the normative inferences implicit in these arguments appear sustainable.

4. Social harms.

All society is harmed by hate crimes. There are three sorts of harms of this nature. 1 Triggers chain reactions 2. General breakdown in sense of order and security 3 Increases polarization.

The first is factually implausible and normatively undesirable. Why should we punish someone more when he his already targeted by revenging actors? The solution to vigilantism is to punish vigilantes, not their victims.

Second factor - all crimes have this effect. The third depends on society’s reactions - it could actually go the other way - so that people react towards the crime in a pro-social manner. (Comment: in fact, the legislation can be viewed as an expression of precisely this kind of reaction.)

B. Motives of Hate as Constituting Greater Deontological Wrongs

Let’s move away from the harm account and consider “non-consequentialist” or “deontological” views of morality. Actions can be wrong intrinsically (not depending on consequences) - the gravamen of a moral wrong consists simply in doing an act prohibited by morality or in not doing an act required by morality. Acts of equal consequence may nevertheless vary in their wrongfulness. A greater wrong violates a more stringent moral norm. (Killing is worse than stealing etc.). Some think categorical norms can conflict in the actions they forbid, and stringency is a function of winning in such cases. Others argue that moral norms come with exceptions, and stringency is a function of the number and scope of the exceptions existing for a given norm; so-called threshold deontologists think that sufficiently good consequences can justify the violation of otherwise categorical norms, and stringency to be measured by height of that threshold. Or measured by duties to we have to prevent them and/or repair for them.

All assaults violates a categorical obligation, and are thus wrong. Does hate crime assaults violate a more stringent obligation? “The challenge for such a proponent is to specify the content of the more stringent moral norm that hate/bias-motivated crimes violate”. (P 1094)

There are two general positions:
The Kantian position. Aimed at reasons as much as actions - Our moral duties are to refrain from certain actions for certain reasons. "Because of this two-level structure of obligations, it is wrong to do some act A that violates our duties, but it is more wrong to do A for reason R, if R is a prohibited reason."

Is it, then, worse to assault a person for a bad reason such as racial hatred?

Kant himself considered ends (or goals), rather than having and acting on certain emotions like hatred or certain predispositions like bias. (Which would be more of a Aristotelian concern). The distinction between reasons as goals and reasons as emotions/dispositions is interesting here is of considerable interest here (Hurd and Moore return to it below). We can choose our goals, but we have a limited capacity to choose our characters, and such components that determine what we feel and what we are disposed to believe. (Comment: "ought implies can")

Hurd and Moore argue that we don’t have categorical obligations with respect to our motives. Our categorical obligation is not to kill, not not to kill for revenge. Just a general obligation not to kill for any reason or for no reason.

"That the categorical norms of morality are directed at actions, and not those actions’ reasons, is evidenced by the structure of all criminal codes" - prohibiting actions of killing etc. With rare exceptions, such codes do not prohibit "acting our of greed". The morality of obligation - with which criminal law deals - is about actions and not motives. (Comment: this can be put into question).

"The thesis that our obligations are about actions and not reasons is buttressed by the fact that we cannot choose not to act on certain reasons in the way that we can choose not to act. We can (as noted before) choose our goals (or ends); this distinguishes such goals from emotions, which we cannot will into or out of existence." (1095)

We cannot will that an end motivate, or not motivate, a certain action. We cannot choose our reasons for an act. (Important Comment: We can, however, choose what reasons we act on.)

The second non-Kantian position suggests the "organic harm thesis" (See Kamm) - they are greater than the sums of their parts; this in turn means that they are multiplicative, rather than additive, functions of their parts. Not just hate plus burglary, the burglary is made worse by the hate with which it is committed. Comparable to being shot with your own gun. This is not a very good example (first - it is not clear that it is worse, second, it is not a case of a motive interacting with an action to produce something worse).
Rather, the analogous circumstances in the literature favoring hate/bias crime legislation include

"1) the greater vulnerability of typical hate/bias crime victims; (2) the fact that the characteristics by virtue of which hate/bias crime victims are selected for attack are immutable characteristics; (3) the fact that our history includes many similar acts motivated by racism, homophobia, sexism, etc., so that any new hate/bias crime is a form of worse-because-repetitive wrongdoing; (4) the fact that other potential victims just like hate/bias crime victims (save for their races, ethnic origin, sexual preference, and the like) are not subject to these sorts of attacks, and (5) the fact that many persons view hate crimes as expressing a message of contempt for the groups from which hate/bias crime victims are selected.” (P 1096)

Hurd and Moore deal with each of these suggestions. The first thing of note is that these are all objective features of the situations - they are not themselves bad motives of the perpetrators of hate crimes. So bias is used as proxy, again - and there are better options readily available. “why not generally enhance the punishments of criminals who pick on vulnerable victims. Why single out hate/bias-motivated criminals, a proxy we know is wildly under- and overinclusive with respect to the vulnerability of victims?” (Comment: why indeed?) In addition, these circumstances are already taken into account when the victim is unusually vulnerable (Federal Sentencing Guidelines).

So the proxy objection applies to all of these suggestions. And even if they are used "directly" as it were, there are questions about their ability to enhance wrongdoing.

First, consider heightened vulnerability. There are two ways in which this might play out: First - the greater harm that more vulnerable people suffer. I.e susceptibility to physical or psychic injury. This returns us to harm-based accounts of wrong-doing. The second is that it attacking the vulnerable is evidence of cowardice. But everyone can be (temporarily) vulnerable, and there is no reason to believe that all groups protected by HC statutes are (equally) vulnerable. Again, motive is a poor proxy, and a preferable statue would enhance punishment directly for vulnerability (of victims).

Lawrence Crocker points towards the immutability of the characteristic on basis of which the victim is chosen. This negates any inference of victim provocation or fault. "Often assaults are provoked by behavior with which an ordinary person could take some exception. Assaults provoked by immutable characteristics seem unjust in comparison.” But, Hurd and Moore rightly point out, even if it is some mutable characteristics, this should not make the victimhood "partially her fault". (Comment:
this is very important, compare with the suggestion the OSCE guidelines) It’s a right not to have to change such characteristics.

Now turn to the history of assault against a certain group - partly based on recidivist lines, is problematic as well. Enhanced punishment, even for true recidivists is problematic from a retributivist point of view. Even more so when we repeat the crimes of others. There are two sort of desert-based justifications - the character of the recidivist is proven. But repeating the acts of others may not offer such evidence - or if it does, it rather shows weakness of character). Second - culpability with which most recent act of wrongdoing is done. The perpetrator should have known better. This can be transferred to repeating the crimes of others. In our case, we should all be aware of the evil done in the name of racism, for instance. But that should hold for all sorts of violence. This does is not particular to Hate Crimes.

Now as to the discriminatory nature of Hate Crimes - additional wrong of discrimination, which is not derived from the harm caused. But, H&M argue all victims are unfairly selected. (Comment: this is not true: a victim may be selected at random by an “equal opportunity offender”. But it is true that discrimination laws are usually limited to groupings that do and suffer most from it. This argument is not sufficiently considered in this text. See Harel and Parchomovsky)

The last suggestion is that the wrong doing consist in the message expressed in the crime, and the message expressed by the law. The message in the crime constitutes a separate wrong from the harm. This involves an entire approach to law, and is treated in a separate section.

II The Expressivist analysis

A. The Two Forms of Expressivist Theories

Dan Kahan is one leading proponent of hate crime legislation: “From an expressive point of view, hate crime legislation can be used to criticize the devaluation of gays(…)”

The argument is two-fold: 1) We view the crime as expressing a message. They are serious not only because they impair another’s interest, but because they convey that the wrongdoer doesn’t respect the true value of things. (This is from “the anatomy of disgust”). And criminal punishment express another message, a counter-message. Both crime and punishment are seen as communicative exercises.
Two ways to construe this analysis of hate/bias crime legislation: 1) As at home with conventional theories of punishment, such as retributivism, deterrence-based utilitarianism, or mixed theories. The enhanced punishment is justified because the act that sends hateful messages are more wrongful than other crimes. They wrong victims by communicating false and hurtful messages about them, and such further wrongdoing merits greater punishment under standard punishment theories.

2) Is more radical - it abandons traditional theories and offers something new - punishment is justified if and only if it sends an appropriate message of denunciation to a defendant and those who share the defendant’s corrosive views. This is such a good thing that it and it alone can justify punishment.

B. The Expression of Hate and Prejudice as a unique form of wrongdoing

The moderate expressivist needs an account of why Hate Crimes involves greater wrongdoings that doesn’t collapse into the more traditional accounts rejected in part I. This depends on the sense to be given to the idea that crimes express something possessing bad social meaning.

The most obvious ways are not open, if the challenge should be met. Because they stem from a basic picture of communication involving three elements. First, the one who communicates means something (speaker meaning). Second, a rational speaker will choose conventional means of expressing a thought. (Semantic conventions and pragmatic conventions.) Finally, the beliefs of the audience matches the intentions of the speaker - audience uptake. If we have that, we have a case of successful communication.

This will not do for the expressivist - it is false that criminal actions communicate a message of hatred, disrespect, or devaluation in the tripartate sense. As in the case of "raising ones voice because one is angry - it is possible that this constitutes an act of communication. But usually the "because" is not a communicative act.

"Similarly, criminal actions directed against certain victims because of their race, sexual orientation, gender, etc. , Could sometimes be communicative acts because the criminal seeks by them to send a calculated message of hatred or prejudice. Much more often, however, hate/bias-motivated crimes have no such communicative intention behind them, even though they are hate/bias crimes - that is, crimes done because of hate or bias” (p 1103)

(Comment: This is important, and probably true. If we want to remove emphasis on motive and focus on “expression” and “specific intent”, this is the way to go. But in fact, speakers intention is not necessary. It suffices with conventional/pragmatic
meaning and it being reasonable to suppose that the criminal should have known about it. See Blackburn. Speakers intention is not a requisite for meaning).

Hurd and Moore thinks the expressivist needs something else and suggest prying these elements a part and focus on one of them. The actors intention is not enough. What about "audience uptake"? It makes good sense for defamatory utterances, for instance (comment: indeed hate speech is sometimes understood as "group libel"). And possibly for contracts, statutes, and constitutional provisions. There is a minor problem in that not all hate/bias crimes cause the beliefs in victims needed. So some hate crimes will not express anything, if this is what social meaning means (Comment: meaning is not necessarily tied to the intention and uptake of particular utterances).

More importantly there is the redundancy problem. Why is the audiences understanding normatively important? What is it about this consequence of hate/bias crimes that makes such crimes deserving of greater punishment? Only those suggestions examined and rejected in Part I, i.e. Harm based consequences. The expressivist analysis/justification adds nothing.

The third alternative considers conventions. If it looks like a hate crime, it is one. Again there is the normative question - "Would the conformity of a criminal action to the conventions of hateful/biased expression make that criminal action deserving of greater punishment? Remember, we cannot repair to the greater culpability arguably possessed by a criminal who experiences the emotion of group hatred or the stereotypical beliefs that spawn prejudice, nor may we repair to the harms that may be caused by beliefs about such subjective motivations. These are the speaker-and audience-centered construals of "social meaning" that we have already put aside. The question is why bare conformity of a criminal’s action to the conventions of hatred/bias - the creation of an appearance of hatred/bias, in other words - merits greater punishment". (P 1105)

They consider an answer invoking negligence. There is a substantial risk of causing the kinds of individual, group, and social harms. An unreasonable risk taken. But again, they appeal to redundancy - nothing more than was provided already by the nonexpressivist who predicated greater blameworthiness on the greater harms that are said to be caused by hate/bias-motivated defendants.

The expressivist needs something else, then. Pildes and Andersen (see Blackburn) argues that public meaning "need not be in the agent’s head, the recipient’s head, or even in the heads of the general public". What senses are there? Four - first - evidential construal. Paul Grices "natural meaning" such as "clouds mean rain". In
the context, this returns us to an actor-centered, subjective interpretation of social meaning. Blackburn offers a "credibility" construal - A expresses M when M is the only credible motivation an actor could rationally have had in doing A.

This depends on norms for rationality, among other things, and it's not always possible to identify unique meanings. The suggestion would make a defendant more blameworthy not because of any fact about him or his deed; rather, because of the appearance of there being a fact about him. Hurd and Moore acknowledge that this is not entirely crazy, but note that, first, the creation of an appearance of a bad motivation is not itself a wrong, it’s not part of our responsibility. Others are responsible for their beliefs. (Comment: is this true, though? Consider the N-word).

Second - the obligation is due to /a function of the bad consequences. And Hurd and Moore have rejected that already. Third, "mimetic wrongdoing". Lightweight significance of false appearance or bad motive. Only actual motive would, increase culpability.

In line with the third construal (See Hellman) - we are to seek the hypothetical beliefs that a populace would have if they were to engage in dialogue in a Habermasian “ideal speech” situation. “The expressive dimension of a law or policy is best understood as the meaning that we would arrive at if we were to discuss the interpretive question together under fair conditions.” How would this work in Hate Crime context? What’s so relevant about hypothetical appearances?

"It is morally unintelligible how one could conclude that those whose crimes would be viewed as racist if people engaged in certain idealized dialogues are therefore in fact guilty of greater wrongdoing” (p 1109)

Fourth - (criticised by Steven Smith) - "objective meanings" are unintelligible, period. "Just there" (Ed Baker) - missing realm of existence.. Last refuge for theories in trouble, applying to such queer entities. (Comment: they obviously haven’t considered social ontology).

"Upon examination, then, it would seem that expressivism cannot deliver up a concept of social meaning that is (1) coherent and determinate in its implications for particular cases; (2) capable of doing the normative work assigned to it in the justification of hate/bias crime legislation (namely, to show greater wrongdoing when the social meaning of a defendant’s crime is racist, homophobic, chauvinistic, etc.); and (3) nonredundant nonexpressivist accounts of greater wrongdoing predicated on claims of increased harms to the interests of victims and others.

The first version of the expressivist analysis of hate/bias crime legislation (the "moderate" version) thus falls away.
C. The Expression of Hate and Prejudice As a Trigger for Enhanced Punishment Under an Expressivist Theory of Punishment

Expressivists might want to replace traditional justifications of punishment (predicated on desert and/or crime prevention) with an altogether new ideal. Punishment itself sends a message, and the justification for delivering it resides in the power of punishment to contradict or counteract the messages of hate and prejudice conveyed by hate/bias crimes. Then any theory of meaning will do. Say: if legislator intends to express social disapproval of the perpetrator's message, that is what the punishment expresses. This might be the main motivating thought behind Hate Crime legislation.

1. Why is sending a message to criminals good?

Remember that answers derived from a utilitarian theory of punishment (expression as an instrumental good) are not open here. (Performing Functions like venting vengeful emotions, reinforce the values of law-abiding citizens, shame others, educate populace, satisfy what most people want, maintain social cohesion). This would not be a radical expressivism. "We were promised more!" The expression of disapproval must be an intrinsic good, nor merely an instrumental good in the service of utilitarian goals.

Expressivist need independent reasons to justify a legislation, that traditional theories cannot. (Comment: H&M are not entirely on the right track here - we are considering the utilitarian effect of having a law. Earlier sections dealt with the utilitarian interpretation of the wrong-doing of the crime. This is something else)

Does this lend itself to relativism? Expressing whatever society feels more strongly against?

Retributivists, they claim, can’t accept relativistic meta-ethics and remain retributivists. Just deserts cannot be collapsed into popular attitudes about just deserts if they are to remain a trigger for justified punishment.

"One cannot urge, as does Lawrence, that even if the expressive value of punishment in no sense justifies why we are entitled to punish in general, it nonetheless "must inform our decisions about the nature of that punishment," and judges must measure out the amount of punishment by the degree of offensiveness of the offender’s conduct to society.” (P 1112)
Nor, as Kahan suggest, ca retributivists use the expressive view of punishment to inform desert - the proper retributive punishment is the one that appropriately expresses condemnation and reaffirms the values that the wrongdoer denies. Hurd and Moore argue that there is no room on retributivist grounds for something other than desert - the expression of societal outrage, for instance. And if desert isn’t enough, then that other factor is doing all of the work. **So: what makes expressing a society’s disapproval of the motive of a criminal’s act intrinsically good?** There is no plausible answer. Some institutional arrangements are arguably intrinsically good, but using criminal law to express popular attitudes does not seem to be a case of this. Sounds like a kind of collective First Amendment right, justified by the intrinsic goodness of “self”-expression (Not plausible for non-individuals)

It’s famously difficult to make an argument that something is, or isn’t, intrinsically good (not by deduction, or instrumental reasoning). But nonconsequentialist justifications are possible in terms of a mix of particular judgments and general principles one provisionally accepts as true. But here, nothing comes to mind by which to justify a belief in the intrinsic goodness of an institution that expresses social revulsion or disapproval.

2. **Is sending a message so good that it justifies punishing an offender more than is deserved?**

The attainment of this good cannot justify punishing the innocent (if one is persuaded that punishment must at least be constrained by the principle of weak retribution - the principle that a defendant should not be punished more than is deserved.) They suggest an expressivist reply: “The obligation not to punish an offender beyond what he deserves does not operate as a side-contraint to attaining the good of expressing condemnation; it is internal to that good itself. That is, the good of expressing condemnation is a good at all only when the criminal being condemned fully deserves the punishment that expresses the condemnation.” This is not possible to achieve without have access to the notion of **desert**. “It is possible, of course, to achieve the educational and other benefits caused by expressions of condemnation even when the person who is condemned is innocent, but these benefits are not what makes expression of condemnation intrinsically good”. (P 1114)

Then the expressivist must construe his theory of punishment as **deontological** in character. We should not condemn those who do not deserve it, even if this is how we manage to condemn those who DO deserve it. This reply completely trivializes the theory, however: it can’t justify punishing beyond what is deserved. Only if hateful or bigoted motivations **actually** increase blameworthiness. Then we’re back to the other less radical branch. And that was criticized above.
Why, then is this approach so popular? Hurd and Moore thinks it is because proponents are focusing only on the passage of the bills enacting hate/bias crime legislation. It is this act that send the desired message. But acting on it would be unjust.

But can this hold? Should we have the legislation, but not act on it? They call this “Acoustic separation”. The message being that Hate Crime legislation is merely symbolic, and should not be used in prosecution. (Sara Beale has examined such a version). Expressivism provides a more satisfactory theoretical basis for the creation of broadly phrased federal hate crimes that will seldom be prosecuted. ” (Comment: wont that send a message, though? - Acoustic separation breaks down when the secondary message is overheard.)

3. Is sending a message so good that it justifies punishing an offender less than is deserved?

Surely, we can express our condemnation of criminals without actually punishing them? The good would be obtained without making those denounced suffer. When it can be achieved, desert drops out as a sufficient condition of punishment. According to expressivism, if a richly deserving offender (of punishment) can be condemned without punishment, that is to be preferred. Public denunciation can sometimes be sufficient. (Possibly, today, only the imposition of suffering can express our condemnation (See Kahan).

Could it be alright, then, to “punish” a brutal rapist merely by verbal condemnation? Furthermore, like the utilitarian, the expressivist is faced with the possibility that a society might merely pretend to punish. Certain risk of detection (but that’s the wrong reason).

Hurd and Moore argue that expressivism fails here, and generally. Even Joel Feinberg held that expression of condemnation is at most an incidental function of punishment and is no part of what properly can be called a theory of punishment. We are left with the question: How can expression of hatred or prejudice by itself increase the wrongness of the crime?

III The Culpability Analysis

"...The language of typical hate/bias crime statutes favors the view that hate and bias toward a victim because of her membership in a particular group constitute uniquely culpable mens rea. While the actus reus of a crime specifies a particular kind of prohibited wrongdoing, the mens rea of a crime specifies the culpability with
which a defendant must have acted in order to be punished for that wrongdoing.” (1117)

Hate/bias may be a particularly culpable subjective mental state on the part of defendants, which would this justify different punishment for crimes that cause equal amount of harm. If so, these crimes differ from all other sorts of crimes in very significant respects. No other crimes are concerned with defendants’ motivations for actions in this way.

”This is because the motivations with which they are concerned are emotional states or dispositional beliefs that attend actions, rather than, say, future states of affairs to which actions are instrumental means.” (P 1118)

”These emotional state and dispositional beliefs constitute standing character traits rather than occurrent mental states (such as intentions, purposes, choices, etc.). Thus, the additional penalties that are imposed on defendants who are found guilty of hate/bias crimes constitute punishments for (bad) character.”

A. Group Hatred and Biases as Character Traits

The standard method of grading culpability in criminal law has long been indifferent (except evidentially) to considerations of motivation. Factfinders mostly are required to answer one of the following questions about the mental state of a defendant - did the defendant have as his purpose this result? Did he know that he would cause it? Was he consciously aware of a substantial and unjustifiable risk (recklessness)? None of these are about the reasons or background motivations. But here it is a much more direct role.

But - there are other cases - cases like provocation/passion, premeditation/deliberation, and specific intent doctrines. Are these not parallel? Hurd and Moore thinks not.

First - in defense doctrines - motivations appear to mitigate - reduce or suspend penalties. For instance - if the defendant reasonably believes that committing this crime is the lesser of two evils. Or necessary to defend self or third party against a culpable aggressor. Or after provoked into a passion in circumstances in which a reasonable person might become similarly impassioned. These circumstances plausibly reduces liability.

”Unlike these doctrines, however, hate/bias crimes require courts to consider bad, or inculpatory, motivations as bases for enhancing penalties for wrongdoing.”
(...) "Worse yet, in the case of the provocation/passion doctrine, hatred, anger, rage, and the like are thought to mitigate blameworthiness because they are thought to suspend the sort of reasoned judgment that is required for full responsibility. It would be flat out contradictory to point to the provocation/passion doctrine as a precedent for hate/bias crime legislation, for it would be to say that the very same conditions that exculpates also inculpates”

The premeditation/deliberation doctrine - premeditation and deliberation makes you eligible for more severe punishment. But this isn’t a parallel - To find out if premeditation took place is relatively easy - it does not require the fact-finder to discover the reasons for which the defendant intended to kill.

"Hate/bias crime liability, I contrast, commits factfinders to assessing not just how a defendant came to do what he did, but why." (P 1121) Not just that the defendant formed an intention/purpose and calculated about the means, but why he/she did.

Comment: This is probably the most important bit of this argument, and of the criticism in general While motives is clearly relevant in the moral domain, there are difficulties in translating it to the legal domain.

Third possible precedent - specific intent crimes. "A specific intent crime is a crime that requires a defendant to do a prohibited action with some further purpose (beyond the purpose to do the prohibited act).” (P 1121)

Burglary for instance is barking in with some further intention - to steal, rape or kill, say. Attempted murder is an assault with intent to kill. "With the purpose to” includes elements of motive, the cause of the act. So fact finders must find our why a defendant did what he did, not just whether it was done on purpose. But there are very important differences between the motivational mens rea of specific intent crimes and those of hate/bias crime. "Specific intentions have as their objects future states of affairs - states of affairs that constitute reasons for action. In contrast, hatred constitutes an emotional state within which an actor acts, while prejudice constitutes a disposition to make judgments about others and to act on the basis of false beliefs about them.” (P 1122)

We should not obscure the distinctions between three sorts of motivations: desires, passions, and dispositional beliefs. We should therefore differentiate between specific intent, hate, and bias crime. Crimes that require specific intent are concerned with particular sorts of desires, crimes that require hatred of a victim are concerned with particular passions, and crimes that require bias or prejudice toward a victim are concerned with particular standing beliefs.
Specific intent - concerns a **desire for an outcome**. (Comment: One may ask whether the relevant sense of “hate” may not be construed as such?) Such desires are motivational - they give reasons for actions. They constitute goals, or perceived goods, or ends. These are objects of practical reason. “To possess a specific intention is thus to have a motive for action in the sense in which that term is used in murder mysteries and detective movies.”

"In contrast, to explain a defendant’s action as a product of hatred is not itself to attribute to him a desire to bring about some future state of affairs. It is, rather, to characterize his action as a product of a particular passion within which he was gripped at the time. Passions differ from the sorts of desires put at issue by specific intent crimes in that they are felt emotional states rather than ends to which actions are means. We speak of emotions “motivating” actions, saying such things as "he lashed out in anger.”

We are not explaining conduct by reference to their future goals (Indeed, we are very often explaining why their powers of practical reasoning were (partially) suspended so as to make them less able to adopt appropriate means by which to achieve their goals.) (Comment: Important here - the many (morally relevant) senses of "hate", perhaps the one to be employed should be the dispositional reading compatible with specific intent.

”Inasmuch as hatred is akin to jealousy, anger, envy, love, and the various pleasures, it motivates action in the way that passions (as opposed to desires) motivate action. It is an emotional state within which an actor acts; it is not a future state toward which an actor acts.” (P1123)

Finally - bias and hate crimes are different things!

”Hatred may necessarily depend upon bias, and bias may commonly cause hatred, but bias does not necessarily depend upon hatred. One who is biased or prejudiced against others possesses false beliefs about them. Moreover, these beliefs are what are called “dispositional beliefs” because they constitute standing dispositions to draw particular conclusions about particular persons in particular situations without more particular information.” We understand prejudices as motivational because they are dispositional beliefs. ”They induce discriminatory actions by disposing actors to make certain (false) factual assumptions about others within the course of reasoning about what they ought to do vis-á-vis others.”

At any rate - it seems hate/bias crime statutes is about adding punishment because of certain emotions or beliefs that the defendant has while acting.
But: 1. Many statutes do not use these terms and 2: Haters often seek some future state of affairs. Thus collapsing emotions and prejudicial belief states into desires.

1) Rather “because of”. But then their language ill fits both their purpose and the occasions on which they are invoked.

"Suppose, for example, that a defendant simply wants to steal from someone who is unlikely to put up a serious fight, and so for that reason he seeks to mug a woman” (p 1125)

So here we have the “because of”, but we do not have hate, in the relevant sense? Many crimes use race etc. as proxy for other criteria - should those be counted as Hate Crimes? If not, then the practical implications of Hate Crime legislation is to punish defendants for hate and bias.

The real mens rea requirement are far from traditional - they are emotions and dispositional beliefs altogether different from the desires traditionally put at issue by specific intent crimes.

What about the second option - re-describing it as an intention to bring about some state of affairs?

"There is nothing conceptually confused about this argument. Its defensibility depends upon whether, as an empirical matter, actions that are caused by emotions or prejudicial beliefs (with or without the intervention of practical reasoning) are in fact plausibly characterized as actions that reflect intentions concerning future states of affairs. It seems to us that this argument grossly overintellectualizes the mental phenomena that the categories of desires, emotions, and dispositional beliefs nicely delineate.” (P 1126)

Do we have reasons to attribute intentions about such future states to persons who do not subjectively experience them? Nothing is gained by so doing, and much may be lost. (P 1126)

Raw emotions, dispositional beliefs and desires are experienced differently, and should not be collapsed into a single category (Comment: but that’s beside the point - the point is what is the relevant sense to be applied here?)

These felt differences may very well be morally relevant - we may have better control over one category of mental states than over others; or we may be more (or less) culpable for harboring one category of mental states over others (regardless of control); or the law may be better able to affect our possession of one category of
mental states over others (assuming, for example, that we have control over all of them, but that some are more responsive to external incentives than others).

(Hurd and Moore point out that we should not confuse the "emotions as goals" idea with the fact that emotions have intelligibility conditions (See Nussbaum and Kahans evaluative model).

Does the differences between specific intentions, passions, and dispositional beliefs make a moral difference?

First - the emotions here are character traits possessed by defendants over time.

"While one can form an intention, set a goal, and fix on a desired object in a moment’s time, it is hard to conceive of what it would mean to hate or bear bias against a group only momentarily". We can feel hate, without being hateful persons, and jump to conclusions, without being biased persons.

But hatred and bias toward whole groups of persons (especially when the grouping is irrelevant) do appear dispositional.

"In punishing a defendant for the intentions with which he acted, then, specific intent crimes do not necessarily punish a defendant for having bad character. But in punishing a defendant for hating or being prejudiced against his victim because of his victim’s membership in a particular group, hate/bias crimes do necessarily punish a defendant for having bad character. In fact, they punish a defendant solely for bad character."

(Comment: In fact they don’t, they punish for acting on bad motives/characters. The actio is already punished by "regular" legislation, so is this allowed? This requires that we show that acting on a motive is somehow distinct from having the motive, and doing the action.

B. The Moral and Political Legitimacy of Punishing Bad Character

Can we will to have, or will away, particular character traits (including emotions and beliefs)? Can I decide not to be selfish? Well, we can gather more information in order to make us less discriminatory. But it is in the nature of bias for one to believe that no further information is required by which to make an informed judgment about a person. We can indirectly alter aspects of our characters by choosing to subject ourselves to experiences that promise life-changing effects.

Perhaps those that do not work on their character flaws deserve punishment, because they failed to will actions that might have caused their character to be
otherwise. Are we trying to induce them to do so with this legislation? While character is not immutable, one’s ability to affect it is clearly imperfect and unpredictable. **Criminal legislation that targets emotions and dispositional beliefs targets things that are not fully or readily within a defendant’s immediate control.**

And if the state ought not to punish us for things that we cannot autonomously control, then hate/bias crime legislation is suspect for doing just that.” (P 1130)

Hurd and Moore are not suggesting that defendants should not be punished for racism because he did not choose to be racist, but because he cannot simply choose not to be a racist. Few criminals become criminals through their own devices alone. Were we to refuse to punish a defendant for character flaws solely because they were not entirely of his own making, we should refuse to punish (virtually) all defendants.

Their view is rather that the law rightly punishes defendants who choose to do harm, even when their choices are informed by aspects of character that are not chosen, because in a very meaningful sense, they could have chosen otherwise. The law is entitled to punish acts, but not motivations, because these could not have been willed away.

"We are sympathetic to the view that *moral* culpability is largely a function of the reasons for which persons act and the emotions that attend their actions. Contrary to the traditional assumptions of the criminal law, it seems to us that surprisingly little is learned about a defendant’s moral culpability by discovering that the defendant intended a legally prohibited harm or knew that he would cause it.” (P 1131)

"Inasmuch as we can distinguish the mercy killer from the contract killer only by reference to their relative motivations, and inasmuch as the mercy killer appears as nonculpable as the contract killer appears culpable, our theory of moral culpability clearly departs from our doctrines of legal culpability by weighting an actor’s motivations for action far more heavily than the intentionality of his actions”

Are hatred and prejudice the worst among culpable mental states? So much so that they should be singled out for special criminal attention? Such a claim must be defended (is it worse than sadism, greed, jealousy?) . Presumably, some reason must be given in support of the claim that hatred and bias are responsive to criminal sanction in a way that the others are not.

Hurd and Moore thinks the advocates can’t do this. Motives can’t readily be ranked by their degree of culpability. . Cases are fact-sensitive, no blanket ordering and it’s often difficult to say certain motivations are per se more culpable/wrong.
Regarding the Second argument: “If criminal sanctions can properly be imposed only when they will deter undesirable conduct and/or mental states (a premise to which no retributivist would subscribe), then there is good reason to enact hate/bias crimes without enacting legislation that targets other equally culpable motivational states”

Is there any reason to believe this is so? Is that racism is learned, whereas other "passions" not? And is it therefore more mutable?. Is this they way to go? Probably not.

If none of these arguments work, then two further avenues of argument are available. 1 Admit and defend the fact that hate/bias crime legislation arbitrarily picks out for extra punishment a set of mental states that is a subset of a larger class of equally vicious states, or 2. to convince theorists and legislators to generalize hate/bias crime legislation by radically revising our culpability doctrines so as to take into account, and dish out punishment in proportion to, all culpable emotional and dispositional belief states that motivate defendants to do criminal deeds - from racial bias to jealousy, road rage, and cowardice.” (P 1133)

1 is foreclosed because of the equal treatment principle. A failure to punish equally constitutes a violation of retributive justice. Perhaps, then, many other ill-motivated defendants are underpunished?

This is the final argument for Hate Crimes for special status. “If one believes that an actor’s moral culpability is better measured by his background motivations than by the intentions, knowledge, or degree of conscious awareness that he possessed concerning the results of his conduct, then one might well think that our criminal law should be radically revised so as to better mirror the conditions of true moral culpability. (...) Hate/bias crime legislation is justified, on this argument, as an interim experiment that successfully demonstrates how legislation can and should more generally permit adjudicators to punish defendants in proportion to the relative culpability of their motivation mental states” (p 1135)

Virtue ethics

A third "moral“ approach is to some sort of "character theory of the criminal law" - the function of criminal law is to punish vice and cultivate virtue. This can’t be defended within political liberalism. "Political liberals classically distinguish a theory of the Right from a theory of the Good, and confine the state to legislating in accordance with a theory of the Right. They maintain that the state may properly use its power only to construct and protect a fair framework of cooperation,defined
as a system of right that allows all citizens maximal equal liberty to pursue their own unique conceptions of the good life." (P 1135-36)

Reasonable people can disagree, and agree to peaceable institutional means by which to disagree. We need not agree on a conception of a good life. Or to state action that advances any particular conception of the good life. "Inasmuch as state action is both theoretically unjust and practically impotent unless it can command the consent (if only hypothetically) of reasonable persons, state action is illegitimate if it pursues a particular conception of the good life." (P 1136)

(Comment: But surely, Hate Crime legislation is supposed to express one of those rare and all-important communal values? Liberalism seems to be at odds with certain ideas of the "good", at least, if that is what racism and bigotry is.)

Character traits are only indirectly responsive to choice. "Inasmuch as punishment for character traits smacks of strict liability, and strict liability threatens to chill liberty, liberals typically predicate moral responsibility on matters of choice." Vices and virtues appear to liberals to be inappropriate candidates for praise and blame.

According to Hurd and Moore, until the enactment of HC, criminal law was a testament to the fact that we could meaningfully assess actor’s culpability without resolving inevitable disputes over the sorts of traits that people should cultivate. (Comment: This is where they disagree substantially with Kahan and Nussbaum). We have agreement only that purposeful harms are more culpable than harms committed only knowingly, and those more so than harms committed recklessly or negligently. Liberalism - limited state to matters upon which we can agree.

"Hate/bias crime legislation exceeds the proper bounds of state action, as would any attempt to radically revise mens rea doctrines so as to use state power to affect people’s moral character." (P 1137)

So we can’t be liberals? Political perfectionists considers it appropriate for the state to use its power to perfect its citizens morally. (Comment: I.e. Targets the causes of crime, rather than the crime itself? Is that the controversy? Interesting, perhaps causes of crimes should be targeted with political means, but not legal.) Perfectionists thinks the state cannot and should not remain agnostic between competing conceptions of the good "Legislators both inevitably will, and morally must, appeal to particular conceptions of the good when legislating conduct. The political morality of their choices thus turns on their success in deciphering what is, in fact, good for persons.” Still there is some morality of freedom, right? As Joseph Raz says: What is good for persons is a product of what they autonomously choose to do and to believe.
We must preserve an arena to make choices about what is good. We must tolerate some bad choices. - We must be confident that in enacting such legislation we are not inhibiting a liberty to be bad that is necessary to the cultivation of good. (This liberal ideal is probably at the root of problems for social engineering). See reluctance to ban racist organisations. - The vices may not best be repressed by criminalizing them.

IV. The Equality Analysis

Harel and Parchomovsky argues that Hate Criminals are neither greater wrongdoers nor more culpable than otherwise-motivated defendants. These concepts are not enough. Hate Crime legislation reveals the shortcomings of this view. That defendants may be punished differently iff the wrong they commit are of different sorts or culpabilities are of different degrees. Instead -they suggest a fair protection paradigm that requires the state to use criminal penalties to equalize (some) individuals vulnerability to crime.

"The fair protection paradigm is predicated on the proposition that the criminal law is a principal means by which society provides protection against crime to potential victims. On this view, protection against crime is a good produced by the criminal justice system, which, like many other state-produced goods, should be distributed in an egalitarian manner. Accordingly, the fair protection paradigm requires the state to take into account disparities among individuals in vulnerability to crime when determining their entitlement to protection. Thus, under the fair protection paradigm, victims who are particularly vulnerable to crime may have a legitimate claim on fairness grounds to greater protection against crime. Bias crime legislation, on this view, is aimed at protecting individuals who are particularly vulnerable to crime because of prevailing prejudices against them."

So vulnerability to crime can be calculated by multiplying the probability that she will be the victim of criminal wrongdoing by the magnitude of that wrongdoing. Some are more vulnerable because of reasons of their own choosing, others because of bad luck, and still others because of factors that no government could reasonably affect. In Harel and Parachovskys view "The state cannot and should not be expected to eliminate all sources of vulnerability to crime, particularly those that stem from exercises of choice or sheer luck. But the state can and should "redress disparities in vulnerability to crime that result from certain immutable personal characteristics of the victim"."
These are things like race, gender, religion etc. There are two ways to do this.  
1. Impose harsher punishments. 2. Devote more resources to detecting and prosecuting defendants who target such victims. Harel and Parochovsky think the latter is impossible when vulnerability is attributable to immutable characteristics. (Comment: Because motive can only be detected after the crime. Is this really a good argument?) So they think it is easier and more efficient to use differential sanctions rather than differential enforcement.

While this account is “creative and philosophically tempting”. Hurd and Moore offer a set of reasons - moral and conceptual - for rejecting the fair protection paradigm and this justification for HC legislation.

First - there is a moral difference between reducing crime by adding to the police force and reducing it by increasing penalties. The latter licenses the state to make examples of some defendants by meting out more punishment to them than they deserve. This, Hurd and Moore argue, is Machiavellian unabashedly consequentialist. There must be side constraints to the means available by the state. Certainly when it comes to undeserved punishment.

As it abandons desert as necessary for punishment, the theory is not retributivist nor a mixed theory. The greater punishment is not deserved.

It is not utility, but equality that is aimed for here. There may, then, be conflicts between these (but note that they’re usually in relative sync). We could decrease crime significantly, but not inequality in distribution. Would that not be preferable? (Comment: Surely, the point is not that equality is the only thing that matters).

"They have to sustain the claim that a community in which men and women are frequently but equally brutalized is better than a community in which very few are brutalized, but the few who are so victimized are all women”. (P 1142) (Comment - No, and this is a very silly argument)

H&P’s suggestion is radically at odds with all the other dominant theories of punishment.

Equality in distribution is a plausible goal for legislators in a liberal state. But what is the good that Harel and Parchomovsky seek to contribute? Protection from crime? Presumably, the ideal is best cast in terms of a right by each of us that the state take crime-prevention measures in direct proportion to our individual vulnerabilities to crime. But what is good in this? Is it equalizing the risk of becoming a victim? It’s literally incoherent - it presupposes that being at risk is itself something bad and that freedom from this is therefore intrinsically good. But what is wrong about being at risk
of undergoing a violent crime? If the crime never happens, and one never knows of one’s danger, is one hurt?

(Comment: Why not, I ask? You can be blamed for putting someone at risk, even if it doesn’t come to pass. This can be derived from the intrinsic disvalue of the probable outcome, however, and is not merely instrumental).

It cannot be intrinsically good not to be at risk. Rather, it is, at best, only instrumentally good not to be at risk, where the intrinsic good is not to be harmed by criminal wrongdoing. Risks are only heuristic (epistemic) means by which we predict the occurrence of real bads - that is, incidents of crime. Freedom from criminal wrongdoing is a better construal of the good to be distributed. Then risk assessments is the best means to ascertain how to achieve an egalitarian distribution of this good. “The good is for no one person to suffer more crime than anyone else, and any indicator that someone might be forced to do so should be considered by legislators when designing and allocating crime prevention measures.” (P 1144) (Comment: but what about perception of risk? (And also crime being part of the evidence for that greater risk?)

Does this make moral sense? Is it plausible to prefer an equal distribution between gays and straights in victimhood of assaults, if the numbers stay the same? (Comment: Well, yes.) ”Why does not each person have an equal claim to not be a victim of such an assault -The good is not freedom from risk, but freedom from assault.” And if both cases are 1000 persons being assaulted, they are both equally bad. But consider if 1000 assaults occur, first victimizing 1000 people, and in second case, 200 people, five times each. Those people have a legitimate complaint against the state - they seem to bear more than their share. (Comment: This is interesting indeed. It’s individualism that plays the role here. A community cannot, it seems, be a victim).

”Having now isolated a coherent, morally plausible ideal of distributive justice here, the question for H&P is whether their proposal does not look more like the first hypothetical situation than the second.” Hate Crime laws are not like repeat-victim legislation, is does not prevent the same individuals from being repeat victims.

”Rather, if, ex hypothesi, it does not punish defendants for unique sorts of wrongdoing or culpability, then it appears simply to protect groups from disproportionate risks of crime. And if this is its purpose, then it is either conceptually incoherent (in concerning itself with the distribution of risks, rather than harms) or morally indefensible (in using group membership, rather than individual victimization, as the trigger for state protection.”
"One might sensibly seek to escape these difficulties by arguing that risks, when perceived by their victims, are harms in themselves (as the law of assaults has long recognized). One might further argue that when offenders perceive and capitalize on victims’ vulnerabilities (risks), they are more culpable for doing wrong to those victims than they would otherwise be (whether their victims perceive their own vulnerabilities or not). Thus, increased risk, when perceived by victims or offenders, properly increases the punishment owed to those who realize that risk." (P 1145)

Hurd and Moore admit that these are plausible claims - but they are not about distributive justice, and they are not open to H&P to rescue their theory (Comment: But could they still be used in a defense of HC legislation?). These are claims about substantive proportionality. Perception of risk can increase a defendants desert - to cause persons to perceive and fear future victimization is an added harm. And if a defendant choose victim as result of perceiving her vulnerability, then they are more culpable. H&P can’t make these claims without giving up the negative thesis - that HC legislation cant be explained in terms of proportionate response to greater wrongdoing or culpability. And their positive thesis - that Hate Crime legislation can be defended as means of doing distributive justice.

And since the discussion of the theory reveals that one of these claims must be true, it means it is indefensible.

(Comment: It is notable that Hurd and Moore does not address the latest suggestion as a defense in its own right, but rather argue that Harel and Parschomovskv can’t use it.)

**Conclusion**

H&M believe they have shown that all the claims considered in favour of hate crime legislation are empirically, morally, or conceptually suspect. None, as yet, provide the necessary theoretical legitimacy for this politically popular form of criminal legislation. "While little could be more important than breaking down the barriers of racism, chauvinism, bigotry, and homophobia, it is incumbent upon the state to restrict its means to those that can be justified by our best theory of the criminal law. As this Article has reluctantly suggested, the case remains to be made that hate/bias crime legislation can be so justified." (1146)
8. Paul Iganski - Hate Crime and the City
Summary and commentary by David Brax

Introduction
Paul Iganski's book "Hate Crime and the City" uses London as a case study. It explores the dynamics of hate crime with emphasis on victim perspectives. The victim perspective is also put at the center of his understanding of the concept 'hate crime' - which is in line with the victim focus in UK hate crime legislation. Iganski demonstrates the ordinariness of hate offenders and offenses - in contrast to the picture of hate crimes as violent, premeditated crimes committed by primarily right-wing extremists - that predominates in the media as well as much of hate crime scholarship. The ordinariness of hate crimes, he argues, shows that the values expressed by hate crimes are not extreme, but have a place in normal society. Hate crime legislation therefore has an important function to counteract these values, and to express and effect a change in the values that informs these crimes. The ordinariness of hate crimes also opens up the question why some who carry these values offend while others do not. Iganski provide a situational analysis to account for this. He also provides evidence that hate crimes do, in fact, cause more (emotional) harm than parallel crimes (i.e Similar crimes otherwise motivated). This, ultimately, is the justification for hate crime statutes and for punishment enhancements.

This commentary will proceed along with the structure of the book. Comments are inserted into the text. The focus is on chapter 5, where the the main issues of philosophical and legal importance are developed.

Chapter One - A victim-centred approach to conceptualising 'hate crime'
Explores the "conceptual disarray of the notion of 'hate crime' and explains how the concept works in this book, and why. It makes a case for the victim's experience to be placed at the centre of the conceptualisation of 'hate crime' .
"A victim-centered approach recognises the salience of the particular harms inflicted by 'hate crimes' compared with parallel crimes, and the chapter introduces evidence of those harms"
Iganski points out that the term ‘hate crime’ has no legal status in the UK. No law uses the term. It has, however, been embraced by the police and other criminal justice agents. The New Labour government introduced penalty enhancement for racially aggravated offenses under section 28 of the 1998 Crime and Disorder Act. This means extra penalties in cases of ‘hate crime’ compared with similar, but otherwise motivated (‘parallel’) crimes. Various interpretations of ‘hate crime’ occurs in scholarly and policy literature, and Iganski notes that, curiously, the word ‘hate’ appears infrequently in the definitions. Instead we find terms like ‘bias’, ‘prejudice’, ‘difference’ and ‘hostility’. ‘Hate’ as an emotion seems to have little to do with the intended class of crimes. ‘Hate Crime’ is thus a misnomer, given the events that it represents.

Gordon Allport, in the influential book “The Nature of Prejudice” (1954), distinguishes ‘hate’ from ‘anger’ in the following way:

**Anger** is

“a transitory emotional state, aroused by thwarting some ongoing activity.”

**Hatred** is

“a sentiment, not an emotion. It is an enduring organization of aggressive impulses toward a person or toward a class of persons. Since it is composed of habitual bitter feeling and accusatory thought it constitutes a stubborn structure in the mental-emotional life of the individual”.

Hatred can thus be understood as “cold” as opposed to the heat of the moment experienced in anger. Iganski notes that if our notion of ‘hate crime’ is informed by Allport’s stress on ‘aggressive impulses’, the class of hate crime offenders would be confined to “the most extreme bigots who either deliberately set out to victimise the targets of their hate or alternatively seize on any opportunity that presents itself to do so”. And, as he sets out to demonstrate, this misses the point of the "ordinariness" of hate crime offenses and offenders. Iganski appeals to Levin and McDevitt’s typology of hate crime offenders, demonstrating that extreme hate mongers are rare. Other impulses, like “thrill seeking” is more likely to motivate offenders. Critics of hate crime legislation like Jacobs and Potter (1998) (see separate commentary) argue that ‘hate crime’ is not really about hate, but bias of prejudice. Of course, prejudice, too, is a vague notion.

**Comment:** It is quite possible to "confine" 'hate crime' in precisely this narrow way, and to claim that what Iganski’s evidence suggest is that a very small part of what 'hate crime' is now normally used to cover actually qualify as such. If this
narrow concept would be adopted in the legal context, hate crime laws would be more akin to terrorism law, which would tie aggravation much closer to (specific) intentions. This would seem to return the focus to the offender, however. If this alternative had been considered, an important question is whether crimes committed by THIS group and in this manner cause more harm than crimes conjoined with "ordinary", "casual" racism, say. If harm is the crucial element, such a comparison would have been of use, and could, in fact, help settle how narrow the "hate" element should be construed.

The US Congress "Hate Crime Statistics Act" (1990) speaks about crimes that "manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity" (Disability has since been added). In -94, the highlight was on discriminatory selection rather than the animus of the offender (see the model developed by Lawrence 1994, separate commentary).

"A crime in which the defendant intentionally selects a victim … because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person". (Adopted by the Federal Hate Crime legislation 2007.)

The US Federal Bureau of Investigations definition:
"criminal offenses that are motivated, in whole or in part, by the offender's bias against a race, religion, sexual orientation, ethnicity/national origin, or disability and are committed against persons, property or society."

Here the term "bias" is used (Lawrence (1994, etc) does abandon the term 'hate crime' in favor of 'bias crime'). In the UK, religiously aggravated offenses were created by the 2001 Anti-terrorism, Crime and Security Act in 2001 (Extended to hostility on basis of sexual orientation in 2003). Here "prejudice" and "bias" is also avoided, instead the focus is on motivation by hostility. (The Home Office, however, uses the term "hatred" frequently. Legislators tend to use less emotive words.)

So why continue to use the term 'hate crime'? It’s an emotive banner under which "is now rallied once disparate field of concerns with oppression and bigotry in various guises". Iganski quotes Jenness and Grattet (tracks the foundations of the US HC policy to anti-hate crime movement, late 1970s, and civil rights and victims rights movements earlier on. See separate commentary) - who calls it "a
signifier that conveys an enormous sense of threat and an attendant demand for a response”. “Hate crime” is perhaps most pertinent as a policy domain - elements of the political system and criminal justice process have converged and focused on the substantive issue of offences and incidents where some bigotry against the victim plays a part.

For scholars, the 'hate crime' banner forms an analytical coalition between disciplines, concerned with oppression, discrimination and bigotry in various forms. This is the spirit of this book, to treat 'hate crime' as a conversations between disciplines.

The harms of 'hate crime'
Iganski refers to Liz Kelly’s analysis of domestic violence: Violence is part of the normal experience for women, and forms a continuum. It's not just separate instances, graded by seriousness, but rather a sequence graded in part by frequency. Iganski propose a similar analysis for hate crimes. He moves on to this central claim:

What distinguishes one form of act from another is not any notion of relative seriousness about acts in terms of the impact on victims because, as Kelly observed, a complex range of factors impact on the particular experiences of victims. However, what distinguishes 'hate crime from other types of crime is that all 'hate crimes' generally hurt more than parallel crimes. The notion that 'hate crimes' inflict greater harms on their victims is therefore the fundamental dimension in its conceptualisation. (My emphasis)

Comment: So this is the problematic part, ripe for criticism. It just CANNOT be a dimension of the "conceptualisation", if understood as "conceptual analysis". In order for Iganski to make the claim that HC's hurts more, he needs to have a SEPARATE way of identifying these crimes. And he does, namely by motive and/or content. If the harm is to be part of the concept, it needs to be a distinct kind. In addition, the formulation "all 'hate crimes' generally hurt more than parallel crimes" is misleading. Strike "all".

Evidence comes in chapter 4. Iganski acknowledge the problems with the claim. His data comes from the British Crime Survey (BCS). Which asks about racial motivation, but not other biases (some have recently been included on an experimental basis). The evidence shows that non-whites experience much more of
these crimes than do whites. It’s often contested that whites can be victims of racist violence, and the research is almost entirely based on white offender and black and minority ethnic victims. It is, however, acknowledged in the Stephen Lawrence Inquiry that "Racism either way must be treated with zero tolerance". And the Home office report 1981 describe a "Racial attack" - "An incident, or alleged offence by a person or persons of one racial group against a person or persons or property of another racial group, where there are indications of a racial motive". Judgment about racial motivation is often based on race of offender and words used during the offence.

Another contentious matter is the fact that crime victimisation surveys provide a static and de-contextualised picture of crime that conceals the processes behind incidents (see Bowling 1993).

**From extreme to everyday 'hate crime'**

The media picture of 'hate crime' focus on premeditated violent attacks by offenders who are "out-and-out bigots, hate-fuelled individuals, who subscribe to racist, antisemitic and other bigoted views, and exercise their extreme hatred against their victims." The scholarly and policy literature has also focused on this. But these crimes are **not typical**. (See "The dramatic fallacy", Felson 2002). Hate crimes mainly consists of everyday incidents, harassments, criminal damage etc.

**From the background to the foreground of 'hate crime'**

The UK 98 Crime and Disorder Act uses the word "hostility", which has the potential to help us understand the dynamics of 'hate crimes'. Hostility (greater range of sentiments and behaviors than 'hate') needs to be manifest. Hostility can be based on a number of reasons - offenders arguably acts out and conveys deleterious notions of difference about the 'Other' - in an attempt to exercise power over the victim. Barbara Perry (see separate commentary) famously calls it "doing difference". Iganski believes that this is what the "hostility" in the UK legislation signifies.

The term "hate" (see separate commentary on Perry's "the semantics of hate") pathologizes these crimes, and focuses on the offenders state of mind. The "doing difference" locution grounds it in societal conceptions, structures and oppression. Hate crimes are rooted in and legitimized by these norms (Perry invokes "structured action theory"). Victims are deemed to be deserving of what befalls them. The term "hate" further depolitizes and individualizes the issue Iganski points out that Perry’s theoretical perspective "raise a fundamental question about
whether 'hate crime' offenders are consciously and instrumentally 'doing difference'.” Her analysis does suggest that hate crime is intended to marginalize and "intended to sustain somewhat precarious hierarchies, through violence and threats of violence”.

He points out that empirical evidence is lacking for this purposive instrumentalism. Iganski questions it, and notes that Perry fails to illuminate the connection between structural context and the actions of offenders. The structural context does not provide understanding of the "lived reality” of victims and offenders. Iganski points out that if (as Jacobs and Potter contends) everybody harbors some prejudices, the question is "what brings some people in particular circumstances to express their prejudices against others in criminal acts.” That is the issue of chapter 2. - The context of everyday life when opportunity arise.

**Comment:** If the term is to make legal sense, it sort of has to individualize and depolitize and remove the structural concerns. These things seems theoretically necessary for responsibility in the everyday sense at least

**Conclusion: Situating the victim at the centre of 'hate crime'**

Iganski repeats that "the one common characteristic that we can be sure about is that 'hate crimes' hurt more than parallel crimes: this is borne out by the experiences of victims”.

Ch 3 will examine spatial aspects of racist attacks - geography of space and place matters in terms of mediating between the background structural contexts of incidents and the foreground experience of offending and victimisation.

Ch 4 point to the criticism of hate crime laws. Some argue that they demonstrate the decline of penal welfarism and correctionalism and the rise of punitive and expressive justice (see Garland 2001). But Iganski contents that "the provision of equal concern and respect for all people, and respect for for difference - principles that provide the motivating impetus for advocates of 'hate crime' laws - constitute a central plank of political liberalism”. Is it a case of using illiberal means to achieve liberal aims? Not if what’s punished is proportional to the harm caused (or risked), Iganski argues. A clash of rights surrounding 'hate crime' and 'hate speech' is acknowledged.

Ch 5 focus on including the victims in the policy process via evaluation of such efforts in London.
It’s argued that hate crime laws are "an explicit attack on the background structure that provides the context for the motivating impulses in acts of 'hate crime'. Such laws are intended ultimately to reweave the structural fabric by legislating morality”.

(Given that the problem has been framed as a human rights problem, state intervention involves the state either as the guarantor or the violator of the rights of its citizens.)

**Comment:** As we shall see, there are issues concerning the legitimacy of using the law, and to increase punishments, to serve this function. If we are actually changing values, legitimacy issues are clearly relevant. The expressive function of the law is usually legitimized by the fact that it expresses societal values. In this case, the structural account suggests that the law must counter such values.

**Chapter Two - The normality of everyday 'hate crime'**

According to Human Rights First, the most pervasive and threatening form of racist violence in Europe and North America is banal and unorganized. It mainly consists in low-level violence like broken windows, late night banging on doors etc. Victims experiences are that offenders are not usually politically motivated extremists, but ordinary people. This makes the focus on victims even more important in order to treat these crimes as a cogent class. This chapter aims to "unravel the situational dynamics of anti-Jewish, anti-Muslim and other racist incidents.”

It will be argued that understanding the situational foreground of incidents is not only important in its own right for understanding how and why incidents occur, but it also sheds light on the background structural contexts that inform the actions of offenders. And, most significantly, it illuminates the connections between background structure and the foreground of offender action in cases of 'hate crime', providing the missing link between the macro-societal ideological edifice and the micro-level actions of offenders (P 23).

**Comment:** This makes the ALL the terms suggested (hate, bias, hostility) unsuitable, as they all categorize crimes according to causes and/or "content". Or could it be argued that it's called 'hate crime' because the consequence is that the victim turns out (feeling) hated?
The commonalities of everyday 'hate crime'

The instructive case of anti-Jewish crimes in Britain falsifies the "extremists” thesis. Most crimes are not assaults, and not premeditated. Opportunity is the key - random encounters. Iganski quotes Felson (2002): "Even without prior planning, an offender responds to cues in the immediate setting and decides what to do". Opportunistic incidents do appear to be instigated because of animus, but its impossible to tell if that's the primary motivation. In many cases there are other reasons (as well). A hate incident may start out in a conflict of some other nature - the perpetrator often believes that a wrong have been inflicted on them.

**Comment:** This clearly diverges from the common formulation that hate crimes must be committed "because of" prejudice/bias/hate. If hate expression just happens to occur at the same time, that would then be either a separate crime, or not sufficient to make it a hate crime at all.

An important insight follows:

"Perhaps not surprisingly, rather than examining the culpability of the state itself when focusing on the politics of 'hate crime', official analyses of the problem of racist violence have confined themselves to statements about the role of extreme right-wing groups in creating a climate for, and being implicated in, racist attacks."

**Comment:** This may be regrettable (but understandable) on the policy level (but note general counter-prejudice efforts in schools etc.), but absolutely necessary on the legal level.

Manifestations of racism are often on the borderline of "violence", incivility, aggression or threat, is part of the everyday experience for ethnic minorities in London. The mass of "incidents".

Typical context for the opportunity of a hate incident: "Shared use of locality provides the situational contexts in which everyday incidents occur, in the casting together of victims and offenders in the unfolding of their normal everyday lives."

**Structure, action, agency and everyday 'hate crime'**
Paradoxically there was some comfort in holding hate crime offenders to be aberrations. Perhaps both for potential victims and the general public.

"Communities from which the perpetrators are drawn arguably share a collective responsibility for offenders’ actions". (Offenders just carry out what the community "wants").

Those who offend might be different from others only in that they act on their attitudes whereas others do not. But offenders are not that different from others in terms of the particular values and attitudes that they share”. (P 39)

This can be understood in terms of Perry's ideas about HC's as “oppressive violence” - reinforcing or effecting power relations. Hate crimes reconstructs the prevailing structures of oppression and reinforces the boundaries of difference. They are "reminders" of the victims "place". This accounts resonates of "structuration theory", which Iganski uses to some extent. The connection between structure and action must be worked out, however. Iganski believes that it’s not deterministic, but leaves room for autonomy and explanation of differences between agents that offends and those who do not. (Iganskis criticism of Perry: not all hate crimes are "instrumental" and "intended to do difference". "Oppression" etc might be among the "unintended consequences of intentional conduct”.

**Comment**: These are important questions not being answered. The claim that hate crimes has this background structure, and that the structure explains their occurrence, while plausible, is not worked out in any detail. Doubts are raised as to how much of an explanation is actually offered, beyond the invocation of a certain kind of theory. (Structured action).

**Chapter Three - The Spatial dynamics of everyday 'hate crime’**

Hate crimes occur during the normal frictions of day-to-day life. They take place "when offenders seize an opportunity in chance encounters that occur in the course of the victims’ and offenders’ everyday life." Geography of space and place plays a role in generating these encounters. Iganski uses London as a case study. London, due to it's diversity, offers plenty of such opportunities.

(More than 2 million of the 7,2 are from black or asian minority ethnic communities. Nearly 40% of the British muslim population. Half of the Jewish and Hindu population lives in London)
London is the UK capital of 'hate crime'. Or at least it used to be (has fallen since 1999-2000, during a steep rise in the rest of the country (England and Wales). There are well-known limitations to the statistics, however. Iganski uses data from two years, because of proximity to the 2001 census. (Group classifications differs between the hc data and the census, however.)

There is a definite pattern of victimisation. Asian group has the highest mean rate of victimisation. (10,64/1000) (ten times as much as for the white group). Black group 9,23/1000. 

**Comment:** I’m not going into the specifics here, but will focus on the general conclusions.

### Inter-group friction and 'race-hate crime'

A number of hypotheses about the spatial dynamic of 'race-hate crime' exists in the literature. One can be called the **inter-group friction hypothesis.** It posits that hate crime is proportional to the amount of intergroup contact in a given locality.

**Comment:** Not all contact is "friction", surely? See the contact hypothesis for prejudice reduction (Allport) for an opposite effect.

Iganski examines the association between two variables: ethnic group diversity in the London boroughs and the rate of recorded incidents per unit of the total population in each borough. He finds only a weak association. The problem might be that IGHF assumes that race hate crime is an equal opportunities phenomenon. There is some support for the hypothesis if one factors in power differentials.

The **'Power differential' hypothesis** proposes that "the rate of 'race-hate crime' against minority ethnic groups would be higher in those areas where minority communities account for a small proportion of the population. Green et al observes that "Members of the dominant group may be emboldened to attack by the perception that law enforcement officials and the majority of those living in the neighborhood are unsympathetic to the victim group". (In conjunction with an associated lack of fear of reprisals).

**Important:**

When compared with the inter-group friction hypothesis the difference that the correlation coefficients clearly indicates in the case of the London boroughs
is that 'race-hate crime' is not an equal opportunities phenomenon, as the same propensity to offend does not apply to each of the groups and that it is the numerical dominance of the White community that is the important predictor variable for racial victimisation of minority ethnic communities. (P 54)

There is a conundrum, however - there is a correlation between the smallness of the white group and their victimisation. Inter-minority crimes occur as well. So focus should be on the vulnerability of the numerically inferior minority ethnic groups - by using independent variables the representation of the minority ethnic groups in the borough populations, rather than the representation of the White group. (Vulnerability focus is consistent with the victim-centered approach in this book.)

The analysis:

while the strength of representation of the White group provides the dominant predictor variable for rates of victimisation of the minority ethnic groups, for any particular minority group the presence of other minority groups in the locality increases their rate of victimisation.

The geography of everyday 'hate crime'

Through "snapshots” of distribution of hate crime within two boroughs, Iganski argues that frequency of intergroup contact is high in shopping and commercial areas. There is a potential for conflict. Hotspots around nightclubs, pubs, takeaway outlets etc. Incidents concentrated at spaces of higher everyday movement and density of people.

Another hypothesis is the "defended neighbourhood hypothesis". - In some instances 'race' hate crime’ can be regarded as an instrumentally defensive activity, defending neighbourhoods from unwelcome 'outsiders’. (See motivational dynamics of offenders in Levin and McDevitt - defensive logic). From the point of view of the offender - to convince the victim (and group) to relocate.

"From this perspective racist victimisation is an expression for the offenders of a sense of ownership, or propriety, to geographic space that they regard as 'White territory'. The presence and difference of the 'other’, the 'outsider’, is seen as a threat to the traditional spatial identity, or the 'ethnoscape’, of the area.”
Crimes manifest wider exclusionary sentiment at the structural level. (This evolved in the 50's. Fear of 'race riots' etc.). Iganskis analysis so far uses static data. The Bias Crime Unit data, introduces a dynamic element - population change as a factor. Especially strong effects when non-whites move into a traditionally white stronghold. The rate of increase positively correlated with rate of non-white migration into areas that were numerically traditionally White.

**Comment:** presumably, if the change continues, the ratio of White to non-white (a predictive factor according to the power differentials hypothesis) goes down, and so hate crimes should decrease?

**The political economy of 'hate crime'**

An other variant adds the defence of material and economic resources within particular localities - competition for jobs and housing for instance. Racist voting is at least partly a reaction to the perceived threat residential integration. (See Susan Smith 1989).

This is a dominant theme in recent scholarly literature. Investigation into the motivations of offenders show that unemployment is a factor, as is low-wage employment, low qualification, prior convictions, etc. Much of the violence relates to a sense of shame and failure, resentment and hostility felt by young men "disadvantaged and marginalised economically and culturally, and thus deprived of the material basis for enacting a traditional conception of working-class masculinity". Hate crimes is thus motivated, but mainly for those for whom resorting to violence is a common approach to settling arguments and conflicts.

Often, the only (other) contact offenders has with victims group is in commercial transactions. In these interactions, offenders are often faced with people more economically successful, but perceived to be undeservedly so. (Envy, scapegoating. )

Yet, the qualitative evidence to this effect is not mirrored in the statistical data (for NY). There is not a robust relation between hate crime and economic conditions.

"The relationship between deprivation and 'race-hate' victimisation is compounded by the distribution of deprivation across the London boroughs and the distribution of the minority ethnic communities (see figure 3.7, p 68). There is a strong positive association for the Black group between the extent
of deprivation and the representation of the group in the boroughs, and weaker positive associations for the Asian and Chinese groups. (...) Given the positive associations between deprivation and the representation of the minority ethnic groups in the boroughs, we would expect an inverse relationship between deprivation and victimisation for the groups.

Still, there are few strong associations, and no uniform patterns. (A small representation of the White group and greater socioeconomic deprivation, the greater the rate of recorded ‘race-hate’ incidents against the White group.)

**Conclusion chapter Three: life in the city and everyday 'hate crime'**

Incidents are not distributed evenly, and greater rates of victimisation of minority ethnic communities are positively correlated with the numerical dominance of White communities and inversely correlated with the strength of representation of the different minority ethnic groups in the borough. Greater rates correlated with growth of representation.

**Comment:** these are correlations that does not seem to control for other factors.

Geography mediates between background structural contexts and foreground situation context of incidents. (Holds for crimes in general.)

**Chapter Four - Tensions in liberalism and the criminalisation of 'hate'**

The introduction of "hate crime laws" was a rather quick process in the UK (compared to the US):

Between 1998 and 2003 provisions were enacted in the UK to provide harsher punishment for offenders whose offences were accompanied by manifest hostility towards their victims, on the basis of their ‘race’, religion, sexual orientation, or disability, compared with parallel offences without such accompanying hostility.

David Garland views this as an example of the decline in ‘penal welfarism’ and correctionalism, and the rise of punitive and expressive justice. These laws are often seen as emblematic of the fall of liberalism and rise of "penal excess" (Loader 2007). Iganski gives a defence, and argues that hate crime laws do not fit so easily into this picture.
The provision of equal concern and respect for all people, and respect for difference, principles that provide the motivating impetus for advocates of 'hate crime' laws, constitute a central plank of political liberalism. However, by criminalising 'hate', are illiberal means being used to achieve liberal ends? (P 73-4)

Since the introduction of these laws, a legal debate has raged. Also conducted in newspapers. Critics argue that it violates rights to freedom of speech and expression. While it is a well-worn debate, much ground remains to be explored.

**How 'hate crimes' hurt more**

Critics argue that extra punishment is unjust, as it is the offender’s expressed values that attract it. The additional punishment amounts to the state criminalising the expression of certain thoughts, opinions and values (See Hurd, separate commentary). It contravenes fundamental rights (the European Convention of Human Rights, first amendment freedom of speech, thought and opinion).

The UK lack a written constitution, but has a long political and popular commitment to rights to freedom of expression. (See controversy surrounding provisions against incitement to religious hatred, and recent proposals to criminalise incitement to homophobic hatred).

The columnist Melanie Philips argued that hate crime laws amounts to "an Orwellian response to prejudice". Others argue that these laws does not provide equality of treatment, but special treatment. (Hari: Hate crime laws says that "stabbing me is worse than stabbing my heterosexual brother")

Supporters argue that speech and other expression is not being punished (see Iganski 2001) and that particular categories is not given special treatment. "Instead, they propose that the law impose greater punishment for the greater harms they believe are inflicted by 'hate crimes'. " (See Weinstein, Lawrence, Levin).

The nature and extent of harm inflicted by an offence is critical for determining the appropriate punishment, and in the case of 'hate crime', the offender’s motives are only relevant to determine whether the particular offence committed is a type of crime that inflicts greater harm than a similar, but
otherwise motivated crime that causes lesser harm. From this perspective, the harsher punishment of 'hate crimes' simply provides the just deserts for the greater harm inflicted by such crimes. (P 75)"

(Comment: THIS is the crucial argument, and it has a number of problems associated with it. It says that motives are only relevant to determine the whether the crime is of the type of crime that inflicts additional harm. The harm is the relevant factor. This faces the "proxy problem" (which Iganski does not address). There is no argument in support of punishing particular hate crimes that do not, for some reason, cause this extra harm. Critics argue that punishing in relation to harm caused or risked is just, but then THAT's the category, and motivation is entirely irrelevant.

Iganski admits that the argument hinges on the evidence of the extent and type of harm inflicted. Comment: in fact, in hinges on rather more than that. Theoretical/conceptual issues like the ones above.

Assertions to this effect appear frequent in policy and scholarly writing. It was fundamental to the landmark case which settled the constitutional challenges against 'hate crime' legislation in the US (Wisconsin v Mitchell). Iganski has tried to unravel the evidence, focusing on four different types of harm.

1. Physical harm to victim
2. Spatial or terroristic effect on victim’s community and other communities targeted.
3. Psychological and emotional harms experienced by individual victims
4. ‘Collective normative harm’

A minority of HC’s involves physical violence - so 1 does not justify greater punishment for all 'hate crimes’. More compelling case based on 2. Made worse by the media creating a climate of fear. When attacks go beyond isolated incidents, they act as a threat on the whole group. All members are affected, and some will be reluctant to venture out after dark etc.). Hesse and Rai outline the process: "people begin to perceive social spaces in "racially” particular ways. That is locations which allow freedom of movement and those which inhibit” A mental map of No-go areas and safe places. Experiences of harassment and ineffective responses from statutory agencies. There are wider behavioral impacts of race-hate crime. (A sizable minority say that they are worried about racial harassment.)
Iganski reminds us that the enhanced penalties for 'hate crime' offenders in cases of 'hate crime' are only justified if greater harms are inflicted by such crimes compared with parallel crimes. But "Despite its compelling evidence, the Fourth National Survey of Ethnic Minorities did not provide a comparator group for such a conclusion to be drawn". (P 78)

(Comment: This is a very serious limitation, and means that even if hate crime statutes are justified on this ground, it was not actually supported by the evidence when it was introduced.)

In the BCS: Statistically significant higher proportions of racially motivated incidents report that they had "started to avoid walking in/going to certain places". (Comment: But only about half of the victims, so no defense here for the claim that "generally" these crimes cause more harm).

There's even more compelling evidence for greater emotional and psychological harm. (For instance by the 1989 Home Office report "The response to racial attacks and harassment"). The first evidence was inconclusive (because of the mentioned limitations - no comparison group), but more recent evidence (Herek et al 1999) shows statistically significant higher scores on measures of depression, traumatic stress and anger.

However, while their data revealed that on average victims of 'hate crimes' suffered more emotional harms, the evident variation in the scores indicated that not all victims experienced harm to the same extent, and potentially that some victims of parallel crimes suffered greater emotional harm than some victims of 'hate crimes'. (P 80)

(Comment: This means there is still a crucial bit missing from the justificatory argument.)

Studies to this effect by McDevitt et al (2001) via mail survey, designed to measure the psychological post-victimisation impact of 'intrusiveness' and 'avoidance' reactions (on Horowitz's Psychological Scale). Presented significant differences between HC victims and victims of parallel crimes. Stronger on depression, nervousness, lack of concentration, unintentional thinking of the
incident and thoughts of futility regarding their lives. Hate crimes are more “psychologically intrusive” than parallel crimes.

Some limitations are acknowledged: Chiefly a low response rate and the purposive nature and sources of the sample potentially introduced selection bias. Also: data based only on assaults, which are rare. (Comment: No "parallel" crime of "general" harassment?). Additional variables revealed significant differences in reported feelings of shock, fear, depression, anxiety, panic attacks, loss of confidence and vulnerability. Especially fear. (Note that some of these are generally higher in minority ethnic victims).

Punishing ‘hate crime’ offenders for their bad values

"Could it be that it is the values expressed by offenders that account for the more severe psychological and emotional impacts of ‘hate crime’?”

Frederick Lawrence argues that victims of race-hate crimes experience attacks as a form of racial stigmatisation and that an incident carries with it the message that the target and his group are of marginal value. (Lawrence 2006, see separate commentary). The idea is that it is the message conveyed by the offender that inflicts the psychological and emotional damage: in short, it is the offender’s expressed values that cause harm. The harm arguably occurs as "a consequence of the victim’s aversion to the attacker’s animus towards their group identity. In essence, it is the attacker’s values - painfully evident in their actions - striking at the core of the victim’s identity, which hurt more. The assault on the core of a victim’s identity arguably constitutes another common dimension of ‘hate crime’ when a victim-centered perspective is applied.”

Comment: this is very important to establish a mechanism connecting the statistical significance to the distinctive content of hate motivated acts related to the increase in harm. The talk about "core” and “identity” is risky, as it makes quite a few assumptions that can be challenged, both as it’s descriptive adequacy and it’s legal/moral relevance.

Turning from the mental state of the individual victim to the collective conscience of society, Lawrence (2006) argues that hate crimes violate not only society’s general concern for the security of its members and their property but also the shared value of equality among its citizens and racial and religious harmony in a multicultural society.
Hate Crimes violates not only the harm principle, but the equality principle too. If we accept Lawrence’s reasoning about norms and values, and the evidence about mental impact, it seems that the critics are right: Hate crime laws do punish offenders for their expressed bad values.

That is what ‘hate crime’ laws do. But so does the rest of criminal law, as Kahan (2001, see separate commentary) most cogently reasoned in his argument against the critics of ‘hate crime’ laws. (P 84)

Iganski notes that Criminal law in the UK is much more explicit in its intent to punish offenders’ expressed values in cases of ‘hate crime’ than it is in the US. In Jacobs and Potters account (1998. P 21), it’s argued that in order for an hate crime to occur, there must be a causal relationship between the ‘prejudice’ and the conduct. Iganski point out that “such a rule would exclude the many incidents in the UK in which expressions of bigotry accompanying offenders actions, but not necessarily impelling those actions, fall foul of the provisions for racially and religiously aggravated offences and for penalty enhancement where the offender demonstrates manifest hostility on the basis of the victim’s sexual orientation or disability.”

The key criterion is the demonstration of hostility at the time or immediately in connection to it. The prosecution needs prove the basic offence, and then the racial or religious aggravation. “On the matter of the manifest hostility, which is not defined in legislation, the Crown Prosecution Service points out that for prosecution under section 28(a) on the 1998 Crime and Disorder Act such hostility can be ‘totally unconnected with the "basic" offence’ which may have been committed for other reasons.” (P 84). It’s much more difficult to prove that hostility motivated the offence. (Background evidence occasionally used). It seems, then that the British provisions do outlaw the expression of particular attitudes, sentiments and opinions.

Comment: But that means that the UK legislation is also LESS inclusive. As in cases where prejudice causes the conduct, but is not expressed by it, or in it. It also seems that the harm-argument can only justify expressions that's designed to, or likely to, cause the extra harm.

Everyday ‘hate crime’ and the declaratory value of ‘hate crime’ laws
The Law provides a symbolic cue against transgression by potential offenders. The "HC" law was welcomed by advocacy movements, but also criticized as populistic. Iganski argues that the goal of promoting equal concern and respect for difference is not "populistic". And against the "illiberal means to liberal goals", Iganski points to the principle of proportionate sentencing and just deserts, given the growing strength of the evidence that these crimes hurt more.

So the crimes are justified, but are they desirable? Given the ubiquity of offending, the ordinariness of offenders, and the structural context, these laws provide a "vitally important general deterrent against offending". "They are not just targeted at the committed bigots who are potentially less likely to be swayed way from offending."

Important declaratory purpose aimed at the individuals who might offend in the unfolding context of their everyday lives. As von Hirsch and colleges have concluded from their review - "there is by now unequivocal evidence that ordinary people can sometimes be deterred by both formal and informal sanctions".

Barbara Perry (2001) argues that hate-motivated violence can flourish only in an enabling environment. State practices, policy and rhetoric often have provided the formal framework within which hate crime - as an informal mechanism of control - emerges. But, Iganski argues, if the state plays this important role in providing an environment in which 'hate crime' can flourish, the state can also potentially play a role in eroding that environment. The enactment of 'hate crime' laws "constitute a direct attack on the structural fabric that provides the context for acts of 'hate crime'. (P 87-8)

Hate crime laws are "ultimately intended to reweave the structural fabric by setting a moral agenda (...) for appropriate behavior." The laws are targeted at the normative compliance of ordinary people - and the situational context in which most hate crime occurs. The legislation appears to come from the state under pressure from rights-based advocacy, and not from public clamour for punitive measures.

"A key expectation of the new legislation was that it would send an important message to agencies involved in a more effective response to incidents which would impact on the impressions of victim and offender communities about how seriously incidents were to be taken.” (P 88)
Courts needed to be reminded of their powers, and to take these crimes (more) seriously. (Research in 1998 showed that in only 22% of cases studies in 97-98 where racial motivation was a factor were sentences enhanced). The crime and disorder act (1998) appear to have had the intended effect. (In magistrates courts, at least. Perhaps not in Crown Courts). Most practitioners welcomed the legislation for its declaratory force and for providing clear structures and focus.

(Similarly with policing - see Stephen Lawrence (Macpherson) Inquiry - institutional racism - low trust in officials). It's important to act against racist violence in order to improve on this state of affairs.

**Conclusion: legislating morality**

Dixon and Gadd (2006) argues that even if the provisions have encouraged the police and rest of the justice system to take racially aggravated offending more seriously, it is hard to justify using the criminal law to "send a hortatory message to institutions and individuals that have been charged with enforcing it but, by implication, are failing to do so."

It only works to further criminalize people who are already seriously disadvantaged in a number of ways. Punitive sanctions may only compound the difficulties that such people are experiencing. Iganski deals with this challenge: It would be unreasonable if unjust means were used to spur the criminal justice system into action - but this is not what happens. Harsher punishment is motivated by proportionality. It also potentially provides more equitable treatment to offenders by ensuring a greater level of fairness and consistency in sentencing than when penalty enhancement is left to the discretion of the courts.

However: harsher punishment may not be desirable in some instances. There is a case for flexibility and alternative interventionist measures for such offenders, rather than harsher punishment.

It has been suggested that prosecution be mainly reserved for more serious or recalcitrant cases (Evaluation by Burney and Rose 2002) for fear in part of stoking resentment among those accused of minor incidents. Such diligence may change public opinion. But, Iganski points out, "minor" incidents can have as much emotional impact as assaults can.

"The reach of the law is intended to extend well beyond individual perpetrators and individual victims.”
HC laws are targeted at the collective conscience, as well as the individual offender, “in an explicit attempt to legislate morality.” (That is why New Labour's legislative programme against hate crime has been a radical intervention - "it has been designed to promote justice by attempting to mould the collective conscience”. (P 94)

Comment: In this section we are provided with two different justifications of hate crime laws: one based on proportionality - HC's "hurt more". The other is "expressive", i.e. Hate crime laws are supposed to express commitment to principle of equality, and to counter those widespread values (how widespread, one wonders? There is no demonstrated relation between measures of values (like the world value survey) and frequency of hate crimes) that informs and explains the occurrence of "everyday" hate crime offending. The latter function is not sufficient to warrant punishment enhancements, however, but must rely on the former. At least it we are to keep within the liberal legal tradition.

Chapter Five - Including victims of 'hate crime' in the criminal justice policy process

Comment: This is a very short summary.

The Interests of victim has recently come up on the political agenda. Much writing focuses on initiatives to include victims in the progress of their own cases, but there is less concern with the inclusion if victims as actors in the criminal justice policy process. One Example of the latter is the Race Hate Crime Forum, London. Put in place to improve policy.

'Race-hate' crime and multi-agency working in the European Union and UK

The EUMC on Racism and Xenophobia (now known as FRA) recently proposed in the report Racist violence in 15 EU member states that "ethical working practices" is a key criterion of good practice when working with victims of race hate crime. Consideration should be given to their experiences. Multi-agency working is now the conventional wisdom for dealing with crime, disorder and community safety. Important cooperation with the police and other agencies. Important not to disempower victims, and to have them represented in the process. Carefully managed, general policy learning on tackling these crimes.

Chapter Six - Conclusions: Understanding everyday 'hate crime'
The aim of the book is to apply empirically grounded analysis to further the conceptual understanding of 'hate crime'. These are the key themes of the analysis, and some questions raised by it.

First - the term 'Hate Crime' has been embraced by police and other criminal justice agents, but it’s a slippery concept. The emotion "hate" has little to do with it. Still, good as an emotive "banner". (Jenness and Grattet: hate crime as a "policy domain - an arena in which elements of the political system and criminal justice process have converged and focused on the substantive issue of offences and incidents where some bigotry against the victim plays a part." (P 115)

It can also be understood as a "scholarly" domain - an analytic conversation between different fields of study. The term originated in the US. From anti-hate crime movement in the late 1970’s. A long debate between legal scholars concerning the constitutionality and illiberality of the law. (Not so many sociologists and criminologist writing on this issue in the US - except for Barbara Perry).

Law and scholarship lags behind in the UK. Unfortunately, this means that criminologists have paid more attention to the criminality of minority communities than the victimization of such communities, and its sociocultural underpinnings.

A victim-centered approach to understanding 'hate crime' offending

The focus of this book is not to look into the souls of offenders, but squarely on the foreground of 'hate crime' - informed largely by victims’ accounts and reports of incidents to the police and in the victimisation surveys. Not the background causes, understanding the aetiology of offenders mindsets does not bring us very close to the lived reality of 'hate crime'. Judgingt from the "ordinariness" of hate incidents, the pressing question is what brings some people to express their bigotry against others, while others don't. The answer needs to begin from the social circumstances of offending.

It might at first sight appear to be a contradiction to place the victim at the centre of understanding the impulses of offenders, and if unpicked, many methodological limitations to this approach could be identified. However, a shift back from a victim-centred to an offender-centred methodology brings its own problems. (P 118)

There was earlier a dominance of three theoretical strands -
1) **Victims have been casts as puppets of social structure.** Offenders portrayed as automatons, purposively acting out bigotry that pervades the social structure in various guises. - This does not take into account individual agency or explain why some people offend and others do not.

   A victim centered approach to the analysis of the situational context does provide such an explanation. (Iganski admits an obvious limitation - relies solely on what actually takes place, and offers nothing about when it doesn’t).

   **Comment:** The explanation from situational context could surely be described from an offender centered approach as well? Or a "neutral" perspective. Admittedly, victims are more likely to provide details about the context, and there is, to my knowledge, no similar part for offenders in the BCS.

2) **Offenders as victims** of social and economic disadvantage. Some offenders rationalise their actions in terms of shame and failure. Compelling, but, again, does not explain why some offend and some don’t. And the relation is not robust enough. Correlation better explained by situational cues.

3) **Offenders as extremists.** This picture is not carried out by the evidence.

   The preoccupation with convicted offenders gives a skewed view of hate crime. The majority of offenders do not come into contact with the criminal justice system. Many offenders are ordinary people. This may be disturbing to think about: that these people just act out values and attitudes shared by many.

**'Hate crime' and the criminologies of everyday life**

   The analysis resonates with Garlands “new genre of criminological discourse - criminologies of everyday life.” This is an outcome, not an assumption, of Iganski's work. The normality and ordinariness of 'hate crime’. To commit an offence requires no special motivation or disposition, no abnormality or pathology (Garland 2001).

   'Hate crime’ offenders are not an aberration, and "the values expressed in offences are not extreme and aberrant, but widely shared and tightly woven into the structural fabric of society" (p 121)

   Iganski tries to shed light on the situational dynamics of 'hate crime’ - background structures of bigotry, or the collective human soul, that informs offenders’ actions. Focus switched from individual to the event and situation - to the value systems that inform the actions of offenders. Given the pervasiveness of
those value systems, the state and the criminal law arguably play a critical role in intervening against 'hate crime'.

**Comment:** The argument seems to be that the law is justified in part by the fact that offenders are NOT singularly "responsible" for these crimes. And that the target is not the offenders (that carry the punishment) but society as a whole. As Iganski notes, however, this requires that punishments are *already* deserved, namely on basis of the (extra) harm caused or risked. A matter NOT considered here, however, is that the extra harm is caused not by the fact that the offender expresses a certain attitude, but by the fact that this attitude is widespread. If so, the harm does not fall squarely on the responsibility of the agent, and the problem resurfaces.

**'Hate crime', human rights and 'the state'**

"Human rights today have become a secular religion" (Elie Weisel) - a dominant paradigm through which international and domestic conflicts are commonly viewed. Human rights necessarily involves the state as the protector of the rights of its citizens, and also the violator of its citizens’ human rights (p 122) 'Hate crime' can be seen to be most fundamentally a human rights problem,

when analysed through the human rights paradigmas it deprives victims of the right to liberty and security of the person, the right to freedom from exploitation, violence and abuse, and, on occasion as (...) the right to life.  *(Comment: but this holds for all crimes?)*

There has been a debate over Hate Crime laws justifications, as it may involve the state as the violator of rights to freedom of speech and belief (Jacoby 2002). Supporters then invoke greater harm, something that has always has worked as a limitation on various freedoms. "When the analysis digs deeper into the type of harms inflicted, it is often the values expressed by the offender that hurt". (P123). The essential harm is not in the consequences, but in the "doing" of the Hate Crime (See Perry and Olsson 2008). Lawrence adds that HC's violate the "equality principle".

Iganski has pointed towards the ordinariness of offending, and that hate crime laws provide an important declaration aimed at individuals who might offend in the unfolding context of their everyday lives. Iganski writes
"'Hate crime' laws are an explicit attack on the background structure that provides the context for acts of 'hate crime'. They are intended ultimately to reweave the structural fabric by legislating morality for the normative compliance of ordinary people going about their everyday life." (p 123)

**Comment:** This is a central statement about the moral nature of hate crime laws. It is, however, notable, that Iganski says nothing about whether the prevailing "structure" has anything wrong with it beyond the harm that it causes. This is a major shortcoming.

New labour introduced these laws, and opened a public dialogue about extending the laws to particular manifestations of hate speech more generally. In this context it’s important to consider that the expressed values and sentiments of the offender play a key role in the imposition of harsher punishment under 'hate crime' provisions in the UK. (Especially when the attitudes have nothing to do with why the crime was originally committed). The law does outlaw the expression of particular attitudes, sentiments and opinions.

**Comment:** surely, it does this only for particular forms of expressions, that might in fact be characterized as actions.

Iganski points out that there is no absolute right to freedom of speech. ("The purpose of public order law is to ensure that individual rights to freedom of speech and freedom of assembly are balanced against the rights of others to go about their daily lives unhindered"). Criminalising the use of threatening, abusive or insulting words or behaviour.

The conflict between offenders rights to freedom of expression against the rights of victims to protection against discrimination. Iganski believe it’s a good thing that limitations on expression exists.

"Yet it also reveals that the criminal law works in a partial manner, as certain forms of offensive expression escape proscription. There clearly is a clash of rights involved in using the the criminal law against 'hate speech'. " (P 126).

Both rights are enshrined in international human rights instruments, and in the US constitution.
"The question that still needs to be grappled with in addressing the troubling nexus between 'hate crime' and 'hate speech' is whether a moral compass can be found to navigate a route through the clash of rights involved when 'the state' intervenes against 'hate.'" (P 126)

Comment?
This book is one of the main sources of criticism of hate crime statutes. It’s challenges needs to be met. This commentary proceeds chapter by chapter, with comments inserted in the text. Jacobs and Potter will hereafter be called "J&P". Focus is on matters of philosophical importance, much of which occurs already in the introduction. The argument is that there is no evidence for a rise in hate crimes, the introduction of laws may be unconstitutional and make group-relations worse.

It’s main challenges, however, take the form of boundary issues.

Chapter 1 Introduction

Starts with a quote from the Wisconsin hate crime statute, upheld by the US Supreme Curt in Wisconsin v. Mitchell:

If a person…intentionally selects the person against whom the crime…is committed or selects the property which is damaged or otherwise affected by the crime…because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, the penalties for the underlying crime are increased — (by as much as triple).

The US is one of the most successful multiethnic, multi-religious societies, but it has also been plagued by anti-semitic, anti-black, xenophobic, homophobic (etc) incidents and campaigns. Recently (after mid 80s) these have been labeled as "hate crimes".

"Hate crime" as a term and as a legal category of crime is a product of increased race, gender, and sexual orientation consciousness in contemporary American society. (…) These terms add a new component to our criminal law lexicon and to our way of thinking about the crime problem. (P 3)

We now think (or soon will) of hate crime as a distinct problem from "ordinary" crime. Reflected by and furthered by hate crime data collection initiatives. (Federal HC Statistics Act of 1990 (HCSA)). Before it becomes entrenched, J&P thinks it
and the assumptions that launched it ought to be thoroughly examined. Hence this book.

**Origin of the Term "Hate Crime"**

Representatives John Conyers, Barbara Kennelly and Mario Biaggi coined the term in 1985, as they sponsored a bill in the House entitled "Hate Crime Statistics Act". Required the Department of Justice to collect and publish statistics on the nature and number of crimes motivated by (certain kinds of) prejudice. Since a dramatic rise in newspaper occurrences. Claims about a hate crime "epidemic" was being heard. The term and sentence enhancements have been criticized from the start, and the familiar complaints were voiced: is it a hate crime, or a crime with a gratuitous slur attached? Why should courts judge these misty matters? (John Leo 1989). Why not equal treatment of all crimes?

Legal scholars started using the term in the early 1990's (perhaps more frequently 'bias crime').

"The passage of hate crime laws by the federal government and a majority of states since. The mid-1980s did not occur because of a lacuna in the criminal law, or because some horrendous criminals could not be adequately prosecuted and punished under existing laws. Insufficient or unduly lenient criminal law is not a problem that afflicts the United States.

J&P argues that law enforcement already had the tools to prosecute all these crimes, and motivation by prejudice is irrelevant.

So why were these laws passed? The history of post-World War II needs to be examined. Especially the civil rights movement and the triumph of identity politics. Since mid century, bigotry based on race, ethnicity, gender, and sexual orientation (well…) has been increasingly condemned by American society and political leaders. Anti-discrimination laws, and affirmative action for historically disadvantaged groups. Hate crime laws do not benefit minorities by punishing its members less, but by punishing bigoted offenders more. In addition, these laws seek to send a symbolic message of support to members of certain groups (P 5).

"Identity Politics" - individuals relate to one another as members of competing groups based upon certain characteristics. According to the logic of identity politics, it is strategically advantageous to be recognized as disadvantaged and victimized. Corresponding to a stronger moral claim on the larger society. (Asian-americans resisting the label of "America’s model minority") "The ironic
consequence is that minority groups no longer boast about successes for fear that success will make them unworthy of political attention.” (Even white males) HC laws extend identity politics to crime and punishment, and makes it yet another arena for conflicts.

J&P argues that while bigoted violence of course does occur, and has done so throughout history, But there’s no reliable evidence that things are getting worse. They claim that behavior today is probably less prejudiced than previously.

The current anti-hate crime movement is generated not by an epidemic of unprecedented bigotry but by heightened sensitivity to prejudice and, more important, by our society’s emphasis on identity politics (p 6)

Comment: This “reasoning” is highly speculative. You could say that the law reflects actual state of affairs, rather than "constructing” it. The evidence is not in favor of the stance taken here either.

Hate Speech and Hate Groups Distinguished

Comparison with and distinction between hate crime and hate speech. State and federal courts have struck down hate speech codes as unconstitutional, and critics claim they are extreme example of ”political correctness”.

In contrast, constitutional challenges to hate crime laws have not been as successful "because the majority of courts hold that hate crime laws seek to prohibit conduct, rather than pure speech” (p 6)

But, they argue, the line between conduct and pure speech is unclear.

Hate crime laws recriminalize or enhance the punishment of an ordinary crime when the criminal’s motive manifests a legislatively designated prejudice like racism or anti-Semitism. In effect, hate crime laws impose a more severe punishment for criminal conduct depending on whether the offender’s prejudice falls within the list of legislatively designated prejudices.

This is the point that presently, prejudices like gender bias is NOT covered, and thus does not give punishment enhancement.
Comment: It’s notable that IF there is no line between conduct and speech, this may speak in favour of limiting speech. See libel laws etc. And including gender is presently considered.

The study is not of organized “hate groups” - (who account for a small proportion of hate crimes - most are by “unaffiliated” individuals.)

The Socio-Political Consequences of a New Crime Category
Punishment enhancements and hate crime reporting statutes - for statistics. Critics argue that these statistics will dramatize and draw attention to “the problem”. "But what problem?" J&P asks. How many crimes does it take to constitute a problem (or "epidemic"). Do the crimes indicate overall prejudice in the US?

"Are hate crimes to be taken as a limited problem involving a small number of bigoted criminals or as a social indicator, both of prejudice in the entire population and of the state of intergroup relations?" (p 8)

J&P note that IF the data is taken as such an indicator, it must be approached very carefully, lest the collection and presentation exacerbate the conflict. But using these as a gauge of society’s intolerance may be a mistake, and highlighting these themes may make things worse.

The book argues that the "well intentioned attempt to strike out at designated prejudices with criminal laws raises a number of problems."

First: Attributing crimes to prejudiced motivations - complexity of defining prejudices and establishing motivation for individual crimes.

Second: Should all prejudices be included? If all victims are included, the category will be coterminous with "generic" criminal law.

Comment: surely not. Only those motivated by some prejudice. Mere instrumental crimes wouldn’t qualify.

Third: Criminals inherently are less amenable than others to societal norms of tolerance and equality. So: laws are not effective.

Fourth: Processing hate crimes poses challenges for police, prosecutors, jurors and judges - as audiences will see double standards and hypocrisy, and charge those representatives with bigotry.

Fifth: It may make things worse and "balkanize" American society.

A preview
Chapter 2 - the concept of hate crime. Clarification needed of what "hate" and "prejudice" means in the context, and how it transforms ordinary crime into hate crime.

Chapter 3 - Examines the various types of state and federal hate crime statutes and how they differ. At least three types:
1) statutes which define new low-level crimes like aggravated harassment
2) statutes which enhance the maximum possible sentence for some or all crimes
3) Statutes which are patterned after the federal criminal civil rights statutes

Chapter 4 - Is there a hate crime epidemic? J&P do not think so. In fact "Practically nothing is known about the actual incidence of hate crime". Because of 1) the lack of a uniform definition, 2) in most cases, we can not determine motivation and 3) data-gathering is unreliable. "Social problems have been shown to be inflated by those committed to mobilizing public reaction".

Chapter 5 - Explains the passage of hate crime laws via identity politics.

Chapter 6 - critiques the legal, philosophical, and social science rationales for hate crime laws (Comment: and thus will be the focus of this commentary). Justifications include 1) greater culpability; 2) more emotional harm to victims; 3) more impact on community; 4) tends to trigger retaliation and inter-group conflict; and 5) greater need for deterrence

Chapter 7 - the enforcement of hate crime laws. Problems for police departments and prosecutors.

Chapter 8 - Constitutionality (do they, like hate speech laws, punish improper opinions?) First Amendment.

Chapter 9 - Speculating about social consequences of importing identity politics into the criminal law.

Chapter 10 - What should be done about prohibiting and punishing prejudice-motivated crime?

Chapter 2 - What is a Hate Crime?
The concept is loaded with ambiguities. Difficulties in determining what is meant by prejudice, which prejudice qualify, which crimes can become hate crimes and how strong the links must be between prejudice and conduct.

Complexity of Prejudice
As many have pointed out, hate crime is not really about "hate", but rather about bias or prejudice. A general formula is that hate crime refers to criminal conduct motivated by prejudice.

**Comment:** This may hold for the US context, but note that hate expressive crimes may not always be motivated by hate, and yet qualify under certain jurisdictions. It doesn’t matter why you insult, threaten, libel, incite to violence, for instance, only that and how you do so.

Prejudice is a big and cloudy concept. All of us seem prejudiced to some extent, and the nature and origin of those prejudices are various. Some are considered good, others innocuous, but some provoke strong censure.

**Comment:** Note that J&P here seems to treat preference as prejudice. Also note that the most obvious definition "wrongful and/or unfounded belief or attitude" is missing from this account)

Prejudice may be in favour of something or against something (Allport "hate-prejudice"- desiring the extinction of the object and "love-prejudice"). Some social psychologist believe it to be innate - we have a need to "classify and categorize the persons we encounter in order to manage our interactions with them. We have a need to simplify our interactions with others into efficient patterns" (Baird and Rosenbaum "Bigotry, Prejudice and Hatred"). But some explain it as learned behavior (of course, it’s both). Some hold prejudices that amount to an ideology. Groups and individuals tend to reject the accusation of prejudice, or to argue that their attitude is justified (and thus not a prejudice - see the bell curve). Allport pointed out that "the easiest idea to sell anyone is that he is better than someone else" - prejudices tend to have some functional significance for the individual, like explaining economic problems (scapegoating). For some individuals, prejudice follows from adopting the attitude of others. Individuals also vary in how conscious they are of their prejudices. A great deal of disagreement about who is prejudiced and what constitutes discrimination. Does the fear of a cab driver for picking up young black males a prejudices, when young black males commit the majority of taxi robberies?

Now for J&P’s point: "If practically everyone holds some prejudiced values, beliefs, and attitudes, every crime by a member of one group against a member of another might be a hate crime; at least it ought to be investigated as such". In
addition, criminals are more likely to be intolerant and disrespectful towards others. "Indeed, in one sense, all (or at least most) violent crimes could be attributed, at least in part, to the offender’s prejudice against the victim" (p 16)

**Comment:** The suggestion is lodged as a *reductio*, but may misfire. Indeed, the suggestion that all intergroup crimes should be investigated as hate crimes has been made in all seriousness.

Which prejudices transform crime into hate crime?

Not all prejudices are politically salient in contemporary American Society, and fail to transform crimes into hate crimes. The "official" prejudices are based on race, religion and gender (and in some states sexual orientation, disability, and age). Legislatures "choose" prejudices.

"The civil rights paradigm that has condemned and outlawed certain prejudices in employment and housing does not apply easily to the world of crime". First of all, groups that are targeted may also perpetrate crimes.

**Comment:** Why does this problem not hold for discrimination? In fact, J&P acknowledge that white job-applicants enjoy the same protection by anti-discrimination laws, but argue that that problem rarely arises.

Second, discrimination occur along these lines, but most violent crimes (80%) are intraracial (92% of the murders of blacks). Some argue that black offenders attacking white victims are mostly motivated by economics, not prejudice. Some suggest removing whites from the protected set of groups. (J&P here cites a number of cases were the hate crime label was avoided), others that prejudice be presumed in case of interracial assault by a white offender.

In theory, it would be possible to exclude from the definition of hate crime those crimes motivated by minority group members’ prejudice against whites on the ground that such prejudices are more justified or understandable, and the crimes less culpable, or less destructive to the body politic than crimes by whites against minorities. But such an argument would be difficult to construct, and might well violate the Fourteenth Amendment’s Equal Protection Clause. (P 17)

Another problem in importing the basic civil rights paradigm is the sheer pervasiveness of prejudice - thus it plays a role in most crimes. **Divisions within the groups make for possible "intra-group" hate crimes.** "If hate crime is to become a basic category for defining crime, it will be necessary to get beyond
thinking of "Asians" as a homogeneous group among whose members only nonhate crimes exist.” (P 19)

Once we begin hunting down prejudices in criminals’ motivations, we will find them in abundance

(…)

Are all of these ethnic or color prejudices the proper subject of hate crime laws? If not, what principle enables us to impose extra punishments for offenders who act out only certain prejudices, but not others?

**Comment:** They have a point. Inclusion and exclusion of groups under the hate crime umbrella need to be **principled**.

J&P points out that including gender, in particular women, as protected group would seem to be the most obvious candidate for recognition as hate crime. Should all crimes by men against women be "counted twice": First as generic crimes, and second as hate crimes? Should a harsher punishment be meted out?

"Surprisingly (… see chapter 5) there has been strong political resistance to treating crimes by men against women as hate crimes". (P 20)

When it comes to sexuality, it’s complicated and varies between states (The Supreme Court has held that states can outlaw homosexual relations, for instance. Which is a blatant example of discrimination).

The creation of hate crime laws and jurisprudence will inevitable generate a contentious politics about which prejudices count and which do not. Creating a hate crime jurisprudence forces us to proclaim which prejudices are worse than others, itself an exercise in prejudice. This controversy will really have little to do with appropriate sentencing for criminals an everything to do with the comparative symbolic status of various groups (p 21)

**The Causal Link** - There’s a well known difficulty in showing a causal relationship between conduct and prejudice. This is what "motivated by prejudice” means. But how? Totally, primarily, substantially or just slightly caused by prejudiced motivation? Depending on which we choose there will be NO hate crime, or NOTHING BUT hate crime.
Which crimes, when motivated by prejudice, constitute hate crimes? What about vandalism, defacement of property? Should this be included? When should it be included? What about epithets flung in heated "ad hoc arguments"? Some of them does not qualify as crimes at all, but some may count as harassment or intimidation.

Comment: A lot of J&P’s criticism is of this nature, i.e. Regarding difficult boundary issues. This, it should be clear, means problems, but not insurmountable ones. Similar problems arise about most crimes (rape, assault, libel etc).

The many faces of hate crime

J&P offer a four-field table, showing what might be covered by the hate crime concept. On the horizontal axis we have the offender’s prejudice (high/low) and on the vertical axis the strength of the causal relationship (high/low). There is a difference between the everyday low prejudice - low causation crime and the ideologically driven acts of violence of high prejudice - high causation.

High Prejudice/High Causation - Ku Klux Klan assassination of Medgar Evers and such crimes. Easy to understand, uncontroversial, but covers a very limited number of cases - and little impact in outcome, as such crimes are already punished as much as is allowed. Cell I also includes non-organized emotionally intense crimes. Some commentators argue that mass murder does not count, as it comes from immense psychiatric disturbance. "This argument, in effect, says that bona fide prejudice is irrational but not so irrational as to lead to crimes of grand scale" (p 23) J&P disagree with this contention. "It seems to us that psychosis or mental pathology cannot negate prejudice without stripping the concept of some of its meaning" (p 24).

High Prejudice/Low Causation - Cell II includes extremely prejudiced offenders whose crimes are not solely or strongly motivated by prejudice. Generally not classified as hate crimes. The law should not take the opportunity to punish bad characters when that character is not, in fact, being evidenced by the crime in question. (Comment: Interesting case with kill the Aryan Republican Army, robbing banks to finance their activity. Compare with Breivik’s instrumental killing of future politicians and officials)
Low prejudice/High causation - Cell III - majority of hate crimes. Not ideologues or obsessive haters. To some extent, the prejudices may even be unconscious, but still the main causal factor in the crime or choice of victim.

Low prejudice/low causation - Cell IV "Situational" crimes, ad hoc disputes and flashing tempers. These are sometimes counted as hate crimes and sometimes not.

Conclusion: "Hate crime" is a social construct. Attempts to extend the civil rights paradigm into the world of crime and criminal law. Choices has to be made in the definition, about what counts as a hate crime. This has great importance for the sheer number of hate crimes.

"Why should some victims be considered more protected than others?" (p 28)

Chapter 3 Hate Crime Laws

By 1995, the federal government, thirty-seven states, and the District of Columbia had passed hate crime laws that fall into four categories: (1) sentence enhancements; (2) substantive crimes; (3) civil rights statutes; and (4) reporting statutes.

Sentence Enhancements

A majority of HC statutes are of this type. Typically, they bump up the penalty for a crime when it’s motivated by an officially designated prejudice. Here’s Montana:

A person who has been found guilty of any offense … that was committed because of the victim’s race, creed, religion, color, national origin, or involvement in civil rights or human rights activities…in addition to the punishment provided for commission of the offense, may be sentenced to a term of imprisonment of not less than two years or more than 10 years.

Alabama has a mandatory minimum sentence for violent crimes motivated by bias - no less than 15 years. The enhancement varies between states (Vermont doubles the maximum prison term, Florida triples it). On a federal level, the Violent Crime Control and Law Enforcement Act of 1994 mandate that U.S. Sentencing Guidelines "provide a sentence enhancement of three "offense levels" above the base level for the underlying federal offense. The Act uses the Intentional Victim Selection model.
Enumerated prejudices varies between states, but all mention prejudice on grounds of race, color, religion and national origin. Predicate offenses varies between states. The ADL model statute mentions only harassment / intimidation. Pennsylvania, Vermont and Alabama legislation say that any offense can be a hate crime. Other states are more restrictive. In New York only aggravated harassment. Defining and proving prejudiced motivation - most laws do not use the word "motivation" but prohibit choosing the victim "by reasons of" or "because of" certain characteristics. "Other states prohibit choosing the victim "maliciously and with specific intent". Statutes also differ on whether the prejudice has to be "manifest" in the crime itself, or if it can be based on character evidence and actions or words prior to the crime. In Washington D.C. An hate crime occurs when the conduct "demonstrates prejudice". Florida requires that the crime "evidences prejudice".

One would think that what has to be demonstrated is (1) that the defendant harbors prejudiced beliefs, and (2) that this particular crime, in the way it was committed, demonstrates or reaffirms the existence of such prejudice. (P 32)

Comment: One could object here that if (2) is demonstrated, (1) is not needed. One can express an attitude that one does in fact not have. See the Florida Supreme Court below, however

J&P surmise that some juries and courts, because hostile to the idea of hate crimes, seem to require that the crime demonstrate hard core prejudice. The Florida Supreme Court requires the evidence of prejudice in such a way that the crime itself must evidence the prejudice. "The fact that racial prejudice may be exhibited during the commission of the crime is itself insufficient". (State v. Stadler). A more restrictive interpretation, then.

Wisconsin and California requires that the offender "intentionally selected" the victim "because of" or "by reason of" group membership.

Read literally, this type of statute would not require proof of prejudice, but merely color consciousness in the selection of a victim. (P 32)

For instance if selecting only Asian women to rob, because they are perceived to be vulnerable and less likely to resist. J&P recognize that this is unlikely, as prosecutors and judges would understand that the legislative intent is to penalize prejudice.
Despite differences in the language used to set forth motivation requirements (manifest, evidences, motivated in whole, or in part, because of, etc.), the majority of courts hold that prejudice must be a substantial motivating factor. (P 32)

Comment: regarding the case above, it’s easy to say that the victim selection was not because of the woman’s race and gender, but likelihood of resistance. Race/gender used merely as proxy.

Substantive Offenses
Some statutes define new substantive offenses. Already criminal conduct redefined as a new crime or as an aggravated form of an existing crime. The ADL has a Model Hate Crime Law provide "intimidation" and "institutional vandalism". In effect, it enhances the maximum possible sentence, when such motivation exist. The end result is the same, no matter whether there is a new substantive offense or a sentence enhancement.

Comment: One difference that might occur in some legislations is that substantial offenses will be recorded and made public, whereas sentence enhancements remains "hidden".

For the statute of institutional vandalism, the ADL argue that the enhancement needs to be sufficiently severe to have the desired deterrent impact.

J&P note that in New York, the maximum penalty for aggravated harassment is one year, whereas the maximum sentence for the same conduct absent racial slurs is 15 days. "Such significant differences in sentencing based on the words uttered during the crime have led some critics to call hate crime statutes "thought crime laws". (P 36)

The Federal Civil Rights Acts
Some refer to federal criminal civil rights laws as hate crime statutes but, J&P argue, they are actually quite different in intent, formulation, and operation. They do not distinction between groups in the way that HC statutes do.

In this section J&P points out that civil rights acts were put in place because local law enforcement agencies would not prosecute crimes committed by whites against blacks. That’s why congress passed laws to authorize federal prosecutions of those who denied the newly freed slaves their civil rights. It was not a question
of enhancing punishment or recriminalize conduct. They are directed at "rights interference crimes". They are framed in terms of everyone’s individual civil rights. The purpose is to guarantee even-handed, color-blind law enforcement. The statutes was not meant to single out the prejudices of common criminals for special condemnation. They apply to everyone.

…Their purpose was to ensure that laws were enforced equally on behalf of all victims, no matter what race, and against all offenders, whatever their race, prejudice, or criminal motivation. (P 37)

Code paragraph 245 of the Civil Rights Act of 1968 does mention certain prejudices (but has rarely been used) - but was not intended as all-purpose federal hate crime statute. "Rather, they function as insurance which can be called upon if, for discriminatory or other improper reasons, state and local law enforcement officers fail to prosecute violations of civil rights.

Comment: This is one of the most important aspects of the book: the civil rights origin aiming to provide equal protected, and to make sure that prejudiced offenders were not punished less than others has now turned to make sure they are punished more.

Reporting statutes
The hate crime statistics act of 1990 - directed the Attorney General to collect data on (certain) predicate crimes which demonstrate "manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity". Of course, criteria are needed. The limitation on predicate crimes motivated by the fact that data was already being collected on these crimes. Bias is defined as "a preformed negative opinion of attitude toward a group of persons based on their race, religion, ethnicity/national origin, or sexual orientation". (This, J&P argues, could involve selection victim because of the belief that those are less likely to resist.) J&P points out that gender and disability are left out of this definition. This demonstrates what the mean by "the social construction of hate crime".

Comment: It is notable that this definition of "bias" does not explicitly state that the opinion be "false" or even ill-founded. "Preformed" allows for being based on evidence, it would seem. This is important for the case considered by J&P as the perception of a group as being less likely to resist may in fact be well-founded.
J&P point out that "differences between state and local hate crime reporting and the HCSA complicate the development of an accurate hate crime reporting system". The differences in all the critical regards (predicate crimes, bias, and motivation) varies between states.

**Conclusion**

The hate crime laws passed in the 80s did not criminalize previously noncriminal behavior, but enhanced punishment for conduct that was already a crime. J&P argue that will federal criminal civil rights statutes are often invoked as the model for these laws, they are quite different. The difference is in terms of equality of concern (hate crime laws designates particular prejudices).

**Comment:** J&Ps concern here is with the artificial limitation of prejudices /protected groups. This is their evidence for the (objectionable) "social construction" of hate crime. The same point reoccurs as it makes for inter-state (and country) differences, with the result that people speak of different things when they talk about "hate crimes". Comparison suffers (p 44).

"After several years of operation, the federal hate crime reporting system presents a highly inaccurate and distortive picture of hate crime in the United States and is viewed as a major disappointment, even by its once erstwhile proponents." (P 44)

**Chapter 4 Social Construction of a Hate Crime Epidemic**

**Short summary:** J&P point out that the "epidemic" claims are made by advocacy groups, the media, politicians and some academic commentators, but that this claim lacks empirical basis. In academia, it’s basically sociologists Jack Levin and Jack McDevitt in "Hate Crimes: The Rising Tide of Bigotry and Bloodshed". (Many descriptions of crimes, but no data on the increase of hate crimes). Levin and McDevitt blames the rise on economic decline and "resentment". They also show that the effort to create a reliable governmental accounting system has failed - in the section called "constructing the FBI Annual Reports". (Klanwatch dismissed it as "inadequate and nearly worthless"). It is, they point out, preposterous to claim that the country (USA) is now (1998) experiencing unprecedented levels of violence of this sort. Most HC incidents are “low level” (harassment, intimidation).
J&P point out that the "pessimistic and alarmist portrayal of a fractured warring community is likely to exacerbate societal divisions and contribute to a self-fulfilling prophesy. It distorts the discourse about crime in America, turning a social problem that used to unite Americans into one that divides us" (p 64).

Comment: The criticism is warranted, but it’s notable that J&P fail to provide any evidence in support of the claim that closes this section.

Chapter 5: The Politics of Hate Crime Laws

Identity politics
"There is no reason to believe that prejudice-motivated offenders, particularly those who commit violent crimes, were not or could not be punished severely enough under generic criminal laws" (p 65)

J&P believe the best explanation of these laws being passed is the rise of identity politics. A shift from nondiscrimination to emphases on race and group consciousness.

Fundamentally, the hate crime laws are symbolic statements requested by advocacy groups for material and symbolic reasons and provided by politicians for political reasons. (P 65)

"Identity politics" involve the tendency for americans to define themselves in terms of group membership. The official recognition of these characteristics is problematic. Especially when it points toward those groups in virtue of mistreatment by the majority. The logic of identity politics is that victim group can "assert a moral claim to special entitlements and affirmative action." (P 66)

Hate Crime Law as Symbolic Politics
Interest groups are important in the legislative process. Laws are often the product of lobbying. Hate crime laws were passed because of the lobbying efforts of interest organizations. HC laws are appealing to politicians, as lobbyists have something to offer.

The hate crime laws provided an opportunity to denounce two evils - crime and bigotry - without offending any constituencies or spending any money. (P 67)
Supporting hate crime legislation provides them (politicians) an excellent opportunity to put themselves on record as opposed to criminals and prejudice and in favor of law and order, deency, and tolerance. (P 67)

Much talk about "message sending" in this context. Hate crime laws "send messages to at least three different audiences of which offenders is probably the least important." (P 67) - to the Lobbyists - expressing loyalty (and expecting support) - to the general voting population: condemning prejudices simultaneously claiming themselves to be free of such (these) prejudices. - To offenders - regarding their crimes as worse than others. This group wont listen. J&P points out that this group is no doubt already aware of the opinions of the political "elite". Might in fact make things worse.

Passage of Federal Hate Crime Law
Congress has passed three different laws - The Hate Crime Statistics act, The Violence agains Women Act and the Hate Crimes Sentencing Enhancement Act (1994). Legislative history of each of these demonstrates the importance of symbolic and identity politics.

(A coalition of advocacy groups lobbied for the HCSA, for instance - all testifying that passing of the HCSA would help communities, legislatures, and law enforcement to respond effectively by providing information on frequency, location, patterns etc. Improve law enforcement response by increasing awareness of hc’s. Raise public awareness. And send a message about the concern of the federal government. J&P point out that no support was or have been given that the collection of data has been effective in the first two regards.

Comment: It’s notable that J&P speak of "lobbying" groups rather than representatives of victimized communities. I.e as "witnesses".

The authors claim that the exclusion of Gender Prejudice shows the workings of the process. Why would crimes based on gender not be included? The fact that women’s advocacy groups wants it to be, shows the symbolic significance of inclusion. The coalition lobbying for HCSA rejected gender prejudice precisely on the grounds that the government already collected statistics on rape and domestic violence.
The coalition argued that violence against women was qualitatively different from true hate crime because many anti-female offenders are acquainted with their victims and are thus motivated by animosity against a particular woman, not against women in general. (P 72)

Victims here are not necessarily interchangeable. The coalition thus added "victim interchangeability" to the definition of hate crime, suggesting that the attack on a victim be solely on basis of membership in a group. However hate crime is not always ruled out because there is a personal relation. Women’s advocacy groups disputed this line of reasoning. Some argue that the main reason for exclusion was that crimes against women as so common as to make other hate crimes unimportant in comparison. "In other words, at this symbolic level, groups perceive themselves to be in competition with one another for attention" (P 73).

Comment: This is important, as it suggests that it’s insufficient that bias be part of the motivation. The line of reasoning may be motivated, however, by motives being extremely difficult to pry apart in cases of personal relations. See "honor crimes" against homosexuals within the family.

Later on, the passage of the "violence against women act” of 1994. Which stated that other laws did not adequately "protect against the bias element of gender crimes, which separates these crimes from acts of random violence". - Liability to pay damages.

The Hate Crimes Sentencing Enhancement Act of 1994
This too is best understood as an act of symbolic politics. - "A message of care” claims based in the "expressive” tradition of criminal law. Sentencing guidelines to provide “sentencing enhancements of not less than three offense levels for offenses that are hate crimes” - first formulation based on motive. The sentencing commissions implementing guidelines, however, use the victim selection model. The guidelines list gender as a hate crime category, but the application notes state that it does not apply to sexual offenses motivated by gender bias. "In other words, the sentence for rape or sexual abuse is not increased because of gender bias. Perhaps the commissioners concluded that rape already takes gender bias into account". (P 77)
The implementation of the HCSEA was in order to "harmonize the existing guidelines with each other, reflect the additional enhancement now contained in the guidelines, and better reflect the seriousness of the underlying conduct". Here gender and disability IS included

**Conclusion**

Lawmakers produce legislation in response to "consumer" demand. And the resistance to inclusion of gender crimes illustrates the symbolic nature of the legislation. If all crimes could be hate crime, it loses its special symbolic power.

**Comment:** This is an interesting section, but basically it’s a repetition of the complaint that the limits of "hate crime" seems arbitrary. It’s notable that the relative cheapness of legislation could, and should, be compared to the relative costliness of making these crimes a police priority.

**Chapter 6 Justification for Hate Crime Laws**

J&P claim that hate crime laws have been enacted for symbolic reasons. They must be defended against charges that they are "unnecessary, unfair, and unconstitutional". This chapter is a critical examination of the most frequent justifications for these laws.

**Are Hate Criminals More Culpable?**

It’s an axiom in criminal law that, conduct being held constant, punishment should dependent on the offender’s culpability and blameworthiness. (See differing punishment for homicides). Some defenders offer this kind of justification - criminals motivated by prejudice are morally worse than others.

> We do not object *in principle* to calibrating punishment to motive. (...) For example, a defendant who kills his wife to collect her life insurance ought to be punished more severely than a defendant who kills his wife to end her suffering from a terminal illness. (P 80)

But is prejudice (limited) more morally reprehensible than other criminal motivations? Worse than greed, power, sadism? J&P says "of course not". Lawrence Crocker, on the other hand, writes "One who commits a racist assault with some awareness of the history of racism is not merely of worse character than
the ordinary assailant. The worse character is crystallized into an act that is itself morally worse” - but why? Besides, it wouldn’t justify anti-white crime. And why is history important? And is there not a similar history of crimes out of greed? (Crocker does however think hc laws problematic, for responsibility reasons). Crocker supports only hc laws including racial animus, not merely ”manifesting prejudice” or ”victim selection” models, and even then, he is against strong enhancements.

Should offenders be held fully responsible for their prejudices? A prejudiced offender might plea that he is less culpable than a ”cold-blooded” profit-motivated criminal, because he was indoctrinated by his parents and youthful peers

Comment: This suggestion is probably meant in jest, but is actually quite serious. There are clear cases where we are not responsible for our prejudices, perhaps when this should be counted as a mental deficiency or psychosis.

Disproportionately Severe Impacts on the Individual

Criminal law proscribes more punishment for more serious injury inflicted. (See aggravated and ”normal” assault). One argument has it that hate crimes hurt more. First version: more physical injury. But if this is true, the normal rule would mete out more serious punishment to hate crimes. ”…When hate crimes result in severe injury, they would under generic criminal laws be punished as aggravated assault or attempted murder, not as simple assault.”

Therefore, when hate crime proponents assert that hate crimes are more brutal, they must mean more brutal than other crimes in the same category (p 81)

More brutal than other assaults, yet not aggravated. There is no empirical evidence for this, but even if it was true, ”generic sentencing laws provide for a range of sentences within the same offense category.” And such ranges should be able to accommodate the difference. Levin and McDevitt (again) claim that hate crimes tend to be excessively brutal, but there is no actual support of this (and when there is, it depends on what comparison class is chosen). ”The authors don’t explain how threatening words cause physical injury” (p 82)
When it comes to psychological (emotional) injury, there are many supporters. In *Wisconsin v. Mitchell*, without any authority being cited, it was claimed that hate crimes are "more likely to...inflict distinct emotional harm on their victims". Weisburd and Levin claim that hate crime victims suffer more emotional injury "because the violence is so brutal, the degradation so complete and the vulnerability so omnipresent, bias crime victims exhibit greater psychological trauma than nonbias victims". The survey supporting this, the 1989 National Institute Against Prejudice and Violence survey questioned only hate crime victims, and did not compare with nonhate crime victims. A lot of claims have been based on similarly flawed surveys.

J&P points out that all victims suffers emotional/psychological harm.

Barnes and Ephross made a follow up study and found that the hate crime victims suffered in the same manner and degree as other crime victims. Possibly even less severe injury, as hc victims did not suffer lowered self-esteem to the same degree as others. They wrote "$The ability of some hate violence victims to maintain their self-esteem may be associated with their attribution of responsibility for their attacks to the prejudice and racism of others".

J&P points out that the "greater harm" hypothesis is most plausible at the margin of the criminal law, where free speech blends into criminal conduct. Such as graffiti and vandalism. Compare Symbolic graffiti on symbolic property (swastika on Jewish tomb) with nonsymbolic graffiti on nonsymbolic property (paint splashed on car). (And the two other types). How should these cases be treated? Should there be a scale, with symbolic x 2 receiving the maximum penalty? There are, of course boundary issues. Difficult to define what counts in a politically neutral way. Would any such restrictions on content violate the first amendment? Protecting certain objects, by contrast, does NOT involve/require bias motivation of offender - only that the offender was aware of the objects importance. J&P believe attempts to withdraw content from these definitions have a "hollow ring", and can’t be distinguished from "offensiveness". They oppose such enhancements.

**Comment:** a very large portion of the complaints lodged by J&P are about vagueness and boundary issues. It’s not at all clear that this amounts to a specific problem for hate and bias crimes, however. It’s also far from clear that laws should
be "politically neutral". Also note that "symbolic property" could be protected in the same way, i.e using certain symbols.

The Impact of Hate Crimes on Innocent Third Parties

See Greenawalt - "such crimes can frighten and humiliate other members of the community; they can also reinforce social divisions and hatred". Weinsten "can inflict damage above and beyond the physical injury caused by a garden-variety assault". The Oregon Supreme Court wrote that Hate Crimes "creates a harm to society distinct from and greater than the harm caused by the assault alone."

J&P believe that some hate crimes have this sort of impact, but they are not unique in this respect. Impact on the neighborhood in which a (generic) crime is committed, for instance. The add that since the hate crime label often is used to cover low-level offenses, to say that it spreads terror is probably an exaggeration.

But even if bias-motivated crimes have this impact, and more so than other crimes: "Is third-party anguish a permissible basis for increasing an offender’s sentence?" (p87) In many cases, this would not be acceptable and might in fact breach offenders rights.

The Conflict-Generating Potential of Hate Crimes

Some proponents argue that hate crimes may trigger retaliation, and thus "societal unrest", and this potential is what makes them worse than other crimes. But this general idea seems hard to justify. Is it worse to attack a retaliation-prone group? Disturbing logic.

A more sophisticated version that J&P do not find in the literature focus on intergroup conflict short of retaliation. Hate crimes may promote intergroup friction. This may be true, but it’s far from clear that sentence enhancement would mitigate this effect (comment: even if it might warrant such an enhancement). In fact, it may make things worse (see chapter 9).

Greater Deterrent Threat Required

More punishment is required in order to counter the motivation in these cases. But how many crimes will be deterred by such enhancements? And are hate crimes more amenable to deterrence than nonhate crimes? If not, there is no justification of enhancing punishment for these crimes but not others. It’s also noticeable that a large portion of hate crimes are committed by teenagers, i.e. delinquents, and the
criminal law is not applied. And for older offenders, deterrence is unlikely to have an effect on bias motivation.

**Moral Education**

Legislation simply because it sends a political and symbolic message that bias crime, and implicitly bias itself, is wrong. Weidburd and Levin mentions the "powerful signaling effect inherent in bias crime legislation."

This justification, J&P argues, would be more persuasive is hate crime had previously been lawful, or criminalized in a minor way. But the opposite is true (comment: this depends on how far back you look, of course. See the origin in neutral civil rights statutes). And besides, prejudice is denounced by a "huge body of constitutional law, employment law, civil rights law, and administrative law." (P 90) I.e. J&P believe that a message is already being sent, and in, presumably, a less problematic way.

**Conclusion**

J&P believe that the empirical claims of "more harm" has not been substantiated. None of the other justifications work either, and some seems counter-productive. The idea that bias-criminals are morally worse and more blameworthy than others is also hard to sustain. "Many other motivations for criminal conduct seem at least equally reprehensible" - and in fact, some may claim that lesser punishment is warranted because of lack of responsibility. Most importantly, offenders may fall "along a continuum of blameworthiness".

**Chapter 7 Enforcing Hate Crime Laws**

Short summary: According to J&P, HC laws were passed to satisfy political and symbolic needs. So, how to enforce them? This chapter examines the challenges and dilemmas for police, prosecutors, courts, judges, juries. It points out that little is known about how these laws are used, how often, and with what consequences. For the police, the "labeling decision" is a critical point, involving (see for instance guidelines for the NYPD Bias Unit) a number of criteria and associated questions to ask victim, witnesses etc. Notable that most reported and confirmed bias crimes do not result in an arrest or prosecution. Measures of success are few and unreliable. J&P has not found any agency or jurisdiction that reports prosecution and disposition data on hate crimes. There is (1997) no published research on the subject.
J&P points to problem with prosecution - especially proving bias-motivation beyond a reasonable doubt. And that it caused the criminal conduct (to the extent required). Difficulties for juries as well (often, however, the bias motivation comes in at the sentencing stage and is thus a matter for the sentencing judge. The problem is when the hate crime is it’s own substantive offense).

J&P also surveys a few attempts to "rehabilitate" offenders, but have not found data or evidence in support of these working. In addition, many prison officials are uncomfortable about such "indoctrination".

In short, J&P believe the work is ineffective and the introduction of the law has been a cheap way to express commitment to certain ideas. Most could be done with low-level crimes, but "...It is not clear whether society really wants to divert significant investigative resources to these offenses or to punish them as serious crimes”.

**Comment:** As far as this commentator knows, there is still very little data on these matters.

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**Chapter 8 Hate Speech, Hate Crime, and the Constitution**

In *Wisconsin v. Mitchell* it was claimed that "Mitchell was not punished for his beliefs; he was punished for acting on those beliefs." Critics argue that teh Wisconsin statute expressly aims at beliefs and perceptions. J&P agrees that the heavier punishment is accounted for solely because of Mitchell’s beliefs.

**Prohibiting Hate Speech**
- See "fighting words" - words that "tending to incite an immediate breach of the peace" etc. J&P argue that attempts to limit free speech have for the most part been abandoned in the past. No one has been convicted for fighting words since *Chaplinsky*. *Group Libel* has often been called unconstitutional, but no express overrule of *Beaucharnais*. What are the implications of First Amendment interpretation to hate crime statutes?

**Constitutionality of Hate Crime Laws**

Recriminalization or enhancement for conduct that is already punishable amounts to extra punishment for values, beliefs, and opinions that the government deems abhorrent.
The critics ask: If the purpose of hate crime laws is to punish more severely offenders who are motivated by prejudice, is that not equivalent to punishing hate speech or hate thought? (P 121)

J&P thinks hate crime laws are a second best option for proponents of hate speech laws struck down by the First Amendment.

J&P further argue that murder for pecuniary gain or murdering a police officer may be aggravating, but these differs from hate crime because they are **content or viewpoint neutral**.

In *State v. Plowman*, the Oregon Supreme Court upheld a hate crime statute arguing that "rather than proscribing opinion, that law proscribes a forbidden effect: the effect of acting together to cause physical injury to a victim whom the assailants have targeted because of their perception that the victim belongs to a particular group." J&P are not convinced. The only distinguishing mark is the particular bias.

A number of supreme court decisions have dealt with these questions. In *R.A.V. Vs St. Paul* it was argued that the government cannot regulate fighting words on the basis of viewpoint. - i.e. Content. (Rather - harm).

In *Wisconsin v. Mitchell*, the harm - conduct argument is lodged again. (The legislature may properly singly out such criminal conduct for increased punishment based on the judgment that such conduct causes greater harm to victims, third parties, and society in general). J&P are not convinced by this. A similarly situated offender, with other motivation, would not have received the same punishment.

In *W v M*, the Chief Justice explained that judges have traditionally taken motives into account in determining sentences.

J&P writes "Where is has no relevance to the offense charged, introduction of a defendant’s associational and “abstract beliefs” violates the First Amendment. That is the easy question. The hard question is: What if the speech or belief was relevant to the crime?"

J&P argue that other motives taken into account do not have the same free speech implications.

**Chapter 9 Identity Politics and Hate Crimes**
Of course, J&P share the goal of a tolerant society. They do not think hate crime laws are instrumental towards that goal, however.

The proponents believe that the message-sending potential and the deterrent power of criminal law will deter or persuade criminals and would-be criminals to desist from hate crimes and perhaps to hold fewer and less virulent prejudices. We find this implausible.

They quote Durkheim, claiming that the punishment of crime reaffirms a societies commitment to its core values and norms. But their concern is that rewriting criminal law to take into account group membership undermines the solidarity project. "By redefining crime as a facet of intergroup conflict, hate crime laws encourage citizens to think of themselves as members of identity groups and encourage identity groups to think of themselves as victimized and besieged, thereby hardening each group’s sense of resentment. (P 131)

J&P argue that this conflict-generating tendency of identity politics has been acknowledged by writers from all over the political map. Hate crime laws are both the cause and a consequence of identity politics.

**Comment:** They offer quotations, but no evidence theoretical or empirical. The jury is still very much out.

There are conflicts over which prejudices Hate Crime Laws should include (and exclude). Conflicts regarding making some victims more important than others. It paints an unduly negative picture of intergroup relations (see the "epidemic" chapter). Especially when hate crime statistics are put forward as an indicator of the values and beliefs of all citizens, not just criminals. There are also conflict over labeling individual hate crimes. (Cf the central park jogger). We also have cases of retaliation and false reporting.

"The hate crime laws and their enforcement have the potential to undermine social solidarity by redefining crime as a subcategory of the intergroup struggles between races, ethnic groups, religious groups, genders, and people of different sexual orientations."

**Comment:** the claim here is that hate crime laws **may** be counter-productive when it comes to prejudice reduction etc.
Chapter 10 Policy Recommendations

The book offers an argument against the formulation and enforcement of hate crime laws. Anti-discrimination laws are fine (they are not concerned with already criminalized behavior) and civil rights laws are attempt to rectify power imbalances in relation to government and powerful private sector institutions.

J&P suggest that hate crime laws be repealed, and that generic criminal laws be enforced instead.

First recommendation is to at least define hate crime **narrowly**. i.e. Not to include cases where prejudice plays *some* role. It tends to portray society as a clash of identity groups.

Comment: note that this is **completely** the opposite point from Iganski and Perry.

Next - repeal the hate crime reporting statutes: "Hate crime cannot be accurately counted because, given the ambiguous, subjective, and contentious concept of prejudice, it cannot be accurately defined." (P 146). Determining the motivation of the offender is difficult, and reporting suffers. The reports have been fragmentary, nonuniform, and distortive.

"Clearly, they have no contributed to a more accurate understanding of crime, prejudice, or prejudice-motivated crime in American society; nor have these reports laid the basis for more effective law enforcements" /p 146).

Further: **repeal the hate crime sentence enhancement statutes.** J&P do not believe that hate motivate crimes **invariably are morally worse or lead to more severe consequences for victims** than the same act prompted by other motivations. There is no need for more severe penalties, and they are not justified. Often violates principles of proportionality. J&P believe that these enhancements amounts to punishing beliefs and opinions. A violation of the First Amendment.

**Judicially Imposed Enhancements are just as offensive as legislatively imposed enhancements.**

Traditionally, judges have had discretion, within a range, t set criminal sentences according to whatever criteria they thought appropriate. (Such as lack of remorse). This system has come under attack, leading to sentencing guidelines. It was as such the Hate Crime Sentencing Enhancement Act was introduced. J&P
believe sentence enhancements for prejudices are unwarranted under both systems.

J&P do agree that "symbolic" low level crimes hurt more than others, but are not convinced that they should be punished more. (Offensiveness problems).

The federal criminal civil rights statutes are not called into question by this.

(A cautionary note on the "Rehabilitation" of Hate Crime Offenders - basically a complaint against political correctness. The rehabilitation perspective should be generally applied, if at all).

What’s to be done? The US has done much to be a more tolerant, multicultural society. The progress has had very little to do with criminal law. In fact, the criminal justice system may have done more to impede than to help this progress. The criminal justice system should avoid unfair treatment and discrimination against offenders as well as victims. The police can very well have use of community relation units, but not to ensure harsher punishments to prejudiced offenders.
10. Dan M Kahan: *Two liberal fallacies in the hate crimes debate*

*Law and Philosophy 20, 175-193, 2001*

Both sides of the hate crime debate stands in the shadow of John Stuart Mill. Both accepts the premise that the state is justified in coercing an individual only to prevent harm to others and not to condemn that individual for holding objectionable beliefs, values, or preferences. Contemporary thinkings stresses the inconsistency between liberalism and condemnation of aberrant values and preferences (Dworkin, Raz, Feinberg and Elena Kagan). (See Footnote 1)

"Because hate crime laws distinguish between otherwise identical assaults based solely on offenders’ motives, the opponents of those laws see them as singling out hate criminals for additional punishment solely because of their noxious ideologies. The proponents of hate crime laws, in contrast, disclaim any interest in punishing offenders for their values and insist that such laws are warranted strictly by the greater harms that hate crimes inflict, both on their victims and on third parties". (P 175)

If this picture is correct, critics and proponents have different views on what it is that hate crime statutes punish. The critics have a principled objection, the proponents offer a claim that is basically an empirical claim. Critics often imply that the greater harm argument just is a pretext to punish values.

Kahan wants to remove the debate from this pattern. The legitimacy does not depend on whether these laws punish “harms” or “values”. It cannot depend on that. Because, and this is very important:

"unless we take an actor's motivating values into account, we lack the normative resources necessary to identify and evaluate the harm imposed by her actions"

Kahan claims that the only way to figure out whether hate crime laws are morally legitimate "is to determine whether the assessment they make of offender’s motive is right or wrong. Do hate crimes in fact express valuations that are more reprehensible than those expressed by other types of violent crimes?”

The argument have three parts

**Part I** Hate Crimes laws *inappropriately* punish values rather than harms.

**Part II** Hate Crime Laws *appropriately* punish harms rather than values

**Part III** These fallacies are linked to a "cluster of liberal tropes” that are used to disguise the law’s morally judgmental character. This stands in the way of progressive legal reform.
I. The "Bad-Value Added" Fallacy

Are offenders being punished because of their beliefs? There is a harm in the assault, but an individual attacked on account of group affiliation is not more injured than an individual attacked on any other account. Penalty enhancements amounts to an implicit "bad-valued added tax" on violence. This seems to go against free speech principles. This is the argument we find in, for instance Jacobs and Potter.

But motive is relevant in criminal law already. Homicide law evaluates the motive of enraged killers when it determines whether they were "adequately provoked" by their victims, for instance (P 177, see also Kahan and Nussbaum (1996)).

"The doctrine of duress evaluates motive when it determines whether the defendant submitted to a threat that a "reasonable" person would have resisted”. The law of self-defense makes similar evaluations, of a kind that have often been abused, and disfavored already vulnerable groups. Certain motives for murder can be deemed "outrageously or wantonly vile, horrible and inhuman", and warrant a death sentence, while less disgusting motives would have lead to life in prison.

"When offenders’ motives show that they value the right things in the right amount (their own physical well-being over the well-being of strangers, their honor more than the live of wrongful aggressors), the law exonerates them”.

Then follows an important section, quoted in full:

"When their motives show that they value the right things slightly too much relative to other things they ought to care about (e.g. Fidelity ore than the lives of unfaithful wives), the law mitigates their punishments. When their motives show that they value the right things far too much relative to other important things (their career advancement more than their spouses’ lives, their own physical well-being more than their children’s, their dignity over the lives of chronically abusive husbands), the law affords them no dispensation. And when their motives show they value the wrong things altogether (e.g. The defilement of corpses), the law punishes them all the more severely. Inconveniently for the Millian critics of hate crime penalties, the criminal law comprises a comprehensive series of bad-value added taxes” (p 178-9) This argument is worked out in full in Kahan and Nussbaum (1996)

Why does the law make this judgment? The law uses offenders’ motivating values to individuate harms and to measure their extent. "The harms associated with being inadvertently jostled and being deliberately struck are obviously different, in nature and in magnitude, but why? The answer isn’t that they invariably inflict different
degrees of injury: striking is morally worse than jostling even when the latter happens to result in greater physical damage”. It is ranked as worse because the person intends to harm. **Why does that matter? It is what the intention reveals about the persons ends:** The person who deliberately strikes another values another’s suffering. ”The former valuation is morally worse - it makes a bigger mistake about the objective worth of important things in the world - than the latter.” (P 179)

This is what we could call the ”evaluative” account of the criminal law: ”The values that striking and jostling express are what tell us that assault and negligence are distinct harms, and that the former is worthy of greater punishment than the latter”

This is also connected to the **expressive theory of morality**, which has recently been applied to the criminal law (See Hampton, Anderson and Pildes etc.):

”Social norms define how persons (and communities) who value particular goods - whether the welfare of other persons, their own honor or dignity, or the beauty of he natural environment - should behave- Against the background of these norms, actions express attitudes toward these goods. (...) When we morally evaluate a person’s actions, we consider not only the desirability of the consequences they produce but also the appropriateness of the attitudes they express” (p 180)

We don’t just condemn an actor for harming another due to diminishing that persons welfare: but rather that ”her actions express too low a valuation of the other person’s worth relative to the actor’s own ends.” In ”Expressive theory of retribution”, Hampton writes ”People who believe their purposes warrant them in taking another’s wallet, or another’s savings, or another’s life are people who believe their victims are not worth enough to require better treatment”

The expressive part can be understood in the following manner: ”Punishing the offender - in the appropriate way and to the appropriate degree - is necessary to show that we, in contrast, do value the victim’s worth appropriately relative to the wrongdoer’s interests and goals” (p 181)

(Comment:Not all expressions of wrongful evaluations are thus punished? There must be some form of harm in order for the criminal law to be brought in. Hate speech might, or might not, be a case in point here)

What makes rape distinct from, and worse than, assault is the greater contempt it evinces for its victim’s agency. The expressive view also makes it easier to understand doctrines that evaluate the quality of offenders’ emotions, from preméditation to adequate provocation, from insanity to the voluntary act
requirement - “*substantive criminal law views emotions not as unthinking impulses, but rather as judgments of value.*”  (P 182)

The Appropriateness and inappropriateness of emotions are grounds for mitigation/exculpation and withholding mitigation/increasing punishments.

"Hate crime laws assess the values expressed by an offenders actions in exactly the same way as the rest of criminal law."

Kahan points out that people in our society tend to construct their identities around ethnic and religious affiliations, genders, and sexual orientations. Someone who assaults, or kills on account of one of these characteristics, then, show us that “he enjoys not only the suffering of another human being, but also the experience of domination and mastery associated with denigrating something that the victim and others regard as essential to their selves. **By imposing greater punishment on those offenders, hate crime laws say that society regards the harms they impose as different from and worse than the harms inflicted by those who assault or kill for other reasons.**”  (P 182)

In relation to other criminals, they make a “bigger mistake about the objective worth of their victims”.

Comment: An opponent can obviously object that these values are **not** worse than those expressed by other crimes. But this is an entirely different argument, one that accepts the basic principle - that laws are evaluative. Something that both sides in the previous debate have denied.

**II The ”Greater Harm” Fallacy**

Some (in fact: most) defenders of hate crime legislation argue that Penalty Enhancements are warranted because assaults motivated by group animus do in fact impose greater individual and societal harms than other types of assault. (See Lawrence). Some argue that bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. Indeed, if greater harm is caused, and foreseen, this speaks in favor of both greater wrong doing and greater culpability.

Critics challenge this claim. (Comment: And, as Hurd and Moore points out - we don’t need extra laws if it was true - we already punish additional harms more severely). (In addition: ”emotional harm” of victims wouldn’t be relevant in homicides. (See Jacobs and Potter, but also Harel and Parchomovsky).
"The real problem with the greater harm argument, however, is not empirical but conceptual. Even assuming that hate crime penalty enhancements are geared to deterring greater harms, those laws can’t be justified independently of the state’s aversion to hate criminals’ values. For as is true of the harms redressed by the criminal law generally, the "greater harms" that hate crime laws are said to deter are constructed by aversions to the values that such crimes express” (p 184)

Because of the centrality of these features (group membership etc) to our identities. This means that the "distinct emotional harms" mentioned are not independent of our aversion to hate criminals’ values. "On the contrary, their aversion to their attackers’ animus toward their group identities is precisely what causes victims to experience these emotional harms." (P 185)

(Comment: Emotional harm can conceptually disconnected from this, surely? While this may hold, it’s actually important to have this in place in order for us not to take into account, say, a victims emotional turmoil over having been beaten by a homosexual, say)

Kahan argues that the reason for the likely production of societal harms like escalating retaliation, is also due to this evaluative function. Comment: Again, this seems as a contingent connection, and not a conceptual one. So it can be argued that the harm is conceptually independent of the evaluation, and that’s really all we need in order to save the "harm" argument.

Some defenders of hate crime laws argue that "bias motivated assaults are perceived as an attack on all individuals who share the group affiliations of the victim. "But if that’s so, Kahan points out "What’s distressing those third parties is their reaction to the low value that hate crime offenders assign to members of their group. " (P 185) By accepting the reaction of the third parties (making it a greater harm) as a consideration here amounts to expressing this value. We wouldn’t allow it if the people reacting where offended racists, or the like. Offense isn’t enough (see laws against homosexuality etc.)

Kahan argues that the relation between harms and values makes the opposition to hate crime legislation on Millian grounds void.

"A Millian liberal should treat the responsiveness of legislators to their constituents as simply the mechanism by which the law credits those aversions as a ground for punishment.” (P 186)

III. The Conservative Bias of Liberal Antimoralism
The decisive point isn’t whether Hate Crime Laws punish values or harms, because values expressed are important to how the law individuate harms and measure their severity. There is no value-independent measurement of “harm” that could account for the law looking like it does. So the only thing to do is to assess the moral appraisal that these laws express. “Is it”, Kahan asks “true that persons who engage in violence because of group animus devalue their victims in a manner that is distinct from and more reprehensible than those who engage in violence for myriad other reasons?” (p 187)

Kahan does not give an answer to this question, but wants us to attend to it. And to take a stand against the dominance of a demoralized form of legal discourse (which makes the law more congenial to traditional social norms and more resistant to progressive reform). The language of substantive law doctrines obscure the morally judgmental stance of the law. Doctrines like “premeditation”, “heat of passion”, and “extreme mental or emotional disturbance” seem to make the severity of punishment turn on the force rather than on the moral quality of defendant’s motivating passions. The same with defenses like “duress” and “insanity” and “self-defense”.

Two dominant scholarly theories of criminal law

- Voluntarism - Punishment is justified if, and to the extent that, the offender’s behavior stems from choice

- Consequentialism - Punishment is warranted if it is necessary to promote favored states of affairs.

The first theory cares about motivating passions only insofar as they interfere with volition, and the second only if the impels the offender to act in ways that the law wants to en- or discourage. Neither assign any independent normative significance to the evaluations that the offenders’ motivations express. This, Kahan argues, makes them both inadequate. Descriptively, at least. Gradations and defenses are subject to various qualitative delimiters. These, ”it can be shown, withhold mitigation to offenders whose passions and impulses express what judges and juries see as inappropriate values, no matter how destructive those passions are of offenders’ capacity to choose” (see also Kahan and Nussbaum note 11, 301-346)

Comment: But these in turn can be given Kantian or Utilitarian readings. (See Blackburn, for instance). These are indeed moral views, and the law express them, insofar as it is constituted by them. It does include a conception of the good.

Kahan argues that the difficulty to find the moralistic core of criminal law is due to particular brand of liberalism and its influence on legal and political culture.
"Accepting the fact of permanent moral dissensus, liberalism so understood enjoins us to justify our positions on public issues in terms acceptable to those of diverse cultural and moral persuasions." (This is drawn from Rawls etc.) This form of liberalism discourages cultural and morally divisive rhetoric.

"As a result of these dynamics, participants in the legal culture converge on forms of discourse that abstract from and elide the morally partisan judgments that animate their positions on contentious issues. The mechanistic idiom that pervades substantive criminal law doctrine and the de-moralized abstractions that inform voluntarism and consequentialism satisfy this function." (P 189)

Mill’s harm principle tests whether coercion is justified independent of the ambition to impose a partisan conception of the good on those who disagree with it. With it, opponents can criticize Hate Crimes legislation without contesting moral and ideological commitments. And defenders need not acknowledge their ambition to use the expressive capital of the law to underwrite their struggle against hierarchical social norms. But, Kahan argues, "the irrepressible tendency of such strategies is to stack the rhetorical deck of the law in favor of traditionally hierarchical social norms and against progressive egalitarian ones." (P 190)

There are contestable moral valuations all over the criminal law (in the word "reasonably", for instance). (Comment: Kahan does not address the problem that if what he says is correct, we may have a problem with justifying laws more generally. )

"To identify and evaluate harms associated with acts of violence, we must first identify the values that motivate individuals to engage in them." (Before, if conservative, these values will be invisible in the law). The fact that such evaluations remain hidden leads to a situation where the law may accept the rage of a cuckold as a form of "reasonable provocation", but not the desperation of a female trapped in an abusive relationship.

In contrast, this fact about law becomes transparent when legal reformers advocate doctrinal reforms founded on emerging but still highly contested norms. Against the de-moralized liberal tropes, nontraditional moral claims will seem illegitimate.) (p191).

The development of the "abuse-excuse" is an important example of this. Does an abusive childhood amount to "genuine volitional impairment"? The claims are accepted by courts due to their sympathy with the victim. But, as Nourse ("The new normativity: the abuse excuse and the resurgence of judgment in the criminal law") points out - the law has always indulged facile claims of volitional impairment to
excuse the virtuous outlaw. This myopia, Kahan argues, lies behind the Mill-based critique of Hate Crime Laws.

"Condemnation of values is more visible in hate crime laws than in these other areas only because the norms that inform hate crimes, unlike the norms that inform these other provisions, are nontraditional and contested" (p 192)

Conclusion

"Hate crime laws do punish offenders for their aberrant values in this sense. But so do the rest of the provisions that make up criminal law. It’s impossible to imagine things being otherwise" P 193

Comment: If the law already takes these things into account, what is new, and therefore in need of addition, in Hate Crime Legislation? This, I guess, is why a moral argument is needed to show the greater culpability/harm/fault in prejudice on the grounds mentioned. The real question is "whether those laws are right to see hate criminals’ values as more worthy of condemnation than those of other violent offenders."
11. Frances Kamm: A Philosophical Inquiry Into Penalty Enhancement

1992 Annual Survey of American Law 629-637

Short summary

From the views of those who argue for enhancement of penalties for hate-inspired crimes, we have this argument:

(a) An otherwise criminal act, caused by hate of a person’s race, sex, or sexual orientation, is a worse crime than the same criminal act caused in some other way. (This is the so-called "organic-harm thesis"). When caused by hate, this crime is also worse for the immediate victim or for the community and therefore gives the state a compelling interest in stopping hate crimes.

(b) Penalty enhancement is an efficient means of deterring these worse crimes. Perhaps a necessary means. It is also an appropriate way of assigning retributive punishment.

© Penalty enhancement for hate motivation is a relatively innocuous means of punishing and perhaps diminishing these worse crimes. It sometimes enhances punishment on account of the presence of “fighting words,” (that cause injury, or prompts immediate violence) a constitutionally unprotected category of speech.

PE raises constitutional, pragmatic and philosophical issues.

Constitutional - various aspects of free speech, and the Equal Protection Clause

Pragmatic - effectiveness of enhancement statutes

Philosophical - Moral and Political - even if constitutional and useful

Specific issue - the notion of organic harm - the reasons why content or viewpoint discrimination is objectionable, given the philosophical foundations of free speech.

"I shall also consider whether the same crime is really committed if motivation differs, and whether some objections to the pragmatic effectiveness of enhancement statues are well-founded”.

Is it a deep or superficial issue in the area of intolerance. Kamm’s primary concern is certain conceptual worries with arguments raised by various Supreme Court justices and legal scholars who have discussed this issue.
I Constitutional Issues

Free Speech - Critics of PE claim that speech and thought itself is being punished. Kamm thinks this is an appropriate concern, even if it is only when accompanying an otherwise criminal act, and if and only if the act is the occasion for punishing the speech itself. But not is some new "organic harm" was in fact inducing the higher penalty. What is meant by this, and is it too vague?

Organic harms - greater than the sums of their parts. Multiplicative, rather than additive, functions of their parts. It’s not just hate + burglary. The fact that hate caused the burglary make the burglary worse. Kamm argues that if someone steels your gun and then shoots you with it, it is worse than if he had shot you with his own gun.

"The idea of "organic harms" is one aspect of the phenomenon that I have elsewhere referred to as "contextual interaction" (that is, failure to take notice of, which has been referred to by Shelly Kagan as the "additive fallacy"): factors placed together may not merely add up, but also interact with one another." (p 631) (Kagan 1988)

But are all hate crime statues aimed at thus punishing new and worse crimes? (K thinks it would be unreasonable for instance when a white person is attacked for being white. It was not worse for him (but maybe for the community?).

So what if speech/though is being punished, and not merely an organic harm? One reason is that prior speech may be used as evidence for the motivation, and people will inhibit their speech not to incriminate themselves. May go overboard and punish protected speech.

Enhancement statues involve content and viewpoint discrimination. Those in favor of such regulation argue from the "narrowness paradox" - punishing these words on the basis of viewpoint would lead to less speech being punished than if we punish on basis of content.

Kamm thinks content/viewpoint discrimination is troubling - it involves an inappropriate attitude toward the regulated subject, and is therefore impermissible. A broader restriction (against fighting words) does not exhibit this attitude.

Inappropriate to want to penalize or suppress someone’s expression of a disfavored idea. Why? Three fundamental arguments:

1) Free speech is needed so that we may all have a better chance of arriving at the truth
2) it is important that there be a variety of ideas in the so-called “marketplace of ideas”, even ideas that do not lead to the truth.

3) Each person wishes to express his or her ideas, and it is wrong to suppress *that individual expression*, even if it does not threaten the elimination of ideas or the truth.

3) is the most relevant to this discussion.

(Walzer would not put drug in the water to turn everyone into Swedish-style social democrats)

We regulate expression, not because of content or viewpoint, but because speech that we identify as being of a *certain kind* has some other characteristic - such as causing certain inappropriate consequences in the context.

"To make use of content characteristics does not necessarily require regulation on account of them". (P 633)

*Equal Protection* - Is an act done with a different motive, perhaps an act executed because of hate, a qualitatively different act than it would be without the additional motive? If it is the same act, why may we punish it differently? Susan Gellman has argued forcefully that motive does not alter the type of an act (Gellman - Sticks and Stones can put you in jail, but can words increase your sentence?). But different *intentions* or *purposes* can have that effect.

If I intend to take back my property from you, and for that purpose enter your house without permission, I’m guilty of forcible entry, but not burglary. *(Purpose here is not motive)*

Kamm worries about this analysis - it is possible to construct enhancement statutes without referring to a motive, but rather by referring to a *purpose* closely related to a motive: if my motive for attacking a Jew is that I hate Jews, then my purpose in attacking the Jew I attacked was to frighten and intimidate a Jew because he is a Jew. This is a purpose or intention that someone else who attacks a Jew may lack” (p 633-4).

( - I’m not sure why this is a problem. We could then at least enhance punishment for these crimes.)

It is important than enhancement statutes designed to rule out certain purposes and intentions - the selection of certain victims - be phrased in a very precise way. If it is just victim selection, it will not capture all and only the crimes we think it should capture. Victim selection is *not* enough - if we have been told to attack someone
because he/she is Asian, say. It’s not clear what Kamm thinks here - she seem to think that enhancement enthusiasts should welcome this.

If introducing a new intention or purpose can change the nature of an act, then it may be that enhancement statutes are really punishing someone for a different act - in which case there is no violation of equal protection.

II Pragmatic (policy) Issues

Are enhancement statues counterproductive? Gellman thinks so, here are some reasons:

1) such statutes will tend to produce resentment of protected groups because they are protected

2) protected groups will be seen, and see themselves, as weak, despised, and in need of protection.

3) people will repress hatred, lulling us into a false sense of security that there is no hatred.

Kamm does not think it is legitimate to pay attention to these reasons. We should protect these groups, even is other groups irrationally and improperly will resent it (but what if it will put them at greater risk?)

"However, it is quite possible that rights of speech or thought may take precedence, even when we might achieve much social peace by ignoring them" (p 635)

III Depth, Superficiality and Intolerance

Both sides are concerned with intolerance. Proponents want to stamp out intolerance by individuals, opponents want to stamp out governmental intolerance of the intolerant. Kamm thinks the division is even deeper. "Proponents of enhancement statues, I think, are more concerned with harms to individual victims of intolerance, and opponents are more concerned with freedom of mind and speech."

But the issues may also be rather superficial - maybe a society can be just whether it has these statutes or not. Canada, for instance, do, and in Canada, great weight is given to values of civility and community - and this makes it sensible to have hate-crime legislation and enhancement statues. Americans (like Kamm) does not give the same weight to these values, and thus emphasize the individual freedom of thought
and speech. A bit of cultural relativism may be appropriate on this issue. Arguments here, then, doesn't convince anybody (i.e. If these values are just eligible)

**Conclusion**

Pulled between two conclusions: **IF** a strong case can be made for PE on the grounds that there is a difference in the nature of a crime done our of hate for a certain group, then speech/though regulation issues will not trump enhancement statues.

On the other hand, if it is in fact the implicit speech or thought that *makes* the crime a worse and different one, the First Amendment speech issues seems to trump the enhancement statutes.

There are some areas of law - harassment law fir instance where thought is in some way involved in the penalty. But neither refusing to hire someone nor speaking to someone are crimes *unless* done for certain reasons. However, assaulting someone is *already* a crime, and focusing on the thoughts of the perpetrator in such a case, so as to enhance a penalty, seems to place a heavier burden n free thought than is necessary.

**Comment: if certain acts become crimes when done for certain reasons, why could such reason make a crime worse?**
12. Frederick M. Lawrence: *The Punishment of Hate: Toward a Normative Theory of Bias-motivated Crimes*


**Summary:** Lawrence’s paper (which is very similar in content to the book “punishing hate”) starts with two quotes, the first from David Garland “Punishment and modern society”:

*Implicit within every exercise of penal power there is a conception of social authority, of the (criminal) person, and of the nature of the community or social order that punishment protects and tries to recreate*

And, from Gordon Allport’s “Prejudice”

*America, on the whole, has been a staunch defender of the right to be same or different, although it has fallen short in many of its practices. The question before us is whether progress toward tolerance will continue or whether, as in many regions of the world, a fatal retrogression will set in.*

Lawrence points out that there is general agreement that bias crimes are a “scourge” on our society and that the problem is getting worse (this is in fact challenged by Jacobs and Potter and others). But there is a lack of consensus on two critical underlying questions: (i) what precisely distinguishes a bias crime from a similar crime committed without bias motivation (a “parallel” crime?) And (ii) why should bias crime be punished more severely than a parallel crime?

Legal scholarship has concentrated on hate speech, particularly in university settings, and also on the *the tension between bias crimes and freedom of expression.* It has not addressed the definition of a bias crime or *the normative argument for their enhanced punishment. At most, they have attempted to fine-tune state or federal criminal statutes in order to make them more effective vehicles for punishing bias crimes.*” (P 4)

The article explores the difference between bias- and non-bias crimes, and why it should and does make a difference in criminal law.

"Bias crimes differ from parallel crimes as a matter of both the resulting harm and the mental state of the offender. The nature of the injury sustained by the immediate victim of a bias crime exceeds the harm caused by a parallel crime. Moreover, bias crimes inflict a palpable harm on the broader target community of the crime as well as on society at large” (p 5)
The distinction also concerns the perpetrators state of mind, his bias motivation. "Bias motivation is an essential element of criminal liability for bias crimes. The greater level of harm caused by bias crimes warrants their enhanced punishment. The punishment of an individual offender for the commission of a bias crime, however, is warranted by the state of mind with which he acts"

Comment: this is a very interesting claim. In light of the well known criticism: is it confused/inconsistent? Are we allowed to punish individuals for a general tendency in the sort of crime?

The distinctiveness of these crimes concerns perpetrators and victims, and also their further impact on communities.

**Two bias crime models**

There are two overlapping, but analytically distinct models of bias crimes

*The Discriminatory selection model*

*The Racial Animus model*

Under The DSM it is irrelevant why an offender selected his victim on basis of race (etc). (This model is active in Wisconsin v. Mitchell - which represent the constitutional authority for the enactment of bias crime laws). The RAM centers on the animus in the perpetrators motivation for committing the crime.

**Impact**

The impact of Bias crimes occur on two main levels: (i) the impact on the specific victim of the crime and (ii) the broader impact of bias crimes on the "target" group, that is, the racial group of which the victim is a member, and on the general community.

In part II Lawrence argues that BCs ought to be punished more severely, beginning from the role of proportionality in criminal punishment. This is important for punishment theories of both retributivists and consequentialists. (P 7)

To determine relative punishment, the seriousness of the crime must be measured. Where the level of intentionality is the same (both intentional assault and intentional bias-motivated assault) the relative seriousness of the crimes is best measured by the harm caused.

Part III considers aspects of bias crimes that are relevant in the punishment of an individual offender.
"Whereas the harm caused by bias crimes generally justifies the enhanced punishment of these crimes, the resulting harm to a particular victim does not, in and of itself, warrant the enhanced punishment of the perpetrator. Bias motivation of the perpetrator, and not necessarily the resulting harm to the victim, is the critical factor in determining an individual’s guilt for a bias crime”.

This claim is central to the argument made.

Lawrence argues that the DSM is insufficient as a theory of BC and fails to capture its essence (this opens the free speech issues, but L thinks it is okay specifically to punish bias motivated crimes.) Selection ought to play the role of proof for animus, and not the greater role of element for guilt.

I. How Bias Crimes are Distinct from Parallel Crimes

A. The mental state of the bias crime offender: the "Discriminatory Selection Model” and the ”Racial Animus Model” of Bias Crimes

Lawrence argues that the selection model was developed in reply to the legal conflict between bias crime statutes otherwise understood and freedom of expression. “Because all of the (parallel) crimes are already punishable, all that remains is an additional punishment for the defendant’s motive in selection the victim. The punishment of the defendant’s bigoted motive by the hate crimes statute directly implicates and encroaches upon First Amendment rights.” (Quoted from Mitchell).

(“fighting words” and other categories of expression (defamation, obscenity) are not entitled to full first amendment protection.)

The DSM was “Designed to defend the bias crime statute from the claim that it punished “motivation”. (P 16) Lawrence points out that while this model respects constitutionality, it fails to explain the nature of the discriminatory selection model to the court. (??)

In contrast, the racial aggravation model targets the racist motivation of the offender. This is the model most typically adopted by bias crime scholars and law enforcement agencies.

"The understanding of prejudice, as reflected in the racial animus model of bias crimes, requires that the offender have committed the crime with some measure of hostility toward the victim’s racial group and/or toward the victim because he is part of that group.” (P 19)
Regulations usually provide a set of "bias indicators" - some of these are consistent with discriminatory selection model of bias crimes, others are equally consistent with either model. For the FBI, the DSM is only relevant for inference of animus.

In many states, it’s unclear which model governs. A common formulation is crimes committed “because of” the victims race (etc.), a formulation that’s consistent with either model.

"The "because of" or "by reason of" formulation has been adopted in some form by most states with bias crime laws.” (P 22) It requires only the mens rea for parallel crime and that it be committed "because of” the victims race. Some states add "maliciousness", which does point to motivation.

B. The outward Manifestations of Bias Crimes: the offender’s conduct and the Effect of Bias Crime (p 30)

1. The general nature of the bias crime and its impact on the victim

Looking at sociological and criminological research (admitting that the data is rather limited) - so far, purely descriptive. Bias crimes are far more likely to be violent than are other crimes. On two levels: More likely to be an assault, and more likely to involve physical injury to the victim. (Comment: But what, then, is understood by "parallel" crime?) Perpetrators are more likely to be strangers to the victims, and focus on the victim’s race rather than his/her individual identity. These crimes are often committed by groups of perpetrators

There is also a particular emotional and psychological impact on the victim - due to the fact that they are not attacked for random, impersonal reasons, and it’s hard to minimize risk, because we are unable to change these characteristics. (Comment: this also bares on the “visibility” criteria for inclusion)

"Bias crime give rise to heightened sense of vulnerability beyond that normally found in crime victims”. (P 31) This compares closely with rape victims, where the physical harm is less significant than the accompanying emotional sense of violation. Psychological symptoms like depression or withdrawal, anxiety, feelings of helplessness and isolation is common. This trauma exists for white victims too. But “the very nature of the bias-motivation when directed against minority victims triggers the history and social context of prejudice and prejudicial violence against the victim and his group".
Stigmatization bring about humiliation, isolation and self-hatred. Hypersensitivity in anticipation of contact with other members of society whom he sees as "normal".

2. The impact of bias crimes beyond the immediate victim

"Members of the target community of a bias crime perceive that crime as if it were an attack on themselves directly and individually" (p 34) Bias Crimes may spread fear and intimidation to those who share only racial characteristics with the victims. Greater harm is done to society. A more generalized crime does not create the same sense of personalized threat. There is also the added risk of retaliation.

"On the most mundane level, but by no means the least damaging level, the isolation effects discussed above have a cumulative effect throughout a community".

Hate/bias crimes also "violates society’s shared value of equality among its citizens and racial and religious harmony in a heterogeneous society". (P 36) We could imagine a society in which racial motivation would implicate no greater value than the motivation of dislike. “But that is not our society with its legal and social history. Bias crimes implicate a social history of prejudice, discrimination, and even oppression. As such, they cause a greater harm than parallel crimes to the immediate victim of the crime, the target community of the crime, and to the general society.” P 37)

II. The Enhanced Punishment of Bias Crime

There are two critical requirements for punishment

(I) Only the guilty should be punished

(ii) The punishment of the guilty should be proportionate to the crime committed.

There should be some level of fit between seriousness of crime and harshness of the penalty.

Lawrences conclusion is that the harmful consequences particular to bias crimes warrant their enhanced punishment (we shall see below if this is the only factor, though).

A the proportionality between the Seriousness of the Crime and the Harshness of the Criminal Punishment

Retributivists, utilitarians and modern eclectic punishment theories all embrace the proportionality requirement.

"Punishment to the retributivist, is deserved by the offender because he has violated those norms of society imbedded in the criminal law” It is not justified by
social utility. There are different ideas about "desert". The simplest form of retribution theory is one of vengeance: the criminal has harmed society and therefore deserves to be harmed by society. One theory, the Hegelian view, grounds the punishment of the offender in his/her "right to be punished".

Lawrence quotes Jeffrey Murphy on retributive theory: "speaking very generally, (retributivism) is a theory that seeks to justify punishment not in terms of social utility, but in terms of this cluster of moral concepts: rights, desert, merit, moral responsibility, justice, and respect for moral autonomy"

The other strand talks about the proverbial "debt" owed to society as a result of criminal activity. Kant makes a classic statement of this nature in "the metaphysical elements of justice". This "debt" view is often based on the understanding the the criminal enjoys the benefits of being in a society, and thus is expected to abide by its rules.

There is common ground concerning the level of appropriate punishment - to be morally justified, it must be proportional. (It need not be "identical" to the crime - lex tallionis). The punishment should just hold the same place in the order of punishment, as the crime is in the order of crimes. It is usually geared to the relative harm done to the victim and caused by the offender.

"Proportionality of crime and punishment is not the unique province of punishment theorists. Most utilitarians also embrace some concept of proportionality in their justification for criminal punishment. In the simplest utilitarian model, punishment for a category of crimes must be set at a level that is sufficient to deter the commission of those crimes. " (P 41)

This concept, however, is wholly extrinsic to the nature of the crime committed, and turns on the temptation of future criminal activity. The problem facing utilitarian theories is that fixing punishment in this way could lead to shockingly disproportionate penalties. Such results leads utilitarian to develop a concept of proportionality. "Like retributivists, they sought to ground proportionality in the gravity of the crime but they sought to do so without reliance upon retributive argument."

Alfred Ewing, for example, argued that ideas of "proportion between guilt and penalty are too deeply rooted in out ethical thought to be dismissed lightly, however hard they may be to rationalize". He locates the reason in the educative aspect of criminal punishment. This is traditional "deterrence" theory. (Ewing - "the morality of punishment" (1929)) Unlike other such theorists, Ewing required an account of the deeply held intuitive notion of desert, and of justice as good in itself. (P 42)
The total utilitarian benefit achieved through punishment was not restricted to the specific deterrence of the offender himself, or even to the general deterrence of potential wrongdoers, but also embraced the general moral education of society”. (P 42)

And this educative function can only be properly performed if the guilty is punished.

"The moral object of a punishment as such is to make people think of a certain kind of act as very bad, but, if it were inflicted otherwise than for a bad act, it would either produce no affect of this sort at all or cause people to think an act bad which was not really bad, and this is why we must first of all ask - is a punishment just?” (Ewing, 1929, p104)

For education to be precise, it’s not just that punishment be meted out, but that it be proportional. This is in order to teach the relative seriousness of various forms of impermissible conduct. The criminal law should "compare the degrees of badness presupposed on the average by different offenses, and, having done that, we can lay down the principle that a lesser offense should not be punished so severely as a greater one”.

Lawrence thinks that Ewing’s attempt (to establish desert and proportionality without reference to retribution) was not entirely successful. He offers the standard criticism against pure utilitarian theory- which seems to allow for punishing the innocent - and undermine the usual replies (confusing punishment and publicity).

Mixed theories (p 44)

Mixed theories draws on aspects of both utilitarian and retributivist thought. The proportionality of punishment and guilt can then be embraced not as a principle that serves to justify punishment in its own right, but as a limiting principle of a justification for the imposition of criminal punishment. Hart, for instance distinguishes between the “General Justifying Aim” for punishment and the limiting principles governing the "distribution of punishment”. This allows a significant role for proportionality. “Lengthy sentences for minor crimes might be effective to deter the commission of such crimes but, to Hart, it is “wrong to employ them”. It is wrong not because of the retributive reason that there is a "penalty ‘naturally’ fitted to (the crime’s) degree of iniquity” and not because of the traditional utilitarian reason that the imposition of such a sentence would work a greater cost to the offender than benefit to the society” Rather “The guiding principle is that of a proportion within a system of penalties between those imposed for different offenses whether these have a distinct place in a commonsense scale of gravity”.

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The common sense scale is a central aspect of Hart’s synthesis of utilitarian calculus and retributive judgment. The scale derives its parameters from “very broad judgments both of relative moral iniquity and harmfulness of different types of offense. Punishment must conform to such a scale, or common morality may be confused and the law held in contempt.”

B Evaluating the Seriousness of Crimes: Considering Culpability and Measuring Harms (p 46)

Two elements of a crime describes its seriousness: Culpability of the offender and Harm caused to the society. Murder is a more serious crime than intentional assault because of the harm caused. The offender acts willfully in both, but in the first the victim is dead. Murder is worse than accidental killing due to culpability.

“It is not an overstatement to say the the entire thrust of the study and articulation of modern criminal law has been toward a focus on the state of mind or culpability of the accused.” (P 46) Result is still important, but punishment has been critically linked to the actor’s mental state. Culpability is necessary at some level for guilt at all; the absence of culpability negates possibility of guilt. (See for instance Kenneth Simons Rethinking Mental States).

There are finer distinctions - general organizing mechanism within the model penal code levels of punishment - for most crimes, purposeful or knowing conduct warrants a more severe penalty than reckless conduct, which is worse than negligent criminal behavior. Doctrines relating to excuse generally, and of provocation or diminished capacity in particular, are premised upon the relationship between the offenders culpability and the seriousness of his crime.

“In contrast to this doctrinally and theoretically well-developed understanding of the relationship between culpability and the level of punishment, the role of harm in assessing this relationship has been largely unexplored.” (P 48)

Harm counts, even when two would be killers behave in precisely the same fashion, and one fails due to extrinsic factors. This distinction exists and has always been recognized. The same thing holds with risky behavior that does, or does not, result in a harmful ”accident”.

”Homicide is emblematic of the limitations of criminal law doctrine as a source for informing our understanding of the role played by harm in measuring the seriousness of a crime. It tells nothing of significance about the role of harm in other crimes. We assume that conduct is criminalized by a legislature which has taken the results of this
conduct into account. Criminal law doctrine itself has little to tell us in this regard.” We must look elsewhere.

Two initial propositions in evaluation of relative harms:

1) **The kind of harms measured cannot be restricted to the individualized reaction of particular victims. There must be a large aspect of aggregation in the weighing process.**

2) **Relative harms caused need not be universal and will often be contextual to a particular society**

The calculus of harms may helpfully be visualized either *ex ante* or *ex post*. Ex ante analysis - ranks harm resulting from crimes in terms of the relative risk preferences of a rational person. Ranking crimes by risk. With several necessary qualifications -

- The aggregation of harm assessments of all rational actors in a society renders it impossible to create a strict ranking of all harms in a numerical order. Just a series of groupings of harm.

- Difficulty in comparing unlike harms

Hirsch and Jareborg suggests measuring harm through reference to a “living standard analysis” (Amartya Sen - economic and non-economic factors important for well-being). Draws on what it means to live a good life. Reckless driving and aggravated assault might produce the same physical injury to a victim but the assault will likely offend the victim psychologically whereas the car accident will not. Therefore the assault is worse.

"The living standard measure of harm is necessarily contextual. Properly understood, this contextuality is a virtue and not a short-coming”. Living standard analysis is contingent upon the values held by a society. “The identical conduct may cause far greater harm in one culture than in another as a function of the values held by those cultures”. (P 53) This makes inter-cultural comparisons of harm more difficult.

Is it too vague? Does it open up for unguided discretion and unprincipled intuition? (Not a precise formula, at any rate). At least we have consistent vocabulary for discussing harm, and a set of principles limitations on that discussion. (Reject being precisely wrong in favor of being vaguely right).

Two key variables in measuring harms using the living standard analysis - hierarchy or spectrum of standards, so that we might consider the extent that a
particular crime has injured the victim’s overall well-being. From the life and human capacity function at one end to minor discomfort. (Only some of these are relevant for the criminal law. See Feinberg “offense to others”)

Second variable - various kinds of interests that may be violated by a crime. From physical safety and protection of material possessions. Recognition of personal dignity interests and individual autonomy.

Harm caused by crime in terms of injury and to other kinds of interest. ”Harm, along with culpability, lies at the heart of measuring the seriousness of a crime.” The above discussion will now be brought to bear on the racially motivated violence question.

C. The Relative Seriousness of Bias Crimes

The seriousness of a crime is a function of the offender’s culpability and the harm caused. So the relative seriousness of bias crimes will also turn on these factors. (Comment: Lawrence argues elsewhere that the basis for the distinction between parallel crimes and civil right crimes generally is the mental state of the actor). Every bias crime contains within it a ”parallel” crime against person or property. In the case of a bias-motivated assault, for example, the parallel crime of assault exists along side the bias crime. Perhaps it is better to conceive of the parallel crime as existing “within” the civil rights crime. ” (P 57)

Bias Crimes are ”two-tiered” crimes, comprised of a parallel crime with the addition of bias motivation. The comparison of culpability for parallel crimes and bias crimes will thus weigh the single tier mens rea of the parallel crime with the two tier mens rea of the bias crime. (The requisite mens rea for the parallel crime will generally be recklessness, knowledge or purpose). ”Whatever culpability distinction does exist between parallel crimes and bias crimes resides at the second-tier mens rea of the latter.”

”To establish a bias crime, the prosecution must prove, along with the first-tier mens rea that is applicable to the parallel crime, that the accused was motivated by bias in the commission of the parallel crime.” (P 58) (This holds on either racial animus model or a discriminatory selection model).

”Under a racial animus model, the offender must have purposefully acted in furtherance of his hostility toward the target group. Under a discriminatory selection model, the offender must have purposefully selected the victim on the basis of his perceived membership in the target group. Under either model, nothing short of this
mens rea of purpose will constitute the requisite culpability for the second tier of a bias crime. Unless the perpetrator was motivated to cause harm to another because of the victim’s race, the crime is clearly not a bias crime” (p 59)

Culpability associated with the commission of parallel crimes and bias crimes is thus identical as to what the offender did and differs only in respect to why the offender did so. (Comment: Here one may ask what counts as ”the same action”. Note to that ”purposefully acting in furtherance of his hostility” does rather sound like specific intention, rather than motive.)

Whether this difference in culpability is relevant to crime seriousness depends on the reason that the consideration of culpability is relevant here at all.

In comparison: why is intentional murder more punished than negligent killing?

To the consequentialist, a murder is worse because it is more likely to cause death. If this is why culpability counts, the culpability in bias crime make them more severe only if such offenders are more likely to cause future harm than others. (Comment: And this sounds likely if HC hurts more and, indeed, if animus is a disposition to do harm to the target group) Lawrence, however, finds no evidence in support of this.

An alternative is that intentional murder is more blameworthy than accidental or reckless killing. If culpability is relevant to crime seriousness because of blameworthiness, the argument for bias crime being worse is compelling. ”The motivation of the bias crime offender violates the equality principle, one of the most deeply held tenets in our legal system and our culture.” (P 60)

”Culpability analysis, therefore, will advance an argument for the relatively greater seriousness of bias crimes only to those who accept a non-consequentialist justification for punishment” (p 60) (Comment: I’m not so sure this is true. Unlike retributivists, utilitarian theorists do not look to a non-consequential concept of blameworthiness to measure the seriousness of an offense).

On a harm based analysis - bias crimes are more serious regardless of the theory of punishment utilized.

Using the model above - would a rational person risk a parallel crime before he would risk a bias crime? Take the case of assault. Three “normal” sets of circumstances 1) random selection of victim 2) victim selected for reason that has nothing to do with his identity (such as carrying money for a mugging) 3) victim selected for reason relating to personal animosity between them.
In the first two cases - the victim will have a sense of being unfortunate, possibly heightened vulnerability. In the third - it causes focused fear or anger directed at the perpetrator. (Lawrence note 175 Domestic Violence has many characteristics in common with bias crime - culpability of perpetrator and impact on the victim. He points out that this comparison is worth while, but beyond his scope). Unlike the parallel assault then, a bias motivated assault is directed at the victim because of some immutable characteristic, actual or perceived.

"As unpleasant as a parallel assault is, the rational person would still risk being victimized in that manner before he would risk the unique humiliation of a bias-motivated assault." (P 62) (comment: This seems not quite straightforward.)

This means turning from ex ante oriented relative crime risk analysis to ex post-oriented living standard analysis - injury to interests such as physical safety, material possessions, personal dignity and autonomy.

Similar injuries to the physical and material - but the injury to autonomy (sense of control over life) and personal dignity will be worse.

"This is clear from the far greater occurrence of depression, withdrawal, anxiety and feelings of helplessness and isolation among bias crime victims than is ordinarily experienced by assault victims” (p 63) (Compareble, again, with domestic violence). (References in note 177)

The impact goes beyond the individual victim. Bias crimes cause greater societal injury. They spread fear and intimidation to those who share only racial characteristics with the victims. Other members of group will suffer living standard loss in terms of threat to dignity, autonomy and, possibly, physical safety.

Lawrence quotes Packer writing that "some offenses are to be taken more seriously than others and the severity of the available punishment should be proportioned to the seriousness with which the offense is viewed." This is why bias crimes are more serious than most parallel crimes, and warrant enhanced criminal punishment.

III Attribution of Guilt for Bias Crimes

"Whereas the seriousness of bias crimes generally justifies the enhanced punishment of these crimes collectively, the resulting harm to a particular victim does not, in and of itself, warrant the enhanced punishment of the perpetrator. Bias motivation of the perpetrator, and not necessarily the resulting harm to the victim, is the critical factor in determining an individual's guilt for a bias crime. ” (P 65)

This, of course, is a very important statement.
He considers the two models for bias crime, and favors the racial animus model for warranting the enhanced punishment that attaches to the commission of a bias crime. Discriminatory selection may often provide important evidence of racial animus, however.

A. The crucial role of the offender’s mental state

The result does not tell much of guilt or innocence of an actor. The most compelling basis for individual guilt of a bias crime lies in the mental state of the actor. There is a certain trend - the appropriateness of punishment is critically linked to the actor’s mental state. If the focus turns to results, then punishment would be triggered by events and circumstances beyond human control. “The occurrence of harmful results is ultimately fortuitous and therefore outside the realm of that which provides a justifiable indication of the actor’s blameworthiness.” (See Williams ”moral Luck”)

Relative punishment appropriate for an accidental killing and an intentional assault. The results of the former outweighs the latter, but every jurisdiction punishes the intentional assault perpetrator, and none punishes the accidental killer.

Identical results do not necessarily justify identical blame. So then we cannot have just a ”result of criminal conduct” theory of punishment. It is possible to argue that the harm to others is less by accidental as opposed to intentional assault - but this argument is based on a fallacy - the reaction of the victims family may not bear any relation to what actually happened. They may not believe the ”accident”. (Manslaughter does not become murder because the family believes that the perpetrator acted intentionally) Thus, it’s better understood in terms of culpability.

”A result-oriented focus is particularly inappropriate for determining guilt in the context of bias crime” (p 67)

Lawrence thinks that an inter-racial assault should not be punished based on the counterfactual perception of the victim or his community as to the motivation of the perpetrator. (Comment: But perhaps reported on this basis? See for instance the perception oriented criteria in British legislation. This is not uncommon and it has some justification). The focus on culpability (the bias motivation) present us with three problem cases -

The Clever Bias Criminal, ”The Unconscious Racist and the ”Unknowingly Offensive Actor”

The Clever Bias Criminal articulates a pretextural non-bias motivation for an assault that was in fact motivated by bias
The Unconscious Racist commits an interracial assault that is unconsciously motivated by bias. Perhaps the victim improperly strayed into his neighborhood, and that he would have attacked regardless of ethnicity to defend his “turf”. He may consciously believe this assertion.

The Unknowingly Offensive Actor seeks to shock or offend community generally, but does so in a manner threatening to a certain group. Does not intend this selectiveness.

1) Basically poses an evidentiary problem.

But suppose the Clever Bias Criminal articulates the ”non-racial motivation” not to the jury, but to the victim and his community - who remains unaware of the bias motivation. It could be argued that he does then not cause the objective harms associated with bias crimes. “This requirement of actual harm for guilt, however, is misconceived”. (Comment: But actually, in this case, the intention is something other. If the intention to hurt the community was the aggravating factor in bias crime then the ”clever” racist would commit a lesser crime.)

”As a general matter of criminal law, actual harm has never been a *sine qua non* for guilt and there is no reason that bias crimes should be an exception to thus rule” (p 69)

Take the unsuccessful assassin: guilt either grounded in future dangerousness, or in moral blameworthiness for the attempt. "Similarly, it is irrelevant to the guilt of the Clever Bias Criminal that he did not cause the harms caused by completed bias crimes. He is guilty of an attempted bias crime.”

(Comment: This is not very convincing. The analogy does not hold - not causing more harm seems to be part of the intention of this ”clever” criminal. )

The Unconscious Racist - this case is far more complex. (See (references) “unconscious racism and the criminal law” and ”Bias crimes: Unconscious racism in the prosecution of ”Racially Motivated Violence”.) Often, the conscious motive is ”someone being where they do not belong”. So called ”Turf motivation”. Suppose the jury was persuaded that 1) the defendant consciously motivated by a desire to protect neighborhood 2) there is an Unconscious motivation to target african-americans 3) the defendant is honestly unaware of their unconscious motivation.

Guilty of ”unconscious” bias crime? I.e. ”*Is guilt of a bias crime sufficiently established by a mens rea of unconscious bias motivation and an actus reus of conduct that in fact causes the resulting harm of a bias crime, that is, the victim, the
victim’s community and perhaps even large segments of the general community perceive the conduct as having been racially motivated?" (p 71)

The answer must be "no". In general, punishment based upon unconscious motives runs afoul of the principle of voluntariness that underpins the criminal law: a person may only be punished for that which he did of his own volition” (see Moore - the ”principle of consciousness” - in order to ascribe fairly responsibility to a person for causing a harm, he must have consciously acted intentionally, and to ascribe fairly responsibility to a person for attempting to cause a harm, he must have acted with that harm as his conscious reason”.

He may be punished for the assault, though. But ”We cannot say that he consciously acts intentionally to attack his victim for racial reasons nor is his conscious reason for doing so to inflict the particular harms associated with a bias crime”. (P 72)

Is this criminal comparable to a sleepwalker, not criminally liable for acts committed while in that condition? Such are not considered as his ”acts” at all! (Comment: I’m not sure this is a good analogy either - surely there is more to say here, about our responsibility to know about ourselves. Why doesn’t he realize the bias?)

Of course - there are evidentiary problems here as well. The unconscious is not recognized as an element of a crime nor an aspect of a defense. No need to rely on theories of unconscious racism in order to prosecute bias crimes effectively - in the Bensonhurst case - the motive of ”outsider” can be connected to identifying ”outsider” with ”black persons”, for the defendant. Then the bias motivation would be proved.

Unknowingly racist

Intends to cause harm, but not the kind associated with bias crime. So, it’s not a bias crime, then. Even if we can understand the criminal as either unlucky or negligent - the one that should have known that painting a swastika would have those effects. But negligence is not enough in this context.

B. Analyzing the ”Discriminatory Selection Model” and the ”Racial Animus Model” of Bias Crimes

The models differs as to the role racial animus plays in defining the elements of the crime.
"Any case that would meet the requirements of the racial animus model would necessarily satisfy those of the discriminatory selections model as well because a crime motivated by racial animus for the victim’s ethnic group will necessarily be one in which the victim was discriminatorily selected on this basis. The reverse is not true. Cases of discriminatory selection need not be based upon racial animus. " (P 76) (Comment: This is actually not true, as the victim may be chosen because of his/her importance/interest for the group in question).

Lawrence considers two hypothetical cases -

1) The purse snatcher - preys on women for instrumental reasons (easier target, he believes) No animus.

2) The violent show-off - selecting victim to impress friends, but indifferent towards what group that is.

Are these bias crimes? As a matter of positive law - both are, according to the discriminatory selection model, (Wisconsin) and none of them are, according to the racial animus model (NJ).

The Purse Snatcher acts with no animus. From either a retributive or utilitarian perspective, the Purse Snatcher should not be punished for a bias crime. Not on the same moral plane as one who targets women out of a violent expression of misogyny. Even if the result is the same, the culpability is not.

"For a retributivist, the difference in culpability between that of the Purse Snatcher and the violent misogynist translates into similar difference in blame: the Purse Snatcher is less blameworthy than the violent misogynist and deserves a lesser punishment.” (P 77). A similar claim from a consequentialist point of view. Bias crime need greater deterrence, thus warrants greater punishment.

What’s special about 2) is that the agent may actually be aware of the greater harm caused to a specific group (even if that is not why he does it).

2) Is not a bias crime - and the key to understanding why this is so lies in first understanding why the question is not as difficult as it first appears. Discriminatory selection is powerful evidence of racial animus. But racial animus is what’s essential here. But is it possible that he acts without animus? Beneath the ”impress friends” strategy is knowledge that the friends bear such animus, and his willingness to proceed with the crime under these circumstances - this may qualify the act for bias crime status.
"The evidentiary role of victim selection ought not be taken as general license to proceed to base bias crime cases on discriminatory selection alone in every instance. Where we know that discriminatory selection exists without animus, then the selection ought not be used as a surrogate for racial animus, and should not be punished." (P 80-81)

"In the punishment of bias crimes it is vital to understand precisely what we are punishing: purposeful conscious criminal conduct that is grounded in the racial animus of the perpetrator"

Conclusion

"Laws that identify racially-motivated violence for enhanced punishment are only one means of answering Allport’s call but they do constitute a critical element in the defense of the “right to be the same or different”. Racially-motivated violence is different from others (sic) forms of violence. When bias crimes are compared with parallel crimes something more may be said: bias crimes are worse. They are worse in a manner that is relevant to setting levels of criminal punishment. The unique harm caused by bias crimes not only justifies their enhanced punishment, it compels it." (P 82)

(Elements of proof (selection) should not be confused with the gravamen of the crime (racial animus).)
Summary and comment
The paper argues that carefully drafted hate crime laws punish conduct that is objectively more dangerous to victims and society. It’s thus consistent with the criminal law’s propensity to enhance penalties for seemingly similar conduct based on the risk, severity, and context of a particular crime.

Levin starts by noticing the popularity of introducing so-called hate crime laws in the US, but that the enforcement by police and prosecutors has varied significantly. Authorities immediately accepted these laws, which is of note but not the sole measure of their legitimacy.

"Substantively, certain things must be established to justify the enactment and implementation of hate crime laws." (P 6)

Proponents must offer justification and establish that these offenses are "coextensive with the goals and processes of the criminal justice system". Hate crimes should be demonstrated to be "distinct and more severe than other offenses to warrant differential punishment”.

Definitions and Constitutionality
What exactly is a hate crime? The label have been applied to a very wide set of phenomena. The definition should not be vague and/or overextended.

"Due process requires that a statutes give reasonable clarity about exactly what conduct is proscribed, and the First Amendment prevents criminal punishment for the expression of disfavored viewpoints. For these reasons, the U.S Supreme Court has played a critical role in refining statutory definitions by overturning some types of hate crime laws while affirming others” (p 8)

In general, hate crime refers to "those criminal acts committed because of someone’s actual or perceived membership in a particular group”. It covers a broad category of offenses. Cross burnings, desecration, antimasking laws and, for the purposes of this article, penalty enhancements and stand alone civil rights or intimidation statutes.

Hate speech laws, criminalizing bigoted expressions or symbolies were popular during the first half of the 20th century. In the famous Beaubarnais v. Illinois (1952) - a
law that punished group libel was affirmed by the US Supreme Court. Never technically overturned, subsequent SC decisions have rejected the foundational arguments. (Esp. R.A.V v St. Paul (1992)). Consistent decisions to avoid punishing anything below the level of a threat. "The offensiveness of an idea is an impermissible basis for the government to punish the expression.". (P 9)

And further: Four of the nine justices in the case above argued that it’s constitutional to punish expression whose severity goes beyond mere offence. (Threats and "fighting words"). John Paul Stevens wrote a dissenting opinion

Conduct that creates special risks or harms may be prohibited by special rules. Lighting a fire near an ammunition dump or gasoline storage tank is especially dangerous, such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot…such conduct may be punished more severely than threats against someone based on, say, his support of a particular athletic team. (R.A.V. V. St. Paul, 1992)

The others (following Antonin Scalia) believed that even that "even traditionally unprotected areas of speech must be punished without taking into account the content of the idea expressed". Punishing cross burnings, but not something targeting the mentally ill, say, would violate that principle.

The R.A.V. (1992) decision invalidated those hate crime laws where the criminality hinged solely on the idea expressed.

The SC’s role in "sculpting the definition of hate crime laws" was even more evident in 1993 Wisconsin v. Mitchell. The constitutionality of a penalty enhancement law.

"At issue, the enhancement law punished an offender’s intentional selection of a victim or property based on the status characteristics of another person." (P 10)

In W v M, the "intentional selection" model was applied. The Wisconsin Supreme Court overturned the penalty enhancement, but the Supreme Court upheld it for hate crimes. Three basic justifications were given:

1. Although the government may not punish abstract beliefs, it can punish a vast array of depraved motives. 2. Penalty enhancement laws does not prevent people from expressing their views. 3. Hate crimes are "thought to be more likely
to provoke retaliatory crimes, inflict distinct emotional harm on their victims, and incite community unrest”. (*Mitchell*, 1993)

Controversy surrounded the decision. Some legal scholars contended that punishing discriminatory crimes more was a "subtly disguised legalistic end run to punish unpopular ideas.” (See for instance Jacobs and Potter (1998) *see separate commentary*).

The "intentional-selection” wording was affirmed by the SC, "and it became the preferred lexicon for new hate crime legislation (see e.g., Hate Crime Sentencing Enhancement Act of 1994). Civil rights statutes (here described as “stand alone laws” too has been affirmed.

Yet, important definitional issues remained unresolved. What groups to cover? How much of a role must the victim’s statues characteristic play in the offense? In *In re M.S* the California Supreme Court ruled that because of meant "the prohibited bias must be a substantial factor in the commission of the crime”.

**COMMENT** This, of course, is far from a complete list of the questions that remains to answer. For instance: what sort of attitude is involved? What counts as evidence of bias/hate/prejudice/hostility? Does it matter how the offender came to have the attitude in question?

**Consistency with traditional goals of criminal justice**

"Are these statutes and related policies beneficial and consistent with the aims of criminal law?” (p 12)

Levin believes that they hold up to scrutiny and analysis.

"The justice system adjust culpability for conduct according to the level of intentionality, such as purposefulness, recklessness, or negligence. However, as the *Mitchell* decision (1993) found, even within the same level of intentionality the law frequently makes distinction based on the reason why the crime was committed. Motive often is something more than a tangential consideration, or even a factor to be considered at sentencing - it is frequently made a material element of a particular offense. For example, burglary punishes seemingly similar conduct more severely based on an offender’s motive. If a person enters a building to commit another crime while inside, it is burglary. If not, it is criminal trespass - a less serious offense.” (P 12)
COMMENT: The above section clearly conflate motive with specific intent. Burglary is defined solely in terms of what the offender is intending to do, not why he/she intends to do so. A parallel would be if there were different punishment prescribed for burglary because of greed compared to because of hunger. While the distinction is a fine one, it cannot go without comment in a close argument about the issues.

But enforces have traditionally relied on other factors beside bad motives in crafting punishment for seemingly similar conduct. "The situtional nexus, risk, and severity of seemingly similar criminal conduct is often used to make distinctions relating to punishment." Burglary, for instance, is punished more severely when entry is made at night. Similar with crimes committed by a person possessing a deadly weapon.

Even when there’s not a difference in severity (and level of punishment) it can be important to make statutory distinctions to encourage victim reporting, implement specific police responses, and deter specific types of conduct. (For instance: drunk driving as distinct from other types of reckless driving). Hate crimes, however, are believed to be more severe than similar crimes. Usually because the tend to inflict greater individual and societal harm. In Mitchell (1993) it was stated that "The State’s desire to redress these perceived harms provide an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offender’s beliefs or biases."

COMMENT: It’s notable here that no evidence is presented for this claim, only the belief of the judges in these cases.

Legal and Criminological Severity

The SC’s comments about the possible severity of hate crimes were hedged by words as thought and perceived. The severity is held to warrant special treatment. One way in which hate crimes are more severe relates to their involvement in discrimination. Discrimination is treating similarly situated people differently without a legal or sufficient basis. The Supreme Court: "Acts of invidious discrimination...cause unique evils that government has a compelling interest to prevent". (Roberts v United States Jaycees, 1984). The reasoning is that "if legislatures can punish discrimination in these areas, they may also punish criminals for discriminating in the commission of offenses".
In the *Mitchell* (1993) case, evidence was presented that hate crimes were also "criminologically more severe and risky to victims and society than nonhate crimes. Subsequent research has affirmed those findings. Studies have demonstrated that hate crimes in contrast to crimes in general are more likely to involve excessive violence, multiple offenders, serial attacks, greater psychological trauma to victims, a heightened risk of social disorder, and a greater expenditure of resources to resolve" (p 15)

COMMENT: It’s notable that while such evidence exists (most of it comes from Levins work with McDevitt, btw), these factors would not seem to provide a blanket justification of enhancement of hate crimes when these do NOT have these features. We punish the excessively violent, but why would we punish a "normally" violent crime because of type? The psychological impact model is much more convincing, and may in fact involve a measure of "risk”. To draw a parallel, it would then be "assault with a dangerous opinion”. It is also notable that Levin and McDevitt do not seem to control for these factors. Punishment enhancement may be warranted for crimes with multiple offenders, for instance, rather than for crimes that tend to be committed by multiple offenders.

The risk of repeat offenses can be taken as a consideration in favour of punishment enhancements, and as hate criminals has this tendency, there’s a route for justification there.

COMMENT: again, this seems to put the focus on contingent factors not ascribable to foreseeable risk of consequences. Isn’t more likely that people with these attitudes (or the flaw that result in such attitudes) are likely to re-offend?

While hate crimes are relatively rare, this is no reason to withhold punishment enhancements. Cf Presidential assassinations, terrorism etc. Besides, hc’s are underreported. (About 1/3 by Dunbar’s (1997) assessment)

COMMENT: in fact, what Levin does NOT site as a reason for PE is trend in criminality. If a type of crime is becoming more common (and Levin has described hate crime as an "epidemic" elsewhere), harsher punishments may be required.
"Another justification for treating hate crimes more severely is the grievous psychological trauma that these crimes have on victims" - and courts hold that effects of a crime on a specific victim are highly relevant considerations for a judge in determining an appropriate sentence.

COMMENT: but the latter is at the sentencing stage, and subject to sentencing guidelines, rather than statutes?

Research by the National Institute Against Prejudice & Violence (1989) - targets of bias attacks experience 21% more adverse psychological and physiological symptoms than those who faced similar conduct that was not bias related. Including fear, stress, depression, etc. (See Herek et al 1997)

COMMENT: ideally, Levin would have offered an account of this research. It’s important, for instance, to control for the other "typical" factors mentioned above.

"The effects of hate crimes reverberate beyond individual victims, causing palpable injury to the community at large." (P 17) Such "public injury" is a traditional justification for punishment. Levin write that the two most serious threats to the public involve heightening of tension along intergroup lines, and a heightened risk of civil disorder”. (P 18) Impact on trust and a change of behavior among those affected creates "a distinct harm to the public interest that the government has an interest in preventing".

The risk of civil disorder associated with hate crime is this: HC’s "may spur copycat crimes and a cycle of retaliatory violence by would-be vigilantes who retaliate along intergroup lines." (P 18)

COMMENT: There is a problem with this argument, and that is that it only applies to certain cases. Certain groups may be more likely to retaliate in the feared manner. Should only those crimes count as aggravated? That seems unfair to other targeted groups. And also unfair on the perpetrators of "low-risk" hate crimes, the additional punishment of whom remain unjustified, if this is accepted as the decisive reason.
"In addition to the criminological severity and threat to social order, hate crimes represent those unique crimes where there is almost universal condemnation of the offenses by the community on moral grounds. Crimes that are an affront to the vast majority of the populace and to the moral foundations of a society deserve to be punished more severely. Clearly, there is an intangible component to hate crime that makes them worse."

COMMENT: This is a slightly odd type of reasoning. Does it not conform to the critics idea that hate crime legislation punishes unpopular thoughts?

Weinstein writes that the Kristallnacht had an effect greater than the sum of the damages. Unlike vandalism in response to a football game, there’s a powerful in terrorem effect.

"It was the hate motivation and context that made the dragging murder of James Byrd (…) stand out as a national tragedy, rather than just a horrible local event". Levin appeals to the "message" crime -interpretation here. The crime sent a reminder to African Americans that they are at a special risk for lynching. "A civilized society must decry this aspect of illegal discriminatory conduct by singling it out through criminal laws.

COMMENT: If this is truly the justification, why spend so little time and text on it? There are questions that remains to be answered here. Is hate crime a specific intent crime with the intention to create this form of terror? Is it the mere risk? What does this do to the issue of protected groups?

CONCLUSION
Courts and legislatures have refined their definitions of hate crimes through out the years. We now know more of their negative effects. The new definitions "responds to a category of offenses that have been shown to be more serious than nonhate crimes.. The criminological severity and element of discrimination present in hate crimes establish a public policy basis for enhancing hate crime penalties." (P 19) The constitutionality has also been secured. "The criminological data establishes that hate crime laws properly punish uniquely damaging crimes, rather than a citizen's legal rights to thoughts and speech protected by the First Amendment". (P 19)
Levin ends with a **MODEL HATE CRIME STATUTE**, quoted here in full:

1. Anyone who intentionally selects a person or public or private property to be the target of a criminal act because of the actual or perceived race, color, religion, disability, sexual orientation, gender, or national origin or ancestry of another shall have the penalty for the underlying crime increased to the next higher offense level. (COMMENT: This is a discriminatory account, and as such subject to some controversies regarding whether this is fair, and whether it applies to the distribution of crime in this way. While it may be possible to answer these challenges, Levin doesn’t do so here)

2. This statute requires that a trier of fact separately establish that the requisite elements prescribed in the law exist beyond a reasonable doubt.

3. This statute shall not apply to any state offense where the race, color, religion, disability, sexual orientation, gender, or national origin or ancestry of a victim is an element of the offense. (COMMENT: so, presumably, discrimination cannot also be a hate crime?)

4. The offense by the defendant level shall be increased 2 (two) levels upon a showing of either (a) a prior conviction under this statute, or (b) the defendant acted in concert with another in the commission of the crime charged. (COMMENT: presumably, this is not unique to hate crimes?)

5. The Court shall have jurisdiction to order restitution or to enjoin the defendant from any future conduct that intimidates, threatens, coerces another from the exercise of any right secured by the constitution or laws of this state or the United States. Each violation of this order is punishable by one year imprisonment and a $5,000 (five thousand dollar) fine

6. Anyone injured by an act charged under this statute may also institute a civil action against the offending party(ies) for injunctive or other appropriate relief, including compensatory and punitive damages, as well as attorneys fees and costs.

**END COMMENT:** It’s notable that the only matter in this paper addressing the matter whether hate crimes are worse "by definition" is the discrimination account (1). All the other worse-making features are contingently, and only by tendency, connected to hate crimes. This must be held to be a weakness in the argument presented.
Summary:

Morsch argues that motive is distinct from traditional mens rea. Difficulties with the subjective nature of motive has the result that few convictions are reached. Morsch considers a number of amendments.

There are special statutes that increase criminal penalties for individuals who commit racial violence, and allow the victims of such violence to collect civil damages. The prosecution must prove that the accused assaulted, harassed, or intimidated another person by reason of the person’s race, religion or national origin. Prosecutors are required to demonstrate that the accused’s criminal conduct was motivated by racism. The burden of proof severely limits the number of charges brought and convictions obtained under these statutes. Some commentators propose relieving this burden, shifting "the burden of proof on the issue of motive to the accused through the use of an affirmative defense of no racial motivation where the accused is white and the victim is a minority". This, Morsch argues, would not be acceptable, as it violates due process and equal protection. It would offer little protection of victims, and may convict people not motivated by racism. The paper also addresses the distinction between racial motivation and unconscious racism.

State Hate Crimes Legislation

State and local prosecutions lacking, federal prosecutors had to be the ones to enforce civil rights statutes against hate criminals. This lessened the impact of local prejudices on the initiation of such actions and brought the full power of the national government to bear on the problem of hate-motivated violence. In the 1960s and 70s prosecution of hate crimes was performed under federal civil rights statutes. These were found to be unwieldy means of dealing with racial violence.

Oregon was the first state to enact hate crimes legislation in the “Hate Crimes Act” 1981. Prescribing higher penalties. Only a handful of successful prosecutions have been carried out since then (Comment: up to the the publication of this paper 1992)
The Problem of Motive

Prosecutors must prove a complex set of factors to secure a criminal conviction under existing hate crimes statutes. "A typical hate crimes act requires proof by the government of the accused’s mens rea or "guilty mind". Traditional mens rea elements consist of purpose, knowledge, recklessness, or criminal negligence. Hate crimes statutes also require proof that the accused attacked his or her victim "because of" or "by reason of" that person’s race, religion, or national origin."

This requirement undermines the efficacy of existing statutes, and discourages prosecutors from charging. It is notoriously difficult to "demonstrate by proof beyond a reasonable doubt that the accused acted out of racist motives. To a lesser extent, civil plaintiffs also encounter difficulty in proving the accused’s motives by a preponderence of the evidence in actions to recover civil damages from their victimizers".

Understanding motive

"Motive" has an ambiguous nature: "Courts and commentators often confuse motive with the distinct concept of intent, specific intent, purpose and reason." Motive, Morsch argues, can be distinguished from all of these.

(Comment: This, of course, is absolutely central for the argument that hate crime statutes import a novel and controversial notion into criminal law.)

Motive and intent

Intent probably offers the easiest means for distinguishing motive from other mens rea elements. Intent is defined as the purpose to use a particular means to achieve some definite result. Motive, in contrast, is the cause or moving power which impels action to achieve that result. One’s intent is the desire that a particular consequence follow from one’s action. One’s motive, however, explains why that consequence was desired”. (P 665)

Comment: This is an important distinction, which moves beyond the "what you are trying to do" and "why you’re trying to do it” distinction normally used. However: the "explanatory" power of motive (and of "why") is not entirely straightforward. The manner in which mental states cause actions is far from settled. Motives normally justifies actions, but may not always cause them.
Morsch points out that the law traditionally impose criminal liability on the individual’s intent (to rob a bank) but does not pass judgment about the “good” or “bad” motives behind that intent.

**Comment:** this is challenged by, for instance Kahan 2001 (see separate commentary) and Murphy (1992) (see separate commentary).

Morsch then moves on to distinguish **motive** from **specific intent**

Specific intent is defined as “a desire that a chosen consequence follow from the use of a particular means to affect some result”.

Many criminal offenses impose liability upon proof of a particular specific intent but (...) do not traditionally do so upon proof of the individual’s motive.” (P 666)

**Comment:** The distinction between intent and specific intent seems arbitrary (see Murphy 1992, separate commentary), or at least less rigid than commonly assumed. Can’t motives be re-described to goals, dispositions, future oriented mental states? Or is it merely that a “motive” has no further justification? And is that the line between what’s acceptable to judge people for, and what’s not? Then we are relying on the idea that we must not judge people (legally) because of their “conception of the good”.

**Motive and Purpose**

A purpose is defined as “an explicitly aimed-at, rational goal”. An individual consciously adopts a means to achieve a particular purpose. “The individual’s motive for adopting those means to achieve that purpose, however, is something different.” In the example, the purpose in breaking into the bank may be to steal to provide for a friend. But the **motive** is **friendship** or **beneficence**. Morsch argues that it’s common to mistake these two for each other.

**Comment:** It’s not clear whether purpose understood in this way is more than VERY specific intention. It also sounds like motives are, in fact, character traits. In the cases mentioned, they are virtues. (See Criticism in Hurd and Moore, and Hurd (separate commentaries. A defence for the character improving function of the law exist in Taslitz (separate commentary)).

**Motive and Reason**

Like motive, reason is defined as “the cause which impels action for a definite results.”. But motive is a **particular type of reason**, often the cause of untoward or
criminal conduct. Morsch admits there might not be a difference generally, but that it’s important to keep in mind in this context.

**Comment:** The example he gives is entirely unsatisfactory - confusing reasons for one thing with motives for the aim of those reasons and so on.

Morsch claims that motives can be distinguished from all of these other concepts. Motive is the cause of one’s actions, whether one adopts a means to achieve desired ends or consciously selects those ends. It seems then that motive is somehow explanatorily “prior” to the others.

Motive is determined by personality and psyche, and is inherently subjective.

**Comment:** Morsch does not make clear how this makes it distinct from reasons, intents and purposes. This is very important for the following section, in which motive is said to complicate the proof process.

**B. Motive and its complications for the proof process**

Motives are not public, but reside peculiarly within the individuals own knowledge. It’s therefore difficult to prove racist motive. When the accused invokes the Fifth amendment, the prosecutor must make his/her case on available circumstantial evidence.

1. **The accuracy and Consistency of Inferences About motive**

Inferences drawn from circumstantial evidence may be highly inaccurate given the inherent ambiguity of motive itself. How can we prove that the motive is racism, rather than, say, a paranoid fear of strangers? How can we find circumstantial evidence that demarcate between such interpretations?

In addition, multiple motives may impel an individual to action, and more particularly to criminal conduct, at any given time. What if the motive is actually predominantly another, such as cruelty? (This also opens up for the quite reasonable objection that cruelty is as bad a motive as racism is).

Existing hate crimes statutes incorrectly assume that prosecutors can distinguish the accused’s racist motive from his or her other possible motives. (P 668)

Further problems arise as to how to convince a jury of the “because of” clause. It’s also unclear what exact degree of racist motivation needed, if it needs be the “dominant” motive, or just be part of the motivation.
"Under traditional criminal offenses, a prosecutor needs to prove the requisite intent to commit the act but is not required to prove a particular motive behind the individual’s actions. Of course, this is not to say that motive plays no role in a criminal prosecution. Quite the contrary, proof of the individual’s motive assists in persuading the trier of fact that he or she in fact committed the alleged crime."

(footnote 59, p 668)

What is needed is a clarification of this "because of" - is the racial motivation the sole or principal cause of the accused’s action? What is the evidentiary standard? The standard usually involves proof beyond a reasonable doubt - a standard that deliberately works in favor of the defendant.

2. Limits on the Admissability of Evidence of Motive

Prior racist conduct as evidence? There are severe limitations to whether this should be allowed.

"First, the Federal Rules of Evidence explicitly prohibit the admission of character evidence to prove that the accused acted in conformity therewith during an alleged incident."

There is a well founded fear that a jury would convict based on prior bad acts. It’s admitted under certain constraints, when it speaks to motive. "The difference between these two forms of character evidence can be subtle. (…) Courts considers whether the prejudicial effect of such evidence outweighs its likely probative effect and the relative explanatory power of such evidence with regard to the accused’s conduct."

Courts tend to admit such evidence only where it is based on statements made at the time of alleged criminal activity which reasonably explain the defendants behavior. Membership in racist organizations or possession of racist literature may also provide such evidence. While probative of racist motive, its admission can impinge on First Amendment rights by punishing for unpopular beliefs about certain groups.

3. The Effects of the Motive Requirement

Only when the accused’s actions clearly suggest only one explanation; racial motivation, prosecutors will have a decent chance of securing a conviction. The requirement of proof deters from pressing hate crime charges. There is, Morsch claims, too great a risk of acquittal. Hate Crime statutes emphasis on motive complicates prosecutions because they introduce subjective factors into the proof process. The jury often relies on intuitions about motivations, which may encourage
arbitrary application of the statutes against disfavored groups, groups that these statutes were intended to protect from hate/bias incidents.

**Comment:** This section is very relevant, and the risk mentioned is substantial. The lack of convictions may very well depend on the difficulty to ascertain motive. But also, something that Morsch do not acknowledge, on reluctance to accept the constitutionality/justifiability of the statutes in question.

### IV Reforming Current Hate Crimes Statutes

“State legislatures intended the statutes to serve dual purposes: to send a strong message of support to minority groups traditionally victimized by racially-motivated violence and to deter the occurrence of such violence” (p 673) (quoted from Mason and Thompson)

The inefficacy of these statutes risks to encourage racist groups. Some commentators suggest that we should reform hate crimes statutes - to ease the prosecutors burden of proving the accused motive and have a presumption of racial motivation in cases of interracial violence. (P 673) This suggestion suffers from some fatal constitutional flaws. Morsch offers a more modest proposal: Reduce prosecutorial discretion to charge individuals with hate crimes, clarify the standard of causation required for proof of racist motive, and encourage civil damage actions.

**Shifting the burden of proof**

There is too great a risk involved in shifting the burden of proof, and it violates due process. It’s as difficult to prove that a crime is not committed out of racist motive, especially if we allow for the (quite plausibly widespread) occurrence of unconscious racism.

The law, however, should not hold individuals criminally liable for harboring attitudes that are inescapable to us all. Instead the law should deter the most overt manifestations of racism. The proposal to shift the burden of proof fails to distinguish between individuals whose actions are motivated by racism and those whose actions are motivated by other factors but influenced by unconscious racism. The proposed statute would inevitable lead to the conviction of persons who cannot disprove the presence of some racial motivation, but who should not be labelled as hate criminals. (P 676)

If shifting the burden of proof disfavors the defendant’s interest, so that failure to prove the affirmative defense subjects the defendant to the maximum penalty under
the offense” the state may have violated the reasonable doubt standard depending on the liability imposed under that penalty.” (P 679)

A further consideration is whether the penalty is proportional to facts proven by the prosecution. “The Eight Amendment protects a criminal defendant from punishment which is not proportional to his or her culpability”. (P 679). There should be some sort of rational correlation between facts proven by the prosecution and those presumed. In essence, the presumption would tell the jury that racism more often than not motivates individuals to attack members of another race, religion, or ethnicity.

”Under the proposed statutes, defendant who fail to prove lack of racial motivation would face increased penalties even though the state has affirmatively proved only the elements of these traditional crimes”. (P 680)

Of course, when it comes to combatting racial violence - interracial violence may impose significant harms regardless of its motivation and independently of racial animus.

Should we, for historical reasons, presume racial motivation only when the defendant is white (male)? This would discourage traditional prosecutorial bias against minorities. This would be a case of remedying past discrimination. But the supreme court has rejected the notion that forms of benign racial discrimination should be subject to intermediate scrutiny. And a better enforcement of existing statutes arguably would achieve these same objectives.

The proposal of a shift for white defendants fails, in large part, because its proponents do not adequately distinguish unconscious racism from racial animus. The failure to clarify the evidentiary standard intended by the requirement of proofs the the accused attacked his or her victim “because of” racial motivation allows any expressions of racial animus to go unprosecuted under current statutes. We need such a standard.

”A “sole” or “primary” causation standard for racial motivation would seriously limit the ability of prosecutors to secure hate crimes convictions because of the problems inherent in proving a single motive behind an individual’s conduct.” (P 686) “An ”appreciable” causation standard, on the other hand, would subject individuals whose conduct was influenced only by unconscious racism to conviction under existing hate crime statutes. Racism may play an appreciable role in much of the interaction between persons of different backgrounds, particularly when each is ignorant of the other’s background. To adopt an appreciable causation standard of
racial motivation, accordingly, would very likely subject many such persons to conviction, even though their racism was unconscious”.

This, of course, is highly problematic as we are not usually held legally responsible for matters of the unconscious. So a ”substantial” causation standard should distinguish racial animus from unconscious racism. If the defendant was substantially motivated by racism, this would lead to conviction. One may then introduce evidence for other motivating factors in defense. “For these reasons, states should amend existing hate crimes statutes to include a requirement that racism was a substantial cause of the defendant’s conduct.” (P 687)

Guidelines are clearly needed. Without them, subjective factors will determine judgments and decisions in court. The factors to consider in determining whether the defendant selected the victim for these reasons include any racial slurs used during the altercation, the past relations between the defendant and victim, and neighborhood racial or religious tensions. States should establish independent agencies to oversee prosecutorial decisions to charge persons with hate crimes.

In addition some mechanisms is needed to encourage victims to bring civil action against their persecutors - such a mechanism would make existing hate crimes statutes more effective.

Comment: One problem not mentioned is that the amendments proposed seem to make convictions even less likely.

Conclusion

Due to the inherently ephemeral nature of motive, this burden has proven extremely difficult for prosecutors to meet. Shifting burden would violate Due Process and Equal Protection Clauses and subject persons influenced by unconscious racism to unwarranted convictions.

"The solutions to the problems experienced by current hate crimes legislation lie in distinguishing racial animus and unconscious racism. First, states must adopt a clearer standard of proof of the defendant’s motivation. States should require prosecutors to prove that racism was the substantial motivating force behind the defendant’s conduct. Second, states must provide guidelines and oversight over prosecutorial decisions to charge individuals with hate crimes. These decisions may be influenced by the racism of prosecutors themselves unless checked by states."
Finally, states should establish agencies to encourage victims of hate-motivated violence to bring civil damage actions. Only when states adopt these measures will we begin to resolve the inherent problems of the motive requirement of existing hate crimes statutes.”

Comment: it should be clear that this is really not a solution to the problem stated. ”Clearer guidelines” would not solve the problem in principle, i.e. the difficulty to establish motive. State oversight may be advisable, but nothing would bar inherent racism to be reproduced at that level, especially if these statutes stands on loose grounds to begin with.
Comment: This short paper offers a commentary to one aspect of Susan Gellman’s "Sticks and stones can break your bones, but can words increase your sentence?" (91-92), and presents an argument for the relevance of motive, by noting that the distinction between motive and intent is not as strict as it’s often cracked up to be.

Murphy focus on on "narrow but very important objection" Gellman raises to hate crimes as aggravated versions of traditional crimes.

It has long been recognized as illegitimate for the criminal law to regard motives as material or defining elements of criminal offences. Hate crimes - which punish people more severely when the act by reasons of racial bias or hatred - are thereby making motives into material or defining elements. Therefore hate crimes are illegitimate.

Comment: Of course, he means that hate crime laws are (claimed to be) illegitimate. It’s notable here that motive is said to be illegitimate as material or defining elements of criminal offences. It may still be legitimate as a sentencing guideline (And that’s how it’s often formulated in other jurisdictions). The argument, it seems, does not start from what haters "deserve" but from what laws are allowed to cover.

Murphy offers a number of reasons why Gellman’s argument does not hold.

1) In anything but a purely semantic sense, it’s simply false that criminal law never takes account of motives as elements.

2) Even if true as a description of the law to date, that only shows that the criminal law have been mistaken, "and ought to be improved by allowing motives sometimes to count in the way that Gellman wants to rule out” (p 20)

3) In some instances, "the very concept of harm or injury cannot be understood independently of motives and other mental states" (Comment: Of the offender, that is. Which is required here, and less persuasive if read out, so this should actually be clarified.)
Why should the criminal law bother with mental states (of offenders) at all? At least two reasons: **Crime control** and **retribution**.

Criminal law has at least in part a **utilitarian** function - using deterrence and incapacitation to control crime. Mental states allow us to determine "the **dangerousness** of the offender".

In **retribution**, we are interested in learning how **blameworthy** the criminal is - how much punishment is **deserved**.

This is reflected in how mentally ill offenders are treated - while potentially dangerous, he/she may not deserve the same level of punishment as a sane offender would. Punishing mentally ill offenders may have deterrence value, but would be undeserved, thus unjust.

**Comment**: While Murphy does not spell it out, this is basically the point that the justification of law is utilitarian with responsibility of offender as an important constraint. This, of course, raises questions about desert as a constraint for the utilitarian value of **not** punishing deserving offenders as well. But this is not the place for that discussion.

If dangerousness and blameworthiness makes mental states considerable in criminal law "then it would seem arbitrary to limit those mental states merely to intentions and purposes and not include motives; for surely motives have a direct and important bearing on both (...)" (p 21). And in fact, the law does not ignore motive.

Gellman is mislead about this in two ways.

1) She thinks there’s a sharp distinction between intentions, reasons, purposes, and motives.

2) She is seduced by the (false) cliché that "motives are irrelevant to criminal liability”.

Ordinary language does not make sharp distinctions, and the law should not impose an artificial and thus misleading precision. We sometimes contrast motives with intentions, and sometimes use motive as a **species** of intention or purpose.

Murphy asks us to consider the specific intent crime "burglary".
Generally defined as the intentional entering of a dwelling after dark for the purpose of committing a felony therein. Does this final clause not mean exactly the same thing as "with the motive of committing a felony therein"? The absence of the word "motive" from criminal law is not because of any deep and important reasons. Gellman argues against criminalizing motives, but claims that it is consistent with approving specific intent crimes.

Would she be happy then with a hate crime statute that, using burglary as a model, made it a crime to assault another person with the purpose of subjecting that personal to racial humiliation?

If so, her opposition to the ADL model statute is purely semantic - "easily met with some modest redrafting. Murphy suspects she wouldn’t approve.

**Comment:** This is not that straight forward. Even if motive is often used in a vague way, there is a difference between what you are trying to do and why you are trying to do it. Not reduced to a further intention, but a value, say, or a desire or a disposition. Not all justifications/causes can be instrumental. Redrafting hate crimes as specific intent crimes would make a difference. Might be preferable (for the stated reasons), but might also rule out some crimes that today counts as hate crimes.

If motives are irrelevant, irrational "and even evil" results are produced: in euthanasia case, a humanitarian physician convicted of murder was not really treated as such by the appellate court, because of his motives. But because this was not acknowledged, the court tried to find other ways, and came up with an "act/omission" distinction ruling. (To see the artificiality of this move: if he had unplugged patients in order to collect life insurance etc, he would not have been excused).

**Comment:** This is a familiar argument. The hate crime critic can still argue that motives are not to be used as aggravating factors, but may be (and is) occasionally used as mitigating ones. This is not unfair to the offender. Fair treatment is only constrained by not punishing anyone more than they "deserve" in the classic, non-motive way.
Motives are not punished as thoughts, "but as evidence about the ultimate character of the person being punished." (P 22) Murphy argues that such matters are widely regarded as relevant in sentencing - "particularly in capital sentencing, with its complicated lists of mitigating and aggravating circumstances, including circumstances of character and personality".

But if it is all right to consider motives in sentencing, is there any reason why in principle it would not be all right to consider them in the actual definition of the the crime?

Comment: This is a very good question. It all comes down to what we want to leave up to judges/jurys. If we suspect institutional racism, we are well-advised to write it into the definition.

It’s not absurd to suggest that hate criminals are more dangerous or more “evil” than other offenders. Careful thought should go into it, but it should not be brushed away with “irrelevance of motives”.

Lastly: Even if we wanted to base criminal liability solely on harm, and ignore mental states entirely, we can’t. We relate to each other in ways that are "to a great degree symbolic and communicative”. Physical pain is the least of it. In one case "a degrading and humiliating message is being sent and received."

When I am assaulted, part of what hurts me - part of what constitutes the hurt or injury itself - is in many cases the motive of contempt of hare or simple lack of respect that i see behind my attacker’ conduct.

Being degraded, insulted, humiliated are concepts that don’t make sense if severed from ties to motives. (If Murphy wanted to argue against hate crime laws, it would be on the basis that almost all assaults involve motives that hurt in this way).

Comment: The last bit, of course, suggest a “hate crimes hurt more” reading. The claim that motive constitute the harm, however, is difficult to sustain, strictly speaking. Rather, one could say that expressing ones motive, or making it known, or just making it the likely cause of the crime risks causing this particular impact. It’s thus comparable to assault with a dangerous weapon. This makes motives only
indirectly relevant, and motives have always been treated as indirectly relevant as evidence, for instance.
16. The OSCE ODIHR Guide to Hate Crime Laws

Introduction:

The guide is part of the OSCE's comprehensive approach to security issues, including the protection of human rights and fundamental freedoms, promoting the rule of law, promoting democratic institutions, tolerance etc. A vigorous response to hate crime is necessary in this endeavour - Such crimes have the potential to divide societies.

At the Ministerial council meeting in Maastricht in December 2003, the OSCE states recognized the danger of hate crimes and committed themselves to combating such crimes. Later, a number of decisions that mandated ODIHR to work on hate crimes was adopted. The participating states made a commitment to consider enacting or strengthening, where appropriate, legislation that prohibits discrimination based on, or incitement to hate crimes... The guide is a tool to assist states in implementing that commitment.

Legislation is an obvious and important tool in combating hate crimes and limiting their impact - Hate crime laws explicitly condemn bias motives, and send a forceful message to offenders. This message also goes out to victims and their communities - recognizing the harm done to them, and conveying to them and the surrounding community that the criminal justice system servers to protect them.

Laws - especially criminal laws - are an expression of society's values. Hate crime laws both express the social value of equality and foster the development of those values.

This expressive function can only be performed if the law in question is actually enforced. Comment: This appeals to the expressive function of law. What is not explicitly addressed here is whether this expressive function is also sufficient to warrant a criminal law. Presumably it isn’t - there are important side-constraints.

In order to be effective, a law must be easy to understand and apply - by the public and by the policy officials. The development of the guide is
shaped by the need to make it relevant to the many different legal systems in the region. The working method draws on the widely varying histories, traditions and legal frameworks, and attempts to identify their common element. This, of course, is important for the harmonization process.

**Hate Crimes** are violent manifestations of intolerance. They have a deep impact on the victim but also on the group with which that victim identifies. The impact can be felt in terms of community cohesion and social stability. Hate Crimes are distinguished however, not by impact, but by *motive*.

since motive is usually irrelevant in proving the essential elements of a crime, it is rarely investigated to bring out the real reason for the crime. If a criminal justice system does not use the concept of "hate crime", the motive is not recognized as an essential element of the offence and the existence of hate crimes will therefore remain invisible. (p 11)

Correlation between effective data collection and level of hate crimes - problem that is not being detected. The use of laws across the region is inconsistent. The guide states that "where effective laws exist they create a framework within which cases can be identified and data collected". Legislation, the guide acknowledges, is only part of the answer to hate crimes, but in combination with other tools, it can be a "powerful catalyst" for changes in social attitudes.

*Comment:* Yes, certainly, but note that effective data-collection can’t be sufficient to justify punishment-enhancement either. This is a further *pragmatic* reason for the legislation. Motive is certainly relevant for what we can do to *prevent* certain crime. We need to know what drives these offenders. But that does not mean that it should be relevant for sentencing. At least not if we want to keep within the traditional "culpability - wrongdoing" framework, and respect the proportionality principle. One very serious question here, then, is if punishment enhancement is necessary to provide the basis for effective data-collection.

2. **Why is This Guide Necessary?**

It provides benchmarks for drafting Hate Crime legislation, identifies good practice and risks are identified. It is not *prescriptive*, however. It does not tell how the legislation *should* be throughout the region. Hate Crimes, the guide states, are specific to their social context, and legislation must recognize this.

*Comment:* This is a questionable claim:, We want the concept of hate crime to be *recognisably* the same throughout the region to provide for useful comparisons and so on. The concept may allow for/contain *variables*, however, and in *that* way be sensitive to social context. But this is another matter. Admittedly, as the guide states, the different
national legal traditions will affect drafting choices. "Legislation should be rooted in national experiences and be created after inclusive and extensive public debate". While this is true, we are still looking for common elements, and, importantly, for guidelines for how national variation should shape legislation.

Part I: Understanding Hate Crime Laws

I. What is a Hate Crime?

Hate Crimes are criminal acts committed with bias motive. The motive makes the difference. The crime could be an act of intimidation, threat, property damage, or any other criminal offence.

Comment: This, mind, already involves a theoretical decision: to treat motive as the essential part of a hate crime, rather than, say, hate expression (which is not dependent on motive). This is a very important point, as motive - as opposed to intention - has so far never been an aggravating factor, only (occasionally) a mitigating one.

The term, then, describes a type of crime, rather than a specific offence within a penal code.
A person may commit a hate crime in a country where there is no specific criminal sanction on account of bias
or prejudice. The term describes a concept, rather than a legal definition. (p 16)

Comment: This is very important for several reasons. One is that crimes individuated by motives are obviously of great interest, quite independently on whether they warrant extra punishment.

1.1. The two elements

Every hate crime is constituted by two elements, one of which is the "base offence", i.e. an act that would constitute an offence even absent the bias motive. There is some divergence between countries here, on what offences can be hate crimes, but there is a very large overlap. The act, then, is "committed with a particular motive", which the guide refer to as "bias".

this means that the perpetrator intentionally chose the target of the crime because of some protected characteristic.

Comment: It is noteworthy here that a crime being "committed with bias motive" is said to mean "intentionally choosing target because of...". This so called "victim selection model" is not the only game in town. As, indeed, is recognised later in the guide. This is important, because a victim could have been chosen at random, and yet, once chosen, be more severely beaten, say, because of some characteristic.
The target may be one or more people, or property associated with the protected group in question. A *protected characteristic* - shared by a group can be such things as race, language, religion, ethnicity, nationality ”or any other similar common factor”.

Which characteristics should be protected is a complex issue, *which must be resolved by taking into account each State’s own history and circumstances*. These are among the most significant policy decision for legislators.

The criteria are discussed in part II, below.

1.2. Special Features

Hate Crimes, the guide states, are different from other crimes not only because of the motivation, but also because of the impact on the victim. Selecting the victim because of group-membership: suggests that one member is interchangeable with any other.

Unlike victims of many other criminal acts, hate crime victims are selected on the basis of what they represent rather than who they are.

*Comment:* This is a formulation that recurs in the Hate Crime literature, but it is far from clear what it means. What is the difference between what I am and who I am?

The message conveyed by hate crimes is intended to reach the larger community. They are sometimes described as *symbolic* crimes. The text goes on

Hate crimes as designed to intimidate the victim and the victim’s community on the basis of their personal characteristics.

They send the message that certain people are not welcome, and have the effect of denying the victim’s right to full participation in society. They do not belong and could equally be a target. ”Hate crimes, therefore, can damage the fabric of society and fragment communities”.

*Comment:* First of all, if this were true, hate crimes would be ”specific intent crimes”, but they are typically not put under that heading. Second, if this is a *requirement*, rather than a description of a typical hate crime, it would radically diminish the number of hate motivated crimes that are properly called ”hate crimes”. In short - it describes a very particular notion of Hate Crime, and it should be up front if this is intended as a definition.

1.3. Bias or Hate
The term ”Hate” can be misleading here, since many crimes motivated by hate are not actually hate crimes. Conversely, a crime where the perpetrator does not feel hate can still be a hate crime. Hate is a very specific and intense emotional state, which may not properly describe most hate crimes.

Hate Crimes can be committed for one of a number of different reasons

1. For reasons of resentment, jealousy, or desire for peer approval
2. Hostile thoughts or feelings about the group to which the target belongs (but not about the particular target)
3. Felt hostility to all persons outside the own group
4. Target represent an idea, such as immigration, to which the perpetrator is hostile

Any one of these motivations would be sufficient to classify a case as a hate crime if the two elements described are present.

Comment: It’s not clear what this list adds to the criteria. ”Resentment, jealousy or desire for peer approval” does not seem to be sufficient for a bias motive, so if the bias motive must also be present, this list is beside the point.

The guide uses ”Bias”, because of its broader meaning. It only requires some form of prejudice on account of a personal characteristic, and can be felt in respect of a person, or a characteristic, or an idea.

Comment: This is not entirely a happy formulation, however, as bias, typically, need not be ”felt”, but may rather be habitual or whatever..

”When preparing hate crime laws, the drafting choices of legislators will determine whether the law requires the perpetrator to feel ”hate”.

A discussion of the consequences of different drafting choices is included in part II.

Comment: This seem to be a rather central feature, so how can it be up to the individual legislator to decide? 2. What sets Hate Crimes Apart?

As described above hate crimes are special in that the perpetrator is sending a message about the victim and their right to belong to that society. This means that hate crimes have consequences which set them apart from other crimes and which justify a different legal approach.

Comment: This is a very important, and problematic, claim. First - above, the distinguishing mark was the motive/ reason, not the message. Second, the message claimed to be sent here is quite specific, and might not fit with all crimes we want to
treat as hate crimes. Third, consequences can not be derived from the content of the message.

2.1. Human Rights and Equality

Hate crimes violate the ideal of equality between members of society. The equality norm is a fundamental value that seeks to achieve full human dignity and to give an opportunity to all people to realize their full potential.

This norm is constantly reiterated in human rights documents. First line of the UN declaration refers to ”recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family”. It exists in most constitutional documents. Violations of this ideal has great practical and symbolic impact, and it is thus important whether hate crimes are such violations.

2.2 Effect on Victim

Now, the guide claims that ”By targeting a person’s identity hate crimes cause greater harm than ordinary crimes. The immediate victim may experience greater psychological injury and increased feelings of vulnerability because he or she is unable to change the characteristic that made him or her victim.”

Comment: This is a very debatable claim. First - it’s very debatable whether hate crimes targets ”a person’s identity”. I could be the victim of hate crime because of an attribute that’s no part of my ”identity”. It seems, in fact, to be enough that someone identifies with it. Second - ”hate crimes cause greater harm than ordinary crimes” - this too is a highly debatable point, and it has been widely criticised. At the very least, the guide should back it up with evidence. See below. Third - the very questionable claim that properties of a persons ”identity” are things they cannot change, and that this would be the factor that account for the (possible) greater harm. None of these claims are backed up by evidence or other reasons.

Hate crimes have a significantly deeper psychological impact on their victims, leading to feelings of depression an anxiety.

Comment: The reference here is the report ”Hate crimes today: an age-old foe in modern dress” APA, 1998. Which in turn refers to Herek 1997 ”The impact of hate crime victimization”. This paper in turn is ”brief summary of preliminary findings”. This is hardly solid ground. It is not clear, for instance, whether the impact of hate crimes have been properly compared with the impact of other, parallel crimes. The idea that crimes should be ranked in proportion to harm is an influential, and quite plausible, one. It is, in other words, very important that this claim is right, if hate crimes are to be more severely punished than other crimes.
2.3 Community Impact

The community that shares the characteristic of the victim may also be frightened and intimidated. Other members of the targeted group can feel not only at risk of future attack, they may experience the attack as if they were themselves the victim.

This tendency can be increased when there is a history of discrimination.

Comment: What is lacking here is evidence of the truth of this, quite reasonable, claim. More important: to what extent should this tendency to identify with victims of one's own group only be judged important? Presumably, this phenomenon is not limited to groups of the protected characteristics but would hold also for tight nit neighbourhoods. Should crimes in such neighbourhoods be more severely punished? Should offenders that happen to attack resilient group be punished less? Surely not.

Social acceptance of discrimination against particular groups is an important factor in causing hate crimes to increase

Comment: Is this true? Where is the evidence? And what constitutes "social acceptance" in this context?

The guide point out that hate crimes can be committed against the majority, but that marginalized communities are disproportionately the victims of hate crimes. (Comment: One presumes that the proportion in question is calculated on the number of minorities, not on the majority as potential perpetrators). In relation to such groups there is a particularly strong symbolic value to adopting and enforcing strong hate crime laws.

2.4 Security issues

Potentially serious security and public order problems caused by hate crimes. This would affect a wide circle of people, and can cause social division and civil unrest. Creating or emphasizing existing social tensions. Hate crimes can have an explosive impact.

3. Why Have Hate Crime Laws?

If hate crimes are treated like other crimes and are not recognized as a special category they are often not dealt with properly. (p 21)

Comment: This is very important indeed, even if "dealt with properly" implies that there is a crucial difference between hate crimes and other crimes.

If there is no such category investigators may disbelieve the victim or fail to properly investigate allegations of bias motive, prosecutors may
minimize the offence, courts fail to apply their powers to increase sentences to reflect the motives of the perpetrator.

Hate crimes do not occur in a vacuum; they are a violent manifestation of prejudice, which can be pervasive in the wider community

There are certain patterns, so that investigation into crimes with a bias motive may be poor, the victim blamed if belonging to a certain group. It doesn’t take many cases of this kind to affect the community to become disillusioned with the response of law enforcement officials. Where prosecution and sentence does take account of the bias motive, such acknowledgement reassures the victim that his or her experience has been fully recognized.

Codifying the social condemnation of hate crime into law is important to affected communities, can help build trust in the criminal justice system, and thus can repair social fissures. (p 21-22)

Comment: While this sounds right, it needs empirical backing. Theoretically, it should also be noted that to build trust in the criminal justice system can’t be sufficient to justify a particular law here. The punishment must also be deserved. This aspect is almost entirely absent from the guide, and it is a serious problem.

3.1 Practical Arguments

The practical impact of hate crime legislation can be significant. ”Ideally, legislation is passed after discussion within government, law enforcement authorities and society at large. This serves to focus attention and raise awareness of the extent and nature of these crimes.” Improving awareness and responses.

Next:

The existence of hate crime laws makes data collection more effective, which gives improved intelligence and policing information, enabling resources to be properly allocated. When hate crime cases are identified, the nature of the problem and the effectiveness of the response become clearer, allowing training and resources to be allocated to those areas most in need. (p 22)

This is very important, and in turn raise the confidence of target communities, which yield better information and cooperation. Better responses again.

”...legislation increases awareness and enables better scrutiny, which in turn leads to more effective implementation and improved police-community relations”.

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Comment: These indeed are good pragmatic reasons for a special legislation - but are they sufficient?

3.2 Theoretical arguments

There are three main arguments presented in the guide. None of them is particularly good as it stands.

1. ”The symbolic value of the law can and should be utilized to demonstrate society’s rejection of crimes based on bias. The enactment of hate crime laws is a powerful expression of society’s condemnation of certain offences as especially reprehensible, and deserving of greater punishment.”

Comment: But it should be noted that this means that 1. is not independent. It is because HC’s are for some other reason worse that they are to be counteracted in this way. It is because they somehow warrant special condemnation.

2. Criminal Law penalizes the harm caused. Hate Crimes have a greater impact on the victim, and also affect others. ”The justification for increased sentences is therefore the additional harm caused both to the individual and the community.”

Comment: In fact, this is not true. Hate crime laws punish bias motive even when there is no demonstrated increased harm. Motive is here used as a proxy for increased harm. If anything along these lines is true, it should be enhancement because of greater harm risked by causing a hate crime. Not greater harm caused. But if so, hate crimes are patently not worse per se, but belong to a broader category of harm-prone offences. In addition, as seen above, good evidence that hate crimes cause more harm than parallel crimes has not been presented.

3. HC laws punish the greater culpability of the perpetrator. (Reference here to the work of Frederick Lawrence). ”The perpetrator’s motive makes the crime more serious than if the offence had been committed without such motive. The criminal law frequently imposes increases penalties for acts based not only on their outcome, but on the intent of the perpetrator. This argument therefore assumes that it is the intent of the perpetrator to cause disproportionate harm, or that they are reckless to the risk of additional harm.” (p 23).

Comment: This is important and controversial - motive is, probably, not equivalent to any sort of intent. Motive is not about what you are trying to do, but why you are trying to do it. And if it is not intent, we seem to have stumbled onto a new mens rea. This possibility is not worked out here, as it should be The recklessness argument (see comment to 2) is probably
the most promising here, because otherwise we need to seriously narrow the scope of punishment enhancement for "hate crimes" to the ones that actually cause "disproportionate" harm.

3.3. Are Hate Crime Laws Discriminatory?

Does Hate Crime laws protect some groups more than others? No: minorities are more often victims here, but hate crimes can be committed against majority communities as well. The perpetrators may come from a minority group, the target may be selected because of membership in that group, and both may be members of different minority groups.

The principle of equality before the law means that hate crime laws do not and should not protect one group over another. For instance, if a hate crime law includes ethnicity as a characteristic, it does not specify a particular one... (p 23)

Comment: This is actually not entirely straightforward. We could agree that hate crime laws protect certain groups more than others, namely those that need it. Those that are more frequently victimized. So using the equality angle can give a different result, depending on what you include as acceptable grounds for special treatment.

4. Related Concepts

Genocide is a crime motivated by bias, but excluded because it has certain special features that distinguish it from "ordinary" crimes. Also - it’s criminal behaviour we are concerned with - so discrimination would not be a crime without bias, for instance. Or so it’s claimed.

4.1. Genocide

G. requires the intention to destroy a whole group. Both qualitatively and quantitively different from hate crimes. Too systematic (more like terrorism?).

4.2 Anti-discrimination laws

Anti-discrimination laws are not hate crime laws. Discrimination refers to less favourable treatment of people from certain groups. Usually applied to workplace discrimination, or in the provision of goods and services. Paying someone less on non-discriminatory grounds would not be unlawful. This is usually a civil law matter, but sometimes criminal penalties are given. But hate crime laws does not apply because there is no base offence.
Comment: Well, actually: discrimination on the basis of group-membership can take place without actual bias motive. Adding such motive, then, could make it a hate crime. But discrimination as such is not, necessarily, a hate crime. But not for the reason the guide states.

4.3 Hate Speech

Some laws criminalize speech because of the particular content of that speech. What content this is differs widely between states. In some jurisdictions it’s speech inciting hatred or insulting certain groups. Other includes speech denigrating a person’s or a nation’s ”honour” or ”dignity”. Some restrictions on specific historical subjects - most notable Holocaust denial. The speech itself would not be a crime without that specific content.

Comment: What this means is that speech motivated by hatred, but not having hateful content, would not be prohibited. The guide does not mention this, but it clarifies the issue.

This means that hate speech lacks the first essential element of hate crimes - ”if the bias motive or content were removed there would be no criminal offence”. There would be no criminal ”base offence”.

Comment: Again: this is actually not that straight forward: if Hate Speech (based on content alone) is a crime, as it is in some states, then there would be a base offence that could become a hate crime if it was joined by hate motive. The ”bias motive or content” formulation above is too quickly glossed over.

The guide does, however, recognize something along these lines: Direct and immediate incitement to criminal acts is universally prohibited within the OSCE region.

Where such incitement occurs with a bias motive it should be catagorized as hate crime because there is a criminal base offence.” (p 25)

Comment: This is important, because it opens up for interpretation - incitement may be context, rather than content, dependent. The guide excludes hate speech from it’s scope. One, quite valid, reason is the extreme variations between the different countries. ”Different constitutional and philosophical approaches mean there is insufficient common ground for this guide to provide useful commentary”.

Hate speech may constitute evidence of motive, however, and should form part of any criminal investigation into hate crimes.

A common criticism of hate crime laws is that they infringe freedom of speech or amount to a penalty for opinions or attitudes rather than actions. because the majority of OSCE participating States already have in place laws that restrict certain forms of speech, those criticisms of hate crime laws are not discussed in this guide.
Comment: My emphasis - this is a clear limitation for this guide as a theoretical text. There are reasons to go beyond what seems to be an agreement, if applications further down the line shall be possible.

5. The International and Regional Framework

A number of international organisations have made hate crime a priority. Many human rights treaties make general statements relating to discrimination.

"Both the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) require states to refrain from race discrimination and to provide their residents with equal protection of all laws" (My emphasis). Article 4 of the UN declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief require states to prevent and eliminate discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion.

Some instruments call on states to criminalize certain acts. Article 4 of CERD imposes an obligation to take "immediate and positive measures" and require that it should be an offence to disseminate ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin. The committee overseeing CERD has called upon states to define offences with bias motives as specific offences and to enact legislation that enables the bias motives of perpetrators to be taken into account. (There is also the European Commission on Racism and Intolerance (ECRI)).

The European Union Framework Decision on Racist and Xenophobic Crime was adopted 2008. It aims to establish a common criminal law approach, punishable in the same way in all the Member States, and will require states to review whether their existing legislation is in conformity with the directive. Many also calls for laws on hate speech, but that remains controversial, and there is no OSCE consensus position.

A number of decisions in the European Court of Human Rights has held that "states have positive obligations under the European Convention on Human Rights and Fundamental Freedoms to investigate the potential racial motivation of crimes." (p 27)
In a landmark decision ”Nachova and others v. Bulgaria”, the court held that there is a duty to investigate possible racist motives behind acts of violence by state authorities. Bulgaria’s failure constituted a violation of the non-discrimination provision in Article 14 of the Convention.

The Court has not demanded the introduction of specific legislation against hate crime, but explicitly recognized that hate crimes require a criminal justice response proportionate to the harm caused. In the ”Secic v. Croatia” case it was stated that ”State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.” (p 27)

Comment: Note that states are the objects of these decisions, which might work better, theoretically - states are ultimately responsible for protecting human rights. But the requirements here does trickle down to hit individual perpetrators. And it’s on that level that problems ensue. There’s a clear tension here, obviously, if the duties of the state would include enforcing laws that punish individual perpetrators for things they are not properly responsible.

6. Conclusion

When criminal cases are prosecuted, the hate motivation should be explicitly recognized and punished. But note that you can favour the recognition, but disparage the punishment. To the same effect in particular cases. This might, as noted above, undermine the practice, however.

Sometimes when cases of hate crime are prosecuted, the motivation for selecting the victim is never mentioned. If this happens, the opportunity and potential for the perpetrator’s punishment to have a deterrent effect on others is lost. The danger is that the message to the victim and the perpetrator is that the state does not view seriously the hate motive which caused the crime” (p 28)

Comment: These are legitimate concerns, surely.

Part II: Drafting Legislation: Key Policy Questions

Introduction
This part explores the way in which the hate crime concept is translated into law. How are the laws drafted, and what are the consequences of specific legislative choices?

Drafting a hate crime law or revising an existing one involves a series of choices for law and policymakers. Starting with the factors common to all hate crime laws - this part goes through the constituent parts of such a law. Key choices and policy questions.

**Policy Question 1** - Should the law create a new substantive offence of operate as a penalty enhancement for existing crimes?

**PQ2** - Which characteristics should be included in the law?

**PQ3** - How should motive be defined in the law?

**PQ4** - How should association, affiliation and mistakes in perception be dealt with? **PQ5** - What evidence is needed and how much motive is required?

Considered in isolation, and then in combination.

Individual policy decisions that are justifiable and reasonable in themselves could, in combination, produce laws that are unworkable if the cumulative effect is to create laws which are either too narrow or too broad.

*Comment:* I’m not sure how this argument works. Surely, what’s “too narrow” or “too broad” depends on the reasonableness of the decisions made?

In addition to the basic two features - crime and bias, there these two features of hate crimes: "Victims" can be either people or property (Associated with the group)

*Laws protect all people equally.* Which means that although hate crime laws must specify protected characteristics, the should not be drafted in terms of specific groups. Rather, laws protect all individuals defined by the generic version of that characteristics. Examples are ”religion”, ”race” etc. Thus no particular group would receive ”special” protection.

*Comment:* But, I ask, *is this sufficiently generic?* These categories does not seem generic enough, if we want to protect all groups, say, from being picked out as targets by bias motive. And why shouldn’t we?

**1. Policy Question 1: Substantive Offence of Penalty Enhancement?**

1.1 *Substantive Offences* (Chech, UK)
A separate offence that “includes the bias motive as an integral element of the legal definition of the offence”. (p 32) This is relatively rare in the OSCE region.

1.2 Penalty Enhancements

”Aggravating sentencing clauses” or ”aggravating circumstances clauses” can also be used to create a hate crime law. Increase penalty for a base offence when it is committed with a bias motive. Bias motive is usually considered at the sentencing stage of a trial. So the perpetrator is first found guilty, then the court considers evidence of bias, to apply penalty enhancement. In common law jurisdictions, this will be at the sentencing phase. In civil law, determination of guilt and sentencing are not separate phases, and the judge considers evidence of motive affecting sentence as part of the same process.

Penalty enhancement can be general or specific:
- General PE- Enhancement provisions that apply to a wide range of criminal offences. In OSCE,

23 countries list some form of bias motive as a factor that can lead to a penalty enhancement for all crimes.
- Specific PE - increased penalties only to some criminal offences. 25 countries list this.

Some specify the degree of increased sentence. other leaves it to the discretion of the court. Some laws require the court to state explicitly the reasons for applying or failing to apply the penalty enhancement. There is often a stated duty to investigate anything that could increase the sentence.

1.3 Commentary

Advantages of the substantive offence version:

Because part of the importance of hate crime law -for both the individual victim and society at large - is the symbolic value of labelling the offence, a substantive hate crime law explicitly condemns the prohibited bias motive. When hate crimes are enacted as substantive offences, the crime usually has greater visibility and hate crime data is easier to collect. Thus, a substantive hate crime law fulfils the expressive function of criminal law.” (p 33)
But they pose challenges as well: ”A substantive hate crime offence requires motive to be proved in order for the accused to be convicted”. This means prosecutors may be reluctant to press hate crime charges if it is harder to prove. In some jurisdictions, courts can only consider the offence with which the accused is indicted. ”hence, a substantive hate crime indictment may not allow the court to convict of the base offence if the bias element is not proven.” Prosecutors may then be reluctant to use these laws, or be willing to accept guilty pleas of the base offence, in order to ensure a conviction.

The guide suggest that training prosecutors and investigators as to the indicators of motive is an important aspect of overcoming such problems.

Mere penalty enhancement equally has advantages and disadvantages. It’s easier to incorporate into a penal code. They can apply to a wide range of crimes, and failure to prove the bias will not jeopardize a conviction on the underlying offence. But, and this is important

One significant disadvantage with a penalty enhancement law, however, is that a court’s decision to enhance the penalty on the basis of a bias motive might not be part of the public records. (Germany, for instance). As one consequence, previous convictions for bias crimes cannot be used to determine whether he or she has a past history of bias-motivated crimes. In some states, previous convictions for bias crimes may only under very limited conditions be allowed as evidence in a later case.

Most important here is the loss of symbolic weight. Mere penalty enhancement, especially if not part of the public record, may not fulfil the expressive function as well - recognizing the existence of, and condemning, a prohibited bias. This depends, then, on whether reasons for increasing the sentence are publicly stated, and whether such convictions are included within hate crime data.

For both versions, the success of the case will be connected to the investigation and evidence of motive. A combination of approaches is possible: Some states have specific substantive crimes requiring bias motive and also general penalty enhancements for other crimes (UK and US).

1.3.1 Related Considerations
Should the enhancement be stated on the record?
Well yes, that is good practice, show the reasonings and the decision-
making process. Reassures victims and discourages would-be offenders.  
- *If the substantive offences approach is used, what base offence or offences should have the bias element?*

This requires legislative fact-finding - what kinds are often motivated by bias in the particular society? Impractical and difficult to create too large a number. Focus on those crimes where a new substantive offence will have the most impact.  
- *If the penalty enhancement approach is used, should the law apply to all offences or only particular ones? Should it specify the amount of increase in the sentence?*

Specifying the increase might be necessary if the court is unwilling to do so. But constraining the court’s decision is not permissible in all countries. In addition - there is a problem if the base offence already has the maximum penalty.

2. **Policy Question 2: Which Characteristic to Include**

Different characteristics are protected in different countries. All of them have ”race” as a category. Some include ”gender” etc. This section outlines the criteria for determining protected characteristics. And then lists and comment on those characteristics that are listed.

2.1. **Criteria for Inclusion of Protected Characteristics**

This is the important part, and no precise answer is given. But some characteristics are usually apparent or noticeable to others and therefore more easily targeted by offenders. The decisions must be based on the needs of each states, but there are a number of important factors:

2.1.1 **Immutable or Fundamental Characteristics** - this is the controversial part, I believe.

Hate crime is an identity crime. This is what renders it different from ordinary crimes. Hate crimes target an aspect of a person’s identity that is unchangeable or fundamental to a person’s sense of self” (p 38) (My emphasis.)

Comment: How should we understand the ”or”? And the ”fundamental”? Many problems arise here, as I’ve noted earlier in this commentary. The guide claims that such markers are
usually evident, such as skin colour. But not all immutable (i.e. unchangeable) or fundamental characteristics are markers of group identity. It is therefore necessary to identify characteristics that function as a marker of group identity. Blue eyes does not seem to count. But, and this is important, it could.

More importantly: some characteristics are changeable but nevertheless fundamental to a person’s sense of self. Religion for instance ”is a widely-recognized marker of group identity that a person should not be forced to surrender or conceal”.

Comment: First - we should not be forced to surrender or conceal any characteristic not harmful to others. Second - it would be a hate crime even if I, the victim, did not identify with the group I belong to and which caused my victimhood. Does it, then, suffice that it is important for the identity of some people? It seems that what at issue here is that some characteristics are important to people. And these are the ones that should be protected, arguably.

2.1.2 Social and Historical Context

Determining this requires understanding current social problems as well as potential historical oppression and discrimination. Those attacked in the passed should be included, and those that are currently under attack. The blue-eyed are not part of either. Criminal law deals with social issues, so a legislature considering enactment of a hate crime law must understand those issues. (Dialogue and consultation is important here).

2.1.3 Implementation issues

There are practical implications for investigators and prosecutors when it comes to this choice. Does including a certain characteristic make it more or less likely to be used? Proof problems, if the membership isn’t visible. Harder to show victim-selection.

Comment: But then visibility should be the mark, and that isn’t necessarily tied to either immutability or ”fundamentality”.

2.2 Excluded Characteristics

There may be other sanctions to attacking groups not included here. Attacking police officers, for instance. Sexual assault on a child shouldn’t be included here either. There is a risk, they claim, that if the list is too long it will be too broad.”It may become too general for the law to be enforced effectively.” But if it is to narrow, it risks excluding groups that are commonly victims of hate crimes. Legislators need to balance this.
2.3 The Most Commonly Protected Characteristics

Race, origin, ethnicity etc. Specific for different states. The commonly
protected characteristics are the core of hate crime legislation.

2.3.1 Race

A social construct, not a scientific one. Better to speak of ”ethnic groups”.
Or ancestry or national origin. But ”racism” and ”racial discrimination”
exist and is put to great use. No good replacement for those. But we use
quite broad sense of ”racism” here.

2.3.2 National Origin/Ethnic Origin/Ethnicity

Often overlapping

2.3.3 Nationality citizenship

2.3.4 Religion

If included, all should be included. And those who do not follow any
religion. (Some countries specify this: lack of religion).

2.4 Frequently Protected Characteristics

Gender, age, mental or physical disability, sexual orientation.

2.5 Rarely Protected Characteristics

Wealth, marital status, birth, class, property, social position, political
affiliation etc.

2.6 Commentary

It’s wise to use a combination of ”race”, ”ethnicity” etc. and similar terms,
to ensure broad coverage. There are no universal criteria for inclusion, but
factors to consider include:
- historical conditions
- contemporary social problems; and
- The incidence of particular kinds of crime

Legislature should also assess the practical implication of including or
excluding certain characteristics. Some lack the history of discrimination,
other might pose implementation problems for law enforcement officials -
District of Columbia include educational status - it would be difficult to
show that a crime was committed for such a motive, since education status
is not a characteristic which is evident unless the victim is known to the perpetrator.

*Comment:* This is a weak and, I think, misguided line of argument.

In addition (this is a better argument) - educational status (matriculation) is not generally a strong

marker of group identity, nor does it usually carry with it a history of discrimination. *Comment:* Question, then: how much of *this* should be at the discretion of the state, the judge, the jurors?

A too long or vague list can undermine the concept of hate crime and provide opportunities for

abuse or misuse.

(Comment: No examples are given, however).

The inclusion of categories linked to wealth or class might turn economic crimes into hate crimes. Furthermore, from a law enforcement point of view, the distinction may be impossible to draw. Is a robbery targeting a wealthy individual a hate crime on the grounds of "property" or "social position"? Is it based on "hate" or just greed? (p 45)

Some categories are confusing. "Social group" needs a clear definition.

If a law includes characteristics that are not immutable or in some manner essential to a person’s sense of self and shared by persons who as a group have experienced discrimination, exclusion or oppression, it can be discredited as a hate crime law (p 45) -

*Comment:* This, as argued above, is not a good principle.

It can fail to protect those groups which are in fact victimized. People under "social group" might include groups not typically perceived as oppressed or as sharing fundamental bonds of identity. Indeed, if a law includes protected characteristics that are too far away from the core concept of hate crime it may no longer be seen as a hate crime law.

*Comment:* This is confusing. We had clear criteria in the beginning and none of them required this restrictiveness. The legal concept of certainty requires that a person be able to reasonably foresee the criminal consequence of

his or her actions. The concept of legal certainty is reflected in both domestic laws in the OSCE region and regional and international human rights instruments. A law that imposes increased penalties but is unclear about the circumstances in which those penalties will be applied is likely to fail this fundamental test. p 46

*Comment:* This is good point, and it puts restrictions, arguably, on how vague and/or abstract a workable principle for inclusion could be.
Some states have open-ended list of protected characteristics. There is a possibility, then, that the law could apply to crimes based on characteristics beyond those already named in the law. There are some advantages, but also some problems, the guide claims:

First, a legislative judgment about which characteristics are important to include and which groups are especially vulnerable is essentially a value judgment. (...) Open-ended lists take away from the legislature the decision regarding when to increase the categories of those crimes which are hate crimes.”

Comment: In fact, no. Not if you have clear criteria for inclusion. And especially if these criteria matches the rationale for hate crime legislation/punishment enhancement criteria in the first place

Second, open-ended lists may be problematic for the same reason as are vague laws: they can fail the test of legal certainty and be difficult to implement in a way that reflects the social reality of hate crime

Comment: Again, this argument is weak: The certainty is given by the simple principle “Don’t commit crimes with a bias motive, you’ll increase your sentence”.


A ”popular conception” of hate crime is that an offender acts out of hatred or hostility toward a particular characteristic of the victim

Comment: or rather - towards the group, right? He/she might not be hostile to ”blackness”. But this is not a requirement of all hate crime laws.

Some hate crime laws only require that the offender intentionally chose the victim because of some protected characteristic of that victim.

As with other choices in the draft, the words used may make a significant difference to the categorization of offences as hate crimes. Many legislatures have failed to deliberately choose either model. The impact of the choice of model on investigatory and prosecutorial resources is important.

3.1 The Hostility Model

The offender must have committed the offence because of hostility or hatred based on one of the protected characteristics.
Laws then require evidence that the offender acted out of some kind of hostility towards the victim. Such a statute conforms to the popular idea of hate crime, but might also present obstacles to implementation, the guide notes. It is subjective what a person feels, and hard to prove. The difficulty is compounded by the fact that almost no other criminal offences require proof of motive as an element of the offence. (p 47)

3.2 The Discriminatory Selection Model
Deliberately targeting target because of a protected characteristic, but no actual hatred is required. Attacking an immigrant because they are less likely to go to the police, for instance, would be a hate crime under this model. As would selecting a victim in order to get peer-group recognition. Many states do not mention hatred or hostility at all.

Instead the law requires that the offender acted ”because of” or ”by reason of” the victim’s protected characteristic and the offender’s conduct, but the exact emotion is not specified.

3.3. Commentary

The difference is important. The DS-model is broader - includes offenders without hostility but who ”selected their victims based on prejudices or stereotyped information about victim vulnerabilities”

*Comment:* In fact: No. This is actually NOT the content of this model - that would fall under ”hate” in the relevant sense. This category, if it is to be distinctive, should include selection on NON-prejudiced grounds as well.

A discriminatory selection law does not require that hate be proven as an element of the offence. Which is good, as hostility is difficult to prove. The impact on the victim and members of the victim’s community is usually the same, regardless of whether the offender acted out of hate or some other emotion.

*Comment:* This statement, which carries some weight, should be much more precise and supported by evidence.

A victim who is targeted because the offender assumes that some protected characteristic of the victim makes him/her especially vulnerable to crime is likely to experience the same trauma as a victim who is targeted because the offender actually hates that characteristics.
Comment: This might be true, but that’s not all that’s implied by the DS-Model. From the victim’s perspective, what matters is that he/she has been chosen because of an immutable or fundamental aspect of his/her identity. Comment: Is this established? Why is there no quoted source for this?

If a Hostility-model is chosen, guidance and training for law enforcement and courts as to what evidence is necessary and sufficient to prove this emotion would be useful. Comment: While this is true, doesn’t the same goes for proving conscious victim selection?

4. Policy Question Four: Issues of Association, Affiliation and (mistakes in) perception

4.1 Association and Affiliation
In the company of etc.
4.2 Mistakes in perception
Mistake as to belonging to the targeted group.

4.3 Commentary

Hate crime laws and monitoring systems that require the victim to actually be a member of the protected group will not capture these categories of crimes. If only crimes against these groups are recorded, this wider group is missed. The perception of the perpetrator is important (but more so for culpability than harm reasons, presumably? Or is the targeted group still harmed?).

The guide suggest treating these as hate crimes as well. Especially when the law is drafted in terms of the offenders motives, and not in terms of the victims actual status.

Failure to include such categories of victims would weaken the value of a hate crime law and undermine effective enforcement. (p 51)

5. Policy Question Five: What Evidence is Needed and How Much Motive is Required?

5.1. What evidence of Motive?

Whether to press charges depends on the availability of evidence. - So what is sufficient evidence of bias motive? In some cases, the nature of the attack shows motive. Statements made by the perpetrator and so on.
others, it’s not so apparent. Investigators need to ask around. Some states have laws that describe the kind of evidence that can be used to establish bias motive and impose temporal restrictions.

5.2 Mixed Motives

The offender may have more than one motive for acting. Typical hate crimes may be ”purely” motivated. But often, they are more complex. Research show that hate crimes often have multiple motivations.

*Comment:* This is an interesting claim, as it implies that we have *decided* that these are hate crimes already. And that’s what this ”evidence” is supposed to prove...

Often - there are situational factors that influence the motivation, including social norms that identify particular groups as suitable victims.

Many US states require that bias motive be a ”substantial factor” behind the offence. This does not exclude the possibility of multiple motives. In some countries, it is required to be *dominant*. Toronto used an ”exclusive definition”, only acts *solely* based on victim’s protected characteristic. ”In whole or part” formulations exists as well.

5.3 Commentary

Motive investigation require substantial police work (obviously) - interviews etc. in order to infer the existence of bias. If the crime is unprovoked, there is a history of hostility, the use of derogatory or insulting comments may speak to motive. Some laws explicitly allow for multiple motivations. One alternative is to acknowledge as hate crimes *all* offences committed with a bias motive. If we require bias as the *single* motive, this would drastically limit the number of offences charged.

*Comment:* The guide doesn’t consider the fact that bias may be an *irrelevant* factor. Presumably, there is some bias in nearly all crimes?

Hate crime laws *should* allow for mixed motives. Motive interpretation may differ.

6. Key Points for Legislators

Hate crime laws will differ, and should be drafted with close attention to national history and experiences. Some key points are necessary to a well-functioning hate crime law, though:
Key Points:

1. Hate crime laws should recognize that either people or property can be victims.

2. Hate crime laws should be symmetrical in their application.

3. Courts should be required to consider evidence of motivation.

4. Courts should be required to state on the record reasons for applying or not applying a penalty enhancement.

5. States should consider a combination of substantive offences and penalty enhancements.

6. Hate crime laws should include characteristics that are immutable or fundamental to a person’s identity.

7. Hate crime laws should recognize social and historical patterns of discrimination.

8. Hate crime laws should include characteristics that are visible or readily known to the offender.

9. Hate crime laws should avoid using vague or undefined terminology.

10. Hate crime laws should use a combination of terms such as “race” ethnicity, national origin and nationality in order to ensure broad coverage.

11. Hate crime laws should not require a specific emotional state, such as “hate” or “hostility”.

12. Hate crime laws should protect victims who are associated or affiliated with persons or groups having protected characteristics.

- Hate Crime Laws should include offences where the offender was mistaken about the victim’s identity.
- Hate crime laws should recognize that offenders sometimes act with multiple motives.

Even the most comprehensive and coherent law will fail to achieve the aims of the legislature if it is not enforced. Once enacted, the use should be monitored and assessed. Are they prosecuted, convicted. What are the problems in the practice? Are people aware of the law?

An increased sentence for a hate crime only comes at the end of a long sequence of events. In order for an offender to be subject to a hate crime law, a victim must be willing to report the crime, the police must investigate it carefully, the prosecutor must file a hate crime charge, and the court must convict. Any misstep in the sequence means a lost opportunity to combat hate crime.
17. Barbara Perry, *A Crime by Any Other Name: the Semantics of ”Hate”*

*Journal of Hate Studies (Vol 4 – 121 –140) (2005)*

**Short Summary:**

There are some gaps in the Hate Crime scholarship, one of the concerns the semantics and definition of the term “hate crime”. Quoting self from 2003:

”The phrase is fraught with dilemmas and difficulties. Laypeople as well as professionals and scholars tend to take it far too literally, often insisting that all (violent) crimes are ”about hate,” or alternatively, that perpetrators don’t necessarily “hate” their victims... This is to oversimplify the concept through very prosaic interpretations of the concept. It is, then, unfortunate that the term coined by Representatives Conyers, Kenally, and Briggs in their 1985 sponsorship of hate crime statistics bill has stuck”

The term has been used to criticize the law, talking about ”the criminalization of hatred” (See Dority 1994. Gail Mason (19??) questions hate as a heuristic device). Perry’s intention is to unpack the conceptual limitations of the term ”hate” as a descriptor of the forms of bigoted violence to which it refers, and suggests an array of alternatives.

Language matters. It shapes our perceptions, our ways of interpreting the social phenomena that confront us. Discourse is undeniable central to the production and reproduction of inequality in contemporary Western cultures. ”The term ”hate crime” frame that legal construct.” (P 121). (Perry’s point is, I think, that ”hate” individualize a problem that is more political, structural, collective).

**More Than ”Hate”**

Serious scholars understands ”hate” as shorthand for a sort of bigoted, bias-motivated violence. It loses impact if we understand it as just the ”emotion” (which should, perhaps, not be criminalized).

Even some supporters (Kahan, Kahan and Nussbaum) seem to work with a narrow emotive reference to hate in HC - granted a non-traditional understanding, predicated on emotion as an ”evaluative judgment”. Perry still thinks its unhelpful, since it relies on individual, cognitively based motivations.
It’s certainly not an individual emotion or state of mind. (It’s not that sort of causation, then). See Rosenburys answer to Kahan, that we can’t be rightly punished for having bad emotions. (“Hate” is not just “dislike”, its not just a thought, attitude or belief.) “To make hate illegal”, Or “All crimes are hate crimes” such formulations just fundamentally misunderstands the issue. On pain of making the term HC to broad. Crime motivated by Hate on the base of jealousy, for instance, is not a Hate Crime.

The origins of the relevant sense of hate is cultural, not individual.

"While hate is a strong sentiment, it is a relatively "safe" one that does not imply rigidly structured patterns of oppression. It does not require us to admit that bias-motivated violence is constituted of and by difference; that it is about race and racism;, sex and sexism and heterosexism, for example. Rather, this interpretation of hate crime removes it from the realm of "cultures of violence," placing it instead in the realm of the psychology of violence." (P 124)

It also pathologizes hate., reducing it to an aberration committed by an unstable individual - marginal and extremist individuals. Out of the ordinary. Also Goldberg (1995).

Bigotry and prejudice permeate our culture. Such acts are normative in western cultures, and are seen in cultural forms including the language and epithets we use, the media images we observe, even the legislation that regulates our behavior. (This is strong stuff).

The violence, Goldberg thinks, include normal inductive reasoning and not necessarily the prejudice of affective - hateful - animosity.

"…Hate crime is not typically grounded in a mental state; nor is it the outcome of extreme hostility or pathology. Rather, it is more often foreseeable, and rational, at least from within the world view of the perpetrator.” (P 125) - gay-bashing based on a view that portrays homosexuality as a sin, for instance. And other prejudices. These are the background conditions, the conditions that may make the crime ”rational”.

"The sorts of violence we have in mind, then, are not "about" hate, but are "about" the cultural assumptions we make with respect to difference. In short, bias-motivated violence is reflective not of individual values or sentiments, but of culturally normative values of domination and subordination. It is one of the many mechanisms in an arsenal of oppressive practices.” (P 125)

We must see HC as expressions of the same thing that has other, more subtle expressions. HC is not irrational or pathological in a racist culture. HC is "nested in a web of everyday practices that are used to marginalize and disempower targeted
communities.” It is systematic. HC is as normal and as usual as alternative mechanisms of oppression, such as cultural stereotyping or employment segregation.

Betsy Stanko (2001) argue that the HC terminology obscures the conceptual framework within which ‘hatred’ derives its resources from social resources. The crimes are implicated in efforts to maintain unequal relations of power. It’s an exercise of power (is it, though, when the perpetrator belongs to another disadvantaged group?).

Wolfe and Copeland (1994) argue that HC is violence directed toward those who suffer discrimination in other realms of society. How does the HC contribute to this marginalization? Sheffield (1995) defines it -

”Hate violence is motivated by social and political factors and is bolstered by belief systems which (attempt to) legitimate such violence… It reveals that the personal is political; that such violence is not a series of isolated incidents but rather the consequence of a political culture which allocates rights, privileges and prestige according to biological or social characteristics.” She emphasize hierarchies of identity as precursors to hate violence. - But what about the effect on victim, perpetrator, and their respective communities? Perry wants to extend the definition.

Its a means of marking both the Self and the Other in such a way as to re-establish their ”proper” relative positions, as given and reproduced by broader ideologies and patterns of social and political inequality. HC’s are acts of power intended to constrain the options and activities of those whom our culture has marked as the Other. (Why must it be OUR culture here?). We need better language.

II Moving Beyond “Hate”

Parallel to ”domestic violence”. Should we concretize - racist violence, anti-Semitic violence? They pint to the identity-based animus that underlies such victimization.

Often victimized for living up to (or challenging) prescribed roles. “Victims may be punished for transcending normative conceptions of relevant categories of difference, but they may also be sanctioned for conforming to relevant categories of difference.” (P129)

But we need a more general term. ”Bias crime”? (Relatively neutral) ”targeted violence”, ”oppressive violence”. Or even crimes against humanity, or ”domestic terrorism”. 
What’s need is something that points out that they are violent acts of imposed power over and against those this culture and its members continue to marginalize as others.

"Bias crime" unsatisfying - still to individualized

Ehrlich and colleagues at the Prejudice Institute - “ethnoviolence” - violence against “those people”. It may be to limited, if ”people” are too narrowly understood.

"Targeted violence" (Stanko) (Victim selection criteria) - recognize that the violence is nested in structural complex or relations of power grounded in often intersecting identities.

Perry - structured action theory - historical and contemporary patterns of identity politics have given permission to hate.

Iris Marion Young - ”systematic violence” - the oppression of which racial violence is a part is more than the outcome of the conscious acts of bigoted individuals. Violence is just one aspect, one face of oppression (others: exploitation, marginalization, powerlessness, cultural imperialism).

"Oppressive violence” ? Also covers perception of recurrent threats.


Rosga - an attack motivated by prejudice targets not only its individual victim, but by its symbolic weight, effectively targets a whole group of marked individuals … It functions, in other words, to reduce complex, multi-facted individuals into one-dimensional, victimized identity categories.”

Crime against humanity - racist wrongs are wrongs against an entire class of people (Goldberg) - akin to Human rights violations. - A denial of personal dignity.

"The practical utility of invoking a rights discourse is that it allows for - in fact encourages - recognition of the role of the state as well as of private actors in perpetuating such forms of violence. Additionally, this concept draws force and legitimacy from international law and convention. (...) The notion of human rights is one of few moral visions ascribed to internationally”

(Compare with violence to women as HR violations).

Rights claims generally can shift attention from violence of the person to violations of the body politics."In sort, it invokes the collective identity-based nature of both the act and the harm done.
III Closing Thoughts

Perry doesn’t lobby for any particular terminology. But challenges us to think more seriously and critically about the implications of the language we use. We must recognize HC as a mechanism of empowerment and disempowerment. “The violence of which we speak is not simply about the individual affect of the individual perpetrator. Rather, it is an inevitable outgrowth of a rigidly structured and hierarchical society.” The politics of difference that underlie hate crime should thus become transparent.
18. Paul H. Robinson *Hate Crimes: Crimes of Motive, Character, or Group Terror?*


**Short summary**

**Abstract**

The usual objection Motive ought not to be relevant to criminal liability. Robinson argue that motive ought to be and commonly is, an element in determining liability or grade of offense. What is objectionable is use of an actor’s character or general set of values as an element of liability or grading. But motive is not character. Focus on motive enables us to stay away from character.

But motive might not be the best criterion for defining the harms and evils that hate crimes seek to punish. Indeed, using actors bigoted motivation as defining characteristics creates special difficulties in implementation and application, as well as dangers of infringing constitutionally protected speech or expressive conduct.

”…Hate motivation is best avoided as an offense or grading element, in favor of more objective factors present in such offenses. A promising alternative is the criminalization of conduct that is intended to cause (or risk) intimidation or terror of an identifiable group.” (P 605) This would be consistent with mainstream criminal law theory by punishing an actor according to the extent of the harm caused, risked, or intended.

**Introduction**

The effort is to condemn and deter crimes motivated by hatred and bigotry, and the means have been to enact new crimes or sentencing enhancements. Hate motivation need not be explicit, the ADL model statute punish selection of victim ”by reason of the actual or perceived race, color, religion, national origin, or sexual orientation”.it’s the motivation in selecting the victim here. Is such reliance on motivation appropriate?

I. Motivation as an element of liability and grading

Okay, so the common claim -motive should not be relevant to criminal liability or grading. The dictionary definition of ”motive” - ”something (as a need or desire) that
causes a person to act”. Criminal law is full of offenses that have as elements a particular reason for acting, a need or desire that causes the person to act. (Exposing with the purpose of gratifying one’s sexual desire, breaking into a house with the purpose of committing a crime, killing for payment - relevant to grading, at least). A lot of “with the purpose to”. “It is the nature of human conduct that nearly every action is performed for a purpose”. And these causes of action often are relevant to determining how blameworthy an actor is for the action.

"I will leave it to the philosophers to develop a theory as to which motives ought to be relevant to criminal liability and which ought not, but I can give some examples”. (P 607) - Yes, but does he actually not make a distinction between “motive” and “intention” or “purpose”? There are difficulties here, I believe.

Some motives can reduce blameworthiness (steal to feed starving family) Justification defense, or excuse defense for a mistake as to justification.

Irrelevant motive - Killing out of jealousy, revenge or anger might be condemnable, but none as condemnable as killing for a fee. (?)An actors motive may tell us about the actors desire to cause harm, and the act may be more offensive because it reveals it to be more calculated, perhaps. It may also speak to Character. The law does not punish an actor for greed or indifference, but when such aspects are exercised in performance of the offense conduct, they may alter our assessment of the blameworthiness of the actor for that conduct.

**Motive should alter liability if and only if it alters an actor’s blameworthiness for the prohibited act.**

Some might argue that use of motive is unobjectionable if the motive is to cause an external result. This might be called an intention. More problematic is motive that satisfies an internal emotion. (Revenge?) Important to HC - "because some actors may commit such offenses not for the harm that they cause to the hated group - e.g., intimidating others who identify with the victim - but rather for the internal satisfaction that it brings, the satisfaction of their hatred.” (P 608)

But this distinction seems tenuous - take the flasher again. (In this case as in HC it might be satisfying some emotion through some external result, though).

**II Motive as a substitute for character**

Motive is useful in keeping criminal law from expanding into imposing liability to Character. (Personal predisposition toward certain kinds of conduct or beliefs: honesty, dishonesty, bigotry, tolerance, generosity etc. - Saying something about a person’s internal decision-making and suggests how the person is predisposed to act
in the future). Why wait until the bad character expresses itself? Why not bring the law to bear on the "offender" and protect the public beforehand?

This might be part of the popularity of HC - bigotry shows bad character, which ought to be punished - identify hatemongers and punish them and publicly reaffirm society’s commitment to the virtues of tolerance.

(And then two pages are lacking! Aargh!)

But - the virtue of taking account of motive is that it helps focus the inquiry on the actor’s past conduct. It allows the law to consider character-related issues as they concern the actor’s blameworthiness for his or her action - Was this act committed out of greed? (...) - Without allowing the law to slide into an explicit inquiry into the actor’s character, apart from that is reflected in his or her act.” (P 612) - of course dangerous people might be incarcerated - but few offenses are defined to make future dangerousness an element.

III Problems in Implementing Hate-motivation offenses and the alternative approach of crimes of Group Terror

Is hate-motive the best means of defining crimes of this sort? Might be infringement of protected speech, First amendment.

Problem in drafting and application - How can we tell when an offense was in fact motivated by hatred? Even if we can show hate motivation, how can we tell whether the hatred is for the group or for this person in particular, or some combination of the two? (Presumably, the hatred must be for a characteristic of the victim that the victim shares with a group).( p 613) What proportion is necessary, if mixed? Which characteristics, which groups? How defined?

Is crimes against one group worse than that against another? Should it be?

"On what grounds could we punish hate motivation against some groups but not others? Is there liability if the offense is motivated by a hatred for conservatives? (...) Abortionists? Americans?” (p 614)

"The subjectivity of the judgment, the difficulty of proof, and the complexity in identifying the victim groups to be recognized, make laws regarding hate-motivation offenses difficult to draft and apply”.
A different approach for much of the conduct sought to be covered is to focus “upon the greater harm caused and intended by such conduct, than would occur in an analogous offense without the hate-motivation” (p 614) - But in what sense would it then be “analogous”? Spray painting a swastika on a synagogue causes more harm than spraypainting something else elsewhere. "A greater harm to a greater number of people can result, and frequently is intended, where the conduct seeks to intimidate or emotionally injure an identifiable group, than in instances where the same conduct does not target a particular group”

The HC is intended to reach and intimidate a greater number. By focusing on the additional harms as the basis for greater liability, we avoid the hate-motivation application problems as well as the potential First Amendment issues. (Question: isn’t this in some sense what hate is? Or must it be accompanied by the idea that the victim deserves the harm?)

This occurs in Model Penal Code already: desecration of venerated objects-

Here is a starting point to draft a statute that will encompass the variety of things that people can do to intimidate and emotionally injure a group by victimizing one person on the present occasion:

"Causing or Risking Group Intimidation or Terror." - Commits offense and thus purposely or recklessly causes or hopes to cause intimidation or terror in a group who identify with the victim (through race, religion, gender, or sexual preference), shall be liable for an offense under this section. If the person purposely causes such intimidation or terror, the offense is a fourth degree felony. If recklessly (second degree misdemeanor).

No actual harm need take place, then.

How broadly should the groups be defined? Maybe any group, but in practice primarily against historically victimized groups. If the rationale has to do with symbolic statement in favor of tolerance for diversity along particular lines - then more limited application may be preferred.
19. Megan Sullaway: Psychological Perspectives on hate crime laws

Summary and Commentary

This paper deals with those objections to hate crime laws that starts from psychological constructs as attitude, motivation, behavior, emotion, and intergroup relations. She addressed the measurement of motivation and intent, and distinctions among attitudes, emotions and behavior. She compares HCs with other crimes in terms of perpetrators, type and degree of violence, psychological and physical trauma suffered by victims, and community impact. "Psychologically based defense strategies used by perpetrators of hate crimes are critiqued". At the end, Sullaway points to research and policy implications.

A broad description of hate crimes: "crimes in which the victim is selected because of the actual or perceived race, color, religion, disability, sexual orientation, or national origin of that victim." (P 250)

Hate crime laws have been criticized on constitutional grounds, but also on psychological grounds. This article illuminates those objections and examine research and policy implications.

The hate crime laws addressed her "typically apply when the perpetrator commits an existing category of offense (such as assault or murder) that is ascertained to be motivated by prejudice or bias, in which case penalties may be enhanced." (P 250-1)

The Supreme Court ruled in favour of hate crime penalty enhancement in Wisconsin v. Michell (1993). It’s justification where

"Although the government can’t punish abstract beliefs, it can punish a vast array of depraved motives…. (Hate crime statutes do not) prohibit people from expressing their views, nor punish them for doing so...."

This suggests that hate crimes are "more severe by nature than nonbias-motivated crimes, as they are "thought to be more likely to provoke retaliatory crimes, inflict distinct emotional harm on their victims, and incite community unrest". (P 251) Critics (like Jacobs and Potter 1998 - see separate commentary) argue that these laws may reinforce social divisions and exacerbate social conflict.
Other concerns are that it’s difficult to determine intent and motive, that punishment of ideas and attitudes is in violation of First Amendment rights, that hate motives may not be more severe than others, the creation of a special victim class and the risk of providing mitigating factors, and increased intergroup tension as a result of these laws (She refers to Gerstenfeld, 1992)

**Difficulty in Determining Biased Intent of Motivation**

Some critics argue that it’s impossible to "measure bias or to prove a causal relationship between prejudicial attitudes and behaviors". (P 251) Gerstenfeld, for instance, points out that while most crimes have mens rea requirement, the motive remains immaterial. Assessing motive is a problem, and may require mindreading as the defendant himself may not know his true motive.

COMMENT: Of course, similar problems may accrue to the more traditional mens rea.

There’s a tricky issue of definition. Is a prejudice intent, motive, or both? Another about measurement. These raises "concerns about the propriety of using motive to determine criminality a and the possibility or impossibility of assessing motive”.

**Prejudice, Hatred and Bias: Definitional and Measurement Issues**

"Motivation or intent. Criminal law traditionally concerns itself with mens rea (literally, the reason for which one acts, the conscious intent) in assessing culpability. For example, the conscious intent of a person who breaks into a bank is to steal money

This is not dependent on motive. Motive is "irrelevant as far as the determination of whether a crime has occurred (although it might conceivably be taken into account at sentencing).” Sullaway refers to Morschs (1991, see separate commentary) argument that

Because hate crimes require a determination of motive ("why a perpetrator acted, not for what purpose or with what intent") and because motive is "inherently subjective, entirely within the contents of an individual’s mind,” (p 659) hate crime laws are untenable. (P 252)
In her congressional testimony, Heidi Hurd made a similar argument. "Intent has, as its object, a perceived good"

"To act so as to get money, or so as to subject another to sexual intercourse, or so as to kill someone is not (necessarily of intrinsically) to act on an emotion - it is rather to act so as to obtain what one perceives as a future good" (Hurd 1999)

Hurd believes hate crime mens rea is uniquely motivational, and the motive is an emotional state. Hatred is an emotion, and bias is a disposition to make false judgments - both are different from the motivations known as "specific intent crimes". Such dispositions possessed over time are, she claims "standing character traits. We should not criminalize vicious character traits, only goals or "reasons for action". (P 252)

COMMENT: It’s not clear from Hurd’s further writings on the subject that she would allow punishing "reasons for action", if understood as motive, rather than specific intent.

Sullaway argues that in hate crime cases, "intent and motivation have a much closer correspondence than that acknowledged by Hurd (1999) or Morsch (1991)".

For example, hate crimes may be committed to achieve a perceived future good, whether that is sending a message or discouraging in-migration of a particular group. (P 252)

In some cases, statements made in connection to the crime does reveal specific intentions of this kind, which would seem to fit Hurd’s definition of intent "so as to obtain what one perceives as a future good".

COMMENT: Sullaway’s citing of german cases here does suggest a version of hate crime that’s more akin to domestic terrorism.

Lawrence (1999 "hate crime violence" hearing) cites Dressler (1987) and the Model Penal Code (1985) and suggests that "intent describes the mental state
provided in the definition of an offense in order to assess the actor's culpability with respect to the element so the offense” (p 253). He writes

The mental state that applies to an element of the crime we will call "intent," whereas any mental states that are extrinsic to the elements we will call "motivation." The formal distinction, therefore, turns entirely on what are considered to be the elements of the crime. What is a matter of intent in one context may be a matter of motive in another. (Sullaway’s italics)

"In a hate crime, the two concepts, intent and motivation, are virtually the same. For example, a bias-motivated perpetrator who assaults an African American may possess "a mens rea of purpose with respect to the assault along with a motivation of racial bias" or may possess "a first tier mens rea or purpose with respect to assault this victim because of his race" (Lawrence 1999, Sullaway p 253)

Sullaway holds that both cases describe crimes that could be penalized under hate crime statutes.

COMMENT: It is still not clear that the quite sensible distinction between what and why is being upheld here. It’s hard to see how the concepts, if this is the reading we adopt, could be "virtually the same.

Sullaway (and Lawrence) does not consider admittedly rare but possible (and potentially important) cases where motive explains the crime or some element of it, but no relevant specific intention can be discerned. All this may hang on whether we recognize motive for action as part of the choice of that action.

The role of emotion in hate crime law

In her 1999 statement on hate crimes violence, Hurd objected that "the mens rea requirement for hate or bias crime liability is an emotional state, not a reason for which one acts” (COMMENT but not Hurd and Moore’s more nuanced account 2004). Sullaway discerns two issues in this statement - 1) whether the presence of a particular emotional state is necessary in order to define a crime as hate-based. 2) whether hate crime laws are unique in consideration of the emotional state of the perpetrator.

COMMENT: the second question is of considerable interest (See Kahan 2001, and Kahan and Nussbaum). Presumably, considerations of occasionally play a mitigating role. Mitigation may be less problematic than
aggravation as it does not violate any right or interest of the offender. (It then becomes important whether manslaughter is mitigated murder, or murder aggravated manslaughter)

The presence of the emotion is not a reasonable criterion for hate crimes, and "hate crime" is quite generally recognized as a misnomer. Hate crimes can be committed by psychopath (low emotion) and thrill seekers (where "hate" is not the predominant emotion). On the victim-selection model, emotion does not even enter. The term "bias-motivated" crime has been suggested as a replacement.

As for 2), the "Provocation doctrine" (origin in English common law) used to allow reduction if the offender demonstrated acting in "hot blood" to an affront to honor. (Like gross insult, adultery) when four conditions where met 1) Adequate provocation, 2) acting in the heat of passion, 3) sudden heat of passion before there had been a reasonable opportunity to cool 4) a causal connection between provocation, passion, and action.

These distinctions are reflected in the law of first-degree murder ("malice aforethought") and manslaughter (provocation or extreme emotional disturbance). "Extreme emotional disturbance may mitigate murder when loss of control occurs that might be experienced by a reasonable person in that situation." (P 254)

According to the Model Penal Code, some external circumstances must be taken into account, such as extreme grief. (But idiosyncratic moral values are not held to be part of the actor's situation.) In short - under the "rule of provocation", emotion is even more central than it is to the definition of hate crime.

Bias in victim selection

Sullaway writes that

The mens rea in hate crimes is, in fact, the intent and goal of selecting particular victims because of group membership. Regardless of whether the emotion of hate is experienced during a hate crime, the choice of victim is a deliberate process, supporting Lawrenece's (1999) point of a mens rea of purpose in victim selection (p 254)

Selection, of course, implies choice and cognition, and the emotion is not central (this is consistent with most hate crime laws). Sullaway connects this with civil rights acts, formulated in terms of "right for a person to be free of violence (etc) because of his/her race, color (etc).
COMMENT: This pre-judges the issue in favor of the victim-selection model. It is, of course, an influential model. It still has to explain why this mode of selection is worse than any other. Is it a matter of discrimination? A related concern applies to civil rights, of course: a person have a right to be free of violence period, not just free of violence for these specific reasons.

**Measurement**

As a measurement issue, "the assessment of intent and of motive are similar insofar as both require inference of internal processes” (p 255). Of course, measurements in behavioral sciences are controversial. Psychological constructs are not directly observable, but inferred on various grounds: formal psychological testing, behavioral observation, verbal reports of participants, examination of archival records and behavioral traces. "Prejudice as a psychological construct has been measured, predominantly, via psychological tests” (p 255) (See Dunbar 1995) Tests commonly used measure anti-Semitism Homosexual bias and anti-Black racism. Many of the measures are vulnerable to self-presentation bias - the purposes of the test may be transparent to the subject who may shape the response to create a more acceptable presentation.

Another measurement of prejudice is more unobtrusive - Gough (1951) resulted in the PR scale, with items derived from a criterion-referenced keying strategy to gather characteristics such as anti-intellectuality, cynicism, pessimism, misanthropy, rigidity, dogmatism, discontent, and feelings of estrangement. Gough found significant correlations between prejudice scores and measures of anti-Semitism and between prejudices score and intolerance.

COMMENT: Sullaway here does not seem to offer any operationalisation (behavioral or cognitive of "prejudice" which makes assessment of these claims difficult, unless familiar with the cited material.

The Implicit Association Test offer another unobtrusive method, searching for automatic, learned and hidden stereotypes that may bypass conscious awareness.

More behaviorally oriented psychologists measures rather and operationalizes in terms of behavior. (Not mentioned here: how)

**Determination of Causal Relationships**
While prejudice as a trait or attitude can and has been measured reliable, the presence of such a trait or attitude is not illegal, and the measurements have little to tell about the specific intent or motivation of an offender at the time of a crime.

COMMENT: This, of course, is of tremendous importance if the charge that hate crime laws target "thoughts" shall be met. It should not be enough that a crime be committed by a prejudiced person, for instance.

Rather, it must be, as law enforcement means in general when collecting evidence of motive, to appeal to behaviors and behavioral traces. When the Hate Crime Statistics Act of 1990 was passed, the FBI (the Uniform Crime Reporting program, UCR) had to develop and implement a hate crime data collection system, collecting information about type of bias, offense and victim and offender characteristics. The FBI report states that HC's are not separate, distinct crimes, but only distinguished by the bias-motivation of the offender. Hate crime data, therefore, can only be collected by capturing additional information about offenses already reported.

Determining motive or intent is central for UCR. The Crime Classification Manual of the FBI's National Center for the Analysis of Violent Crime has eight index offenses on the basis of intent and motivation. The authors based the classification on the "primary intent of the criminal" - but the terms of intent and motive is used interchangeably. In the CCM, offenses are classified according to predominant motive. Thus extremist homicide is a murder "committed on behalf of a body of ideas based upon a particular political, economic, religious or social system". Sullaway points out that

In the context of such a concerted effort by the FBI to classify crimes based on perpetrator motive and intent, criticism of hate crime legislation that claim the impossibility of assessing motivation are weakened (p 257)

It’s difficult, of course, to determine whether hate motive caused a harm, as social science research acknowledges that causal relationships can not be proved "in the absence of a controlled experimental paradigm in which potentially causal variables can be manipulated." - In naturalistic observations of behavior, cause can only be inferred. But this is not an unique problem for hate crimes.
The challenge lies in the establishment of valid and reliable methods to determine the types of forensic evidence consistent with hate-based motivation. (P 258)

The FBI data-collection guidelines of 1999 states that "bias is to be reported only if investigation reveals sufficient objective facts to lead a reasonable and prudent person to conclude that the offender’s actions were motivated, in whole or in part, by bias".

If hate crime statutes are to be useful, law enforcement agencies must be able to operationalize hate-based motives so that bias/hate-motivated criminal behavior can be described in specific and measurable ways. - Police offices should be trained to look for the use of hate speech, propaganda and expressed intent, for instance.

Some evidence suggests that the absence of competing motivation (such as theft) characterizes many hate crimes. (In LA, preliminary data has it that more than 80% of the hate violence were not related to material gain). Other factors: absence of provocation and committed by a stranger. (Both factors "ruling out" other motivations).

If these findings are confirmed, it would help determining victims selection on basis of "symbolic" vs "actuarial" status. (For example, whether a gay man is targeted because of sexual orientation or because he is assumed to be an easy target and would be reluctant to contact the police?)

COMMENT: It is also worthy of consideration whether this distinctions should make a difference. If praying on a minorities due to perceived reluctance to report or resist should be recognised as a "mitigating" factor (or canceling out the aggravation of selection). The "absence of other motive" evidence means that hate is construed on based on inference from the best explanation.

Punishment of Ideas and Attitudes in Violation of First Amendment Rights

Attitudes and Behavior
Critics are occasionally conceptually confusing attitudes and behaviors. Sullivan argues that hate cannot be eradicated. Hurd believes that hate crime laws penalize having certain emotions, and that punishing persons for vicious character traits is "a dangerous and illiberal role for the State to take".

It’s a conceptual error to cite (as does Sullivan 1999) the intractability of hate and prejudice and the difficulty or impossibility of eradicating it as rationales to discount the need for added penalties for crimes in which victims are selected by membership in a hated group. (P259) (Attitudes, here, are understood as evaluations).

The psychological literature which concern the measurement of attitudes suggests that associations between attitudes and behaviors are frequently weak. (See Ehrlich 1973). We must distinguish between knowledge of cultural stereotypes, endorsement of cultural stereotypes, and prejudice displayed in observable behavior.

Many, if not most people who hold what might be considered prejudiced feelings, attitudes, and beliefs will no more act on those feelings, attitudes, and beliefs in any criminal way than they would hold up a convenience store (p 259).

Rather, the usual effect of prejudice is withdrawal from and avoiding contact with the group in question. (Thus when feelings of disgust towards lesbians were offered as a murder defense, the supreme court argued that a reasonable reaction would have been to discontinue the observation (Commonwealth v. Carr). Some evidence suggest that many hate crime perpetrators are "career criminals" who seek to engage with the object of their hate in an aggressive manner.

COMMENT: This is in direct contradiction of those who claim hate crimes are often first time offenses. (Source needed)

Protected Speech as Evidence

Hate crime statutes penalize the behavioral enactment of hate beliefs, attitudes, and feelings, as manifested by the selection of a victim(s)/target(s); such statutes do not penalize hateful beliefs and emotions per se. (P 260)
Non-criminal expression of said prejudices are not penalized (in the US, under the SC ruling that "offensiveness is insufficient basis to punish speech" *Texas v Johnson, 1989*). On the other hand, there is the "fighting words" ordinance - referring to "conduct which itself inflicts injury or tends to incite imminent violence". In *R.A.V. V. City of St. Paul* (1992) - the US Supreme Court found that this ordinance was invalid because it prohibited otherwise permitted speech solely on the basis of the content of the speech.

COMMENT: This formulation is curious, as the emphasis would seem to be on the effect, rather than the content. But in fact:

There was content discrimination as it proscribed "only certain fighting words that insult or provoke violence on the basis of race, color, creed, religion or gender, and not "fighting words in connection with other ideas - to the basis of political affiliation, union membership, or homosexuality…." (Noel, 2000)" p 260-1)

COMMENT: This, of course, is crucial to the justification if based on actual and predictable consequences. It also means there’s still a possibility to uphold fighting word doctrines, if carefully drafted. The issue here connects to other complaints regarding the arbitrariness of the groups "protected" by legislation. If selective, it must be principled.

In other cases speech has been used as *evidence*, which is clearly acceptable.

Equivalence of Hate Motivation to other Criminal Motives

Jacobs and Potter (1998, see separate commentary) argue that hate crime laws are "unnecessary, unfair and unconstitutional" because prejudice is "no more morally reprehensible than other criminal motivations like greed, power, lust…etc". Furthermore, a special class of victims seem to bend the concept of equal protection under the law (Haberman, 2000)

Perhaps prejudice is no more morally reprehensible than any number of other criminal motivations. However, there is preliminary evidence that hate crimes do differ from other crimes in the degree and type of violence.
Also, psychological, criminological, and sociological research suggests that hate crimes may create greater harm for the victim and the community at large compared with other types of crimes. These types of factors have historically been taken into account by the criminal justice system in determining punishment (p 261)

COMMENT: As Hurd and Moore points out, this would mean that hate is used as a proxy of these factors (which in themselves are fit and proper grounds for enhanced punishments).

*Type and Degree of Violence*

Sullaway states that criminal behaviors motivated by hate toward a particular class of people "appear to be qualitatively different from other comparable criminal acts." According to FBI data, "there is not a strong correlation between hate crimes and total index crimes, nor between total hate crimes and total violent crimes, suggesting, if valid, that "hate crimes appear to have their own uniqueness, trends, distributions and might not be inferred from Uniform Crime Report (UCR) index crimes"

Hate crimes are more likely to be against persons than property. (COMMENT: some controls would seem to be required here), and those committed against persons tends to be assaults. More frequently aggravated assaults. Sullaway recognize that there are significant problems with the FBI database (see later in this article). Some researchers (Levin and McDevitt) find that he's are more frequently committed by multiple offenders. Law enforcement agencies report that "given similar assault/vandalism cases, bias assault/vandalism is generally more serious than non-bias assault vandalism). The increase in violence reported may, of course, reflect improved reporting. Sullaway repeat that hate crimes seem to be qualitatively different from other crimes (in general)

COMMENT: This would seem to render some validity to the construct as a criminological category, but is it sufficient to warrant blanket penalty enhancement?

*Type of Criminal Who Commits Hate Crimes*

*Instrumental versus reactive violence*
Instrumental - goal directed/purposeful violence tends to target strangers and acquaintances, rather than intimates. Reactive - response to frustration and hostility, perceived threat. Sullaway believe this may be a useful distinction to think about hate crime offenders. She points out that very little research has been conducted regarding the association between instrumental aggression and bias motivation. Is there greater preplanning and goal-directedness as the degree of bias motivation increases? A recent study of bias criminals in Los Angeles County found such a relationship. "The greater the bias component to the homicide, the more likely there was preoffense planning of crime."

COMMENT: This should be connected to more conceptual issues. If hate crimes are more akin to specific intent crime, such goal-directedness is central. If not, less so. It’s not clear from this text whether the "bias-component" was ascertained independently of evidence of planning.

McDevitt et al (2002) provides a typology of hate crime perpetrators where "mission offenders" is one such type (typically using weapons, which suggests planning). McDevitt et all argue that the most common type is the thrill offender - in which case the perpetrators typically go looking for a specific kind of victim. Sullaway points out that "more study is needed", but that if there is a relation, there are significant implications for level of violence, recidivism risk, and possible rehabilitation. (P264)

*Increased Victim Trauma*

*Psychological trauma*

There is evidence that the psychological impact on the victim differs between hate-motivated and nonhate-motivated assaults. Victims of violent hate crimes may be more severely traumatized than victims of comparably violent nonhate-based crimes. (P 264)

She refers to Herek, Gillis and Cogan (1999) who compared psychological distress suffered by gay men and lesbians after bias vs nonbias crime of comparable violence. Especially in the long run - more likely to view the world as "unsafe, to view people as malevolent, to experience a relatively low sense of personal mastery". Some data (Weiss, Ehrlich and Larcom (1991-1992) that hate crime victims reports "trying to be less visible".
Possible theoretical explanations of this can be found in Janoff-Bulman’s (1979) distinction between “behavioral” self-blame and "characterological” self-blame.

Briefly put, crime victims in general suffer psychological distress because the comforting illusion of personal invulnerability, of the world as a reasonable and somewhat predictable place, is shattered. Behavioral self-blame is a means to re-establish a sense of control by attributing the event (correctly or incorrectly) in some degree to one’s own behavior, which implies the ability to prevent a reoccurrence of the event. (P 264)

You can adjust behavior, in order to regain a sense of control. In characterological self-blame the cause is attributed to one’s character, which is not easily modified and implies an uncontrollable risk of future victimization. Ironically, perhaps, being responsible for the event means having some form of control, which may reduce psychological suffering.

According to this model, it is understandable that victims of hate crime assaults may experience greater distress relative to victims of assaults in general.

The latter may be able to make some behavioral changes to minimize perceived future risk. (P 265)

COMMENT: There are a few theoretical kinks to clear up here: First, these are clearly not the only allocations of blame. Blaming the perpetrator, for instance, would seem to be preferable (even if that means that the risk may still be out of your control). Second, it’s not obvious that being targeted because of group-membership is being targeted because of something inherent to your character. Finally, it’s not clear that being target because of group-membership means you suffer a greater risk than otherwise, as you where clearly not singled out, but exchangeable to anyone else sharing that characteristic.

Research with samples shows that "attributing an event to discrimination is associated with greater psychological distress and a sense of less control and mastery (Herek et al., 1999; Ruggiero&Taylor, 1997). Making an attribution to discrimination in the case of hate crime is virtually unavoidable for the victim. (P 265)

COMMENT: This, if true, has intriguing implication for how hate crimes should be handled by officials. It means that we should not “go looking” for bias motivation, as establishment of such would seem to make things worse for the victim. On the other hand, if the victim perceives bias motivation and this is not recognized by the police or the
court, the victim may experience secondary victimization. These are complicated matters, of course. It’s also interesting that revealing the bias may be important for prevention, i.e. Important for others, even though the first order victim will suffer more as a result!

**Physical trauma**
The data on greater physical trauma is limited. HC’s are more likely to be crimes against persons, and more likely to be assaults (COMMENT: But that is no comparison with "parallel" crimes). McDevitt has made claims to this effect, however.

**Increased Community Impact**
All violent crimes have multiple victims. Violent hate crimes add another victim - the more distally targeted group to which the "message" is sent. When hc’s are not reported (as may be the case when the police is not trusted), the entire community is placed at increased risk. Erodes feelings of safety and security.

HC’s may also instigate retaliatory attacks, which harms communities and fuels additional hate offenses.

**Defense Strategies Invoking Psychological Causes**
Jacobs and Potter argues that a prejudiced offender may say that he is less culpable than others, as he was indoctrinated by parents and peers. The prejudice was imposed, not chosen, and should be mitigating. (COMMENT: This is treated as a reductio ad absurdum by Al-Hakim (2010) see separate commentary).

**Prejudicial Indoctrination**
There’s no evidence that indoctrination with prejudicial beliefs creates hate-based criminal behavior - rather than outgroup avoidance. Indeed, parental absence and neglect are more likely to play a role here. Hightower (1997) studies childhood background of racist attitudes, and suggests that disturbances in parental relationships and with peers, and poor interpersonal skills, internal controls and reduced cognitive resourcefulness.

COMMENT: This suggest that even when racist attitudes and behaviors are in-group pro-social, it functions primarily when the in-group is limited and exploitable in this way.

Sullaway notes that in general childhood “indoctrination” of this sort is not recognized as mitigating (unless, of course, it involves pathology). It’s more akin to the loss of control involved in drunk driving - which even for alcoholics or children of alcoholics is not a mitigating circumstance.

**RPIDD - Racial Paranoia-Induced Delusional Disorder**
A "disorder" used in some defenses, but the "diagnosis" has no basis in the medical or psychological literature.

**Homosexual Panic**

Glick (1959) "The term should be used to refer to an acute episodic schizophrenic reaction accompanied by intense terror based on the patient’s unconscious wish to present himself as a homosexual object with the expectation of dire consequences" (p 268)

The notion originates in psychoanalytic theory and depends on theories such as latent homosexuality, repression etc. It’s not a mental disorder.

**Homosexual Advance**

This defense has been used successfully (strangely) in *Shick v. State*, (1991)

**Problems With RPIDD, Panic, and Advance Defenses**

The defenses appear to be variations on insanity, diminished competence, extreme emotional disturbance, or provocation defense strategies. But there are conceptual difficulties with fitting the mentioned defenses into these categories.

Do these states create impulses strong enough to undermine the offender’s volition? Unlikely. As described they do not reach the level impairment required. In many cases of “homosexual advance” defenses, the crime is precisely not reactive, but planned, instrumental.

The situations in which perpetrator emotion mitigates murder change inevitably with societal mores. (p 269)

And current hate crime laws reflects social and political values. Given increased societal acceptance of homosexuality, homosexual advance does not provide sufficient provocation to "incite a reasonable man to lose his self control and kill in the heat of passion".

…Added penalties for such a hate crime are appropriate because a perpetrator’s violent response is not that of a hypothetical "reasonable person." (P 270)

(Sullaway mentions research and scholarship (Kahan, for instance) suggesting that homophobia is connected to disgust rather than fear or panic.

**Hate crime Laws and Intergroup Tension**

Do hate crime laws further divide and increase intergroup tension (suggested by Jacobs and Potter, 1998)? There's no evidence to that effect. (COMMENT: not is there any evidence that hate crime laws improve these matters).
Cognitive Dissonance Models
Sullaway mentions Gerstenfeld (disapprovingly) who applies "cognitive dissonance theory" to the field. CD occurs "when a person holds two dissonant, or inconsistent, cognitions, potentially creating a state of unpleasant psychological tension. (Has been studied with respect to persuasion and attitude change). Now, Gerstenfeld argues that "people’s actions are motivated by a drive to avoid discrepancies between cognitions. This might mean that a person unconsciously alters his attitudes (or motivations) to conform to his behaviors" - thus it predicts that "a person convicted of a hate crime will only become more ardent in his beliefs" because of the discrepancy between punishment for his action and his actions and his desire to believe himself not to be a bigot.

Sullaway undermines the reading of the theoretical model and the conclusion (among other things she omits the complex factors that influence attitude change "including perceived choice, perceived freedom, commitment, aversive consequences, personal responsibility, foreseeability, effort justification, and so on.” (P 271)

COMMENT: While the evidence does not seem to bear Gerstenfeld out, the concerns raised are real and should be met by evidence to the contrary.

Intergroup Tension and Hate Crime Laws
Sullaway states that data fail to "confirm the hypotheses that hate crime laws increase intergroup tension (COMMENT: The question is where the burden of evidence should be put here, then). California has had hate crime-related statutes for more than a decade and reports no increase in interethnic and interracial tension. Neither have there been convincing statistical analysis that associate hate crime laws with intergroup tension on a national level."

COMMENT: It would seem to be well neigh impossible to make such predictions and control for all the other factors.

"A failure to find associations between enactment of hate crime laws and intergroup tension is consistent with Intergroup Contact Theory (Allport, 1958, Pettigrew 1998 and 2002) which holds that contact between groups reduces prejudices if certain situational conditions are present: equal status of the groups in the situation, common goals, no intergroup competition, and authority sanction.” - In fact, hate crime laws may count as such an "authority sanction".

Research and Policy Implications
Measurement
While it’s possibly to measure prejudicial attitudes and beliefs with some degree of reliability and validity, these tools have little relevance in evidentiary questions of intent and motive in the commission of a hate crime.”

Intent and motive are overlapping constructs when examined from the vantage point of psychological measurement. Psychology can contribute to the development and refinement of techniques to collect evidence that best captures the various motivations involved in hate crimes. However, few such attempts have been made. (P 272)


Suffice it to say that there are unique aspects to bias crimes that interfere with accurate data collection, for example, victim’s reluctance to report, failure of law enforcement to appropriately document hate elements or to submit the information to the Uniform Crime Report Hate Crime reporting unit. (P 273)

(See Also Dunbar 2002 who uses method using signifiers (hate speech etc))

Additional research to more clearly delineate the best practices of evidence collection to assess bias motivation must be conducted. For example, different policy divisions may have widely divergent practices in their methods and practices of hate crime data collection. (P 273)

A number of social factors appear to affect law enforcement participation in hate crime data collection, including organizational attitudes and beliefs etc. Best practices should be developed and codified in policy.

**Classification of Hate Crimes**

Hate crimes may be grouped, or typed, by a variety of methods: by target (person vs. Property), by victim group (race, ethnicity, sexual orientation, etc.), or by the degree to which the crime is instrumental or reactive in nature. (P 274)

"But more research is needed to improve the description of hate crimes, with the goal of replicating, validating, and extending proposed typologies”.

COMMENT: In particular, conceptual clarity is needed here to control for factors that would influence how informative this description turns out to be.

It’s also of interest to investigate differences between hate crimes depending on targeted groups.
**Hate Crime Laws and Social and Political Values**

There are inconsistencies between states in terms of categories covered. For instance, several states do not include sexual orientation, despite evidence that they are harmed in the typical way. "Hate crime statutes should accurately reflect our state of knowledge about the groups commonly targeted." (P 274)

The legal and political environment may thus augment, inhibit, or be neutral toward bias motivated violence. Individual behavior takes place in this context.

A strong societal response may deter would-be offenders (particularly the "thrill-seeking" offenders, according to McDevitt et al. (2002))

Yet even if hate crime laws have little deterrence effect, they nevertheless have a powerful symbolic role in communicating social and political values to individuals.

COMMENT: This statement, of course, presupposes an expressive function of the law, rather than (or in addition to) a preventive one.

Sullaway suggests that group position theory supports the idea that change in racial order - not from inner considerations but from outside pressure, political pressures (Blumer (1965)). Hate crime laws, then, might be an example of such pressure. Finally, critical race theory suggests that hate speech and hate violence can be viewed as terrorist acts against the entire group. - Hate crime laws, accordingly, reflects the state’s recognition of an protection of the civil rights of all groups.

**Perpetrators**

Could grouping perpetrator allow prediction of treatment response, or recidivism? If hate-based assaults are more destructive than others, why is that?

Research about perpetrators should guide policy regarding prediction, prevention, and intervention where possible (p 275)

**Classification of offenders**

Levin and MCDevitt (1995) identified three types based on motivation - recently updated to four (2002). "Thrill-motivated" offenders, "defensive" offenders, "mission" offenders and "retaliatory" offenders. In general - more research is needed. McDevitt et all suggested that thrill-seeking offenders may be deterred by strong societal response, but defensive or mission offenders would probably not be (COMMENT: presumably those are the once that would be even more determined by a "societal" response which they regard as unjust).
**What creates an offender?**

Questions of cause. Ezekial (1995) observes that individuals recruited to hate groups mirror many of the theories about causes of involvement in hate activity. Summarized by Turpin-Petrosino (2002) “frequently described as youth who are academically unsuccessful, have poor family relationships, and are insecure, alienated, impotent, and angry…backgrounds of family violence and child and substance abuse are not uncommon”.

Deprivation theory suggests that hate ideology fulfills needs for social affiliation and group membership in youths who are emotionally and economically vulnerable. Interpersonal bonds theory suggests that recruitment into hate ideology occurs through social networks. Once social ties are established, the new member is introduced into group ideology, which maintains the social tie. (P 276)

The average perpetrator is around 30 years old, varying with the nature of the hate crime. (Preliminary data).

Discomfort with social change may be involved in hate attitudes, but it’s not clear if this phenomenon explain hate crimes. It’s consistent with the surge in hate crimes found when there is rapid in-migration of a minority group. (Similarly with "environmental influences beyond our control - like 11/9).

In some cases, genuine mental illness may play a contributory role. ”One hopes that hate crime laws allow for the distinction to be made between bias-motivated violence and violence that is a consequence of genuine mental illness.”

**Prevention and intervention with offenders**

Many proposed prevention strategies starts early. Some schools (California) are required to have human relations education. Sullaway argues that if the theories described above are correct, ”simply adding diversity training classes seems unlikely to prevent vulnerable young people from being drawn to hate ideology” (p 278)

One interesting twist is to include an emphasis on how racism and bigotry impedes Whites economically, politically and socially.

Of course, even though diminishing prejudical attitudes is desirable, we do not know if it will decrease bias-motivated behavior which, after all, is committed by a small minority of people with prejudical attitudes.

In California, the court may order a defendant to complete a class or program on racial or ethnic sensitivity or similar as a condition of probation. Unfortunately, such classes are rarely adapted to offenders, and research is needed to understand when, if ever, these programs work, and for which types of offenders.
(Sullaway notes that psychopaths typically become worse with treatment - the learn to appear more empathic, rather than being more empathic).

**Victims of Hate Crimes**

*Intervention with individual victims*

Variables proposed to explain the mechanism of psychological distress include loss of a sense of self, loss of a sense of safety, feelings of inequity, degree of violence, and prior victimization experiences. Sullaway notes that basic research is needed to see if these are relevant in understanding the psychological impact of bias crimes.

It has been proposed that victims of violent bias crime suffer more psychological injury on average than victims of violent, nonbias motivated crimes. If differential impact is established, psychological research should be undertaken to understand the mechanisms by which this occurs. (P 279)

A small minority of crime victims seeks mental health treatment. Variable that increases the tendency include internal locus of control, social support, level of distress, and the presence of violence in the commission of the crime. - But little is known about whether this translates to hate crimes. No (theoretically grounded and demonstrated efficacious) specific treatments for hate crime victims exists. Models for post traumatic stress disorder and rape victims may be adapted to this population. But caution is warranted.

*Intervention at a community level*

Hate violence may create greater community distress and increase risk for future attacks when victims fail to go to the police our of fear or anticipation of lack of support - though it should be pointed out that the research on community impact is in its infancy.

However, policy development cannot wait for research to be completed

Geomapping is a promising technique, and some evidence exist that we can predict hate crimes when large in-migration of a minority group in a predominantly White area occurs.

If intergroup conflict will almost inevitably occur when certain patterns of demographic change are present, policies may be developed that will allow for preventative responses (p 280)

COMMENT: If true, this is an important condition to be applied to the contact hypothesis. It should not be applied naively.

A further intervention concerns improved relations between minorities and the local police. The McDevitt et al. (2000) report recommends building trust between
members of minority communities and local police, and also improvements in how the police use data from nongovernmental organization.

**Conclusion**

The U.S. Supreme Court rule in favor of penalty enhancements for hate-based crimes in 1993. Critics often invoke psychological constructs in their objections, but they do not hold up to scrutiny.

Psychology has much to contribute to the definition and measurement of hate intent and motivation and to the study and treatment of perpetrators and victims and the communities to which they belong (p 281)

Sullaway points out that the state of research is incomplete, but so far, the evidence suggests that hate-motivated crimes may be more severe in nature and in impact, and that hate-based crimes may be qualitatively different than other crimes. But, again, the weakness is the preliminary nature of the area of inquiry and lack of replications.

One cannot have faith that statistics collected nationally by law enforcement truly capture the extent of the problem. (P 281)

Sullaway concludes with the hope that the debate will be informed by research findings rather than by sensationalism, politics, or personal prejudices and biases.
20. Andrew E. Taslitz: Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong

Boston College Law Review vol 40, issue 3 (1999) (pp 739 - 785)

Comment: Basically, the "critics" of the title are Jacobs and Potter (see separate commentary). Taslitz holds that character morality is suitable for the criminal law (not extensively argued for here, but in other works). It’s notable that social psychology and sociology, from which most of the evidence is normally taken, has of late become increasingly suspicious regarding the existence of "robust" characters.

Introduction

Hate Crime legislation enhances punishment, or creates a new substantive crime, if the offender is motivated by certain prejudices. It increases the maximum sentence imposed. Enacted in many jurisdictions, but have recently come under attack. Four bases of attack are of particular interest to Taslitz.

1) Hate crimes are no more morally reprehensible than similar crimes motivated by greed, power, sadism etc. (See Jacobs and Potter, separate commentary, and Murphy, separate commentary). In addition, "these offenders cannot be held fully culpable for their prejudices", if they stem from upbringing etc. Not chosen, and thus should make for lesser punishment, not greater

(Comment: this is treated as a reductio ad absurdum by Al Hakim, see separate commentary).

2) The harm to hate crime victims is no greater than that of other comparable crimes. Not affected by motivation. (At least one social science study found that the psychological pain of a hate crime is actually less than an ordinary crime - for the "ability of some hate violence victims to maintain their self-esteem may be associated with their attribution of responsibility for their attacks to the prejudice and racism of others" (See Barnes and Emphross - The Impact of Hate Violence on Victims: Emotional and Behavioral Responses to Attack. 1994. Small data set.)

3) Other crimes have repercussions beyond the immediate victim, too. (A rape at a university, for instance). And even if communities ARE more frightened by
bias crimes "that is an irrational fear that courts should not legitimate". (See Jacobs and Potter, Hurd, and Hurd and Moore, separate commentaries)

4) Punishing hate crimes wound reduce group conflict, but, as if manifests "identity politics", it can make things worse, but entrenching these groups. Making it strategic to be recognized as "disadvantaged and victimized".

Taslitz attempts to refute these claims
   By arguing that critics of hate crimes legislation have ignored the important roles of the criminal law in condemning evil character and accommodating the tensions between individualized and group justice.
   (P 742)

Taslitz makes Three core claims
1) "The psychological and moral need for individualized justice is undermined when victims are harmed because they are treated as members of a category rather than as unique beings."
2) "In an especially dangerous way, hate crimes contribute to a racist culture that creates subordinate status for marginalized groups and raises the risk of physical harms, such as further assault."
3) "Racist assaults rely on a despised theory of human worth that has been rejected by our modern constitutional culture."

With these, it can be shown how hate crime legislation promotes inter-group harmony by "relying on political and emotional themes that should be common to all American subcultures". Legislation promotes a vision of virtuous citizen character which requires us to condemn the racist personality. Taslitz assume but does not here defend this theory:

   That the criminal law should embrace character morality, rather than action morality.
   Action morality (freely chosen actions determine moral blame) dominates at present. And, critics say, HC legislation violates it by inquiry into offender’s motive.
   Motive - the reason why a criminal commits a crime - however, can only be assessed by, and indeed is an aspect of, character. To punish an offender
for his motive is thus to penalize him for who he is rather than what he has done.

Character morality "holds that we should be punished for causing certain harms that stem from who we are, rather than merely for what we do." Character is an enduring disposition to behave, revealed through actions. Punishment deserved "to the extent that a defendant’s actions reflect his evil nature". (At the extreme: sadists).

"Character moralities have both retributive and utilitarian justifications." (P 743) Retributitists punish only in proportion to free choices to harm (because of character). Utilitarians punish evil characters because there likelihood to inflict future harm. T claims that Character moralists meet the challenge that racism is not chosen, but arguing that such people could have made efforts to change their personalities. CM's embrace the role of emotions in legal theory (See Kahan and Nussbaum 1996, (see also separate commentary on Kahan 2001)). Character is partly constituted by group membership, so this approach draws attention to the connenction between harm to individuals and to those groups. (T believes that the ADL model is influenced by character morality)

**Comment:** It’s notable that giving "character morality" justifications in the manner Taslitz does, means that it’s not treated as a "fundamental" theory. It owes it’s validity to more basic principles. So why not apply those principles directly? It’s also notable that Hurd (and Hurd and Moore) agrees that character morality does lend support to hate crime legislation, but argues against it as a valid theory.

**What’s a racist character?** T defines it "One that finds pleasure in inflicting pain on a person because of that person’s race.” He intends to explain why it’s worse than other evil characters.

**Comment:** this may strike you as a very narrow and misleading definition of a racist character. Many racist are so only implicitly, and out of other emotions and justifications. As well as being a matter of group dynamics.

In particular, I argue that violent wrongdoers whose character based group animus leads them to attack group members undermine their victims’ need for individualized justice, harm their victim groups’ status, raise the risk of further assaults, and damage values central to our modern republican
government. In these ways, these criminals are more culpable, dangerous, and harmful than similarly situated offenders not motivated by group hatred. (P 744)

Taslitz primary goal is to demonstrate the error in Jacobs and Potters’ claim that it makes no sense to call a prejudice-motivated murder worse than an otherwise-motivated murder.

Part I "defines individualized justice as recognizing the deep-seated human need, reflected in our criminal laws and procedures, to be judged based on our own unique thoughts, feelings, actions, character and situation.” HCts treats victims as mere representatives and humiliates the group-connection part of our nature. One central purpose of the criminal law is to "address the resentment and indignation that society in general, and victims in particular, feel from, from the specific way in which an offender has degraded his prey”).

Hate crimes legislation is needed because it condemns the particular way in which the victims have been humiliated - the damage to their sense that they are judged for who they uniquely are. (P745)

(This part also explains that the damage stems from a racist personality, "particularly culpable for its misdeeds and particularly dangerous to further victims")

Part II - the message sent in hate crimes contribute to a racist culture. This culture damages the status of certain groups. This is an injury in itself but also reduces access to political and social power and material and social resources. Also raises the risk of additional physical harms - the mere existence of risk is relevant, even if the harm never occurs. Taslitz argues that the offenders culpability for such group status harm and for heightened risk of assault, stems from a racist personality. "It is the violent expression of the racist attitudes at the core of his being, not violence per se, that causes these harms.”

Part III - examines the conflict between pro-slavery and abolitionist etc. Concluding that by the time of the 14 amendment’s adoption, the conflicting views on slavery reflected different views on desirable characters of citizens. Here’s also an argument for what legislative, rather than judicial, action is required.
Part IV - for a multicultural society to remain coherent - "it must not tolerate remnants of the master-slave relationship". A decent society does not humiliate or tolerate the humiliation of citizens by treating them as unwelcome in "the family of man".

Hate crimes legislation challenges the racial violence at slavery’s heart and sends the message that all citizens will be treated decently. In this way, hate crimes legislation promotes unity among racial and ethnic groups. Critics are therefore wrong to content that it promotes divisive identity politics.

Comment: From this introduction, it seems that Taslitz are not engaging with all of the criticism lodged against HC- legislation. In particular, even if the criminal law is engaged with the judgment of characters, and the mentioned harms do clearly occur as the result of racial violence, we still face the challenge that an individual perpetrator might not be to blame for this result. There might be a solution based on the notion of vulnerable groups, but that means certain limitations on how the statutes should be drafted. Also: There is a tension in Taslitz treatment of the importance of group-membership. If I’m being targeted because of it, it "violates" individualized justice. But he also wants to claim that this is a "core part" of the individuals identity. (See below)

1. Individualized Justice

Individualized Justice is central to our criminal jurisprudence. Each individual be treated as unique, something of infinite, irreplaceable value. Resist classification as stereotypes ("a mere member of a category"). Understands the individual conditions for consequences etc.

Courts' most explicit recognition of the need for individualized justice occurs at sentencing; indeed, the concept is elevated to a constitutional mandate in the death penalty context

Implicitly recognized throughout the criminal trial process. (Protection of privacy etc). A voice for "individualized pain". Goes for both victims and defendants. A resistance to standard sentences for a "typical" robbery, say. Clear in victim impact statements. Retributive emotions "protest against the criminal offender’s (...) theory of human worth". (749) A moral injury caused by the message the crime sends to us. We are "indignant" rather than "resentful" when we
don’t suspect that the offender is somehow right about us (or others). The term “indignant” best describes society’s reaction to crime. Indignation often accompanied by “moral hatred” towards the insulter, her character, habits, disposition.

How society reacts to one’s victimization can be seen by one as an indication of *how valuable* society takes one to be, which in turn can be viewed as an indication of how valuable one really is (p739, quoted from Murphy and Hampton)

A hallmark of a racist society is the unwillingness of its justice system to protest against "the racially subordinating messages inherent in certain crimes". (P750).

"We must punish him (the offender) in a way that rejects the intolerable messages sent by his conduct” (p 751). “A racially-motivated assault breaches norms of individualized justice in important ways.” (P 752)

Taslitz argues that society’s retributive rage requires that the offenders ”evil cause” be rejected by society.

**Comment:** Taslitz here argues that ”societal satisfaction” (this is a retributive argument) requires separate reparations for the racist element (victim selection "because of"). It’s also notable that T treats hate crimes (perhaps all crimes) as crimes against justice. This section sounds a lot like the "normative harm" of Iganski (2008) or the ”expressive harm” mentioned by Blackburn (2001 - Group minds and expressive harm). But Taslitz account is more individualized - it’s a breach against “individualized justice”. Ironically, he seems to argue that this is generally true for hate crimes. See the tension mentioned in previous comment.

"Addressing legitimate retributive emotions, including moral hatred for those thoroughly identified with reprehensible causes, is necessary for social healing. Society can re-establish a relationship with these offenders (…) only after their sins have been expiated by suffering that has satisfactorily expunged their evil cause.” (P 752)

Then Taslitz argue that this means rejecting not only the cause, but the offender himself. This is clarified by examining the nature of ”motive”. Taslitz recognize that critics challenge HC laws because they punish motives, and motives are supposed to be irrelevant under Anglo-American law (see Gellman (1991), see also
Hurd (2001), and Hurd and Moore (2004)). The law does not ask “why”. We should punish people for what they do, not who they are (See Lawrence Crocker (1992/93) "Hate crime statutes: Just? Constitutional? Wise?) Taslitz states that as a descriptive matter, these critics are wrong.

Motive often plays a role in criminal liability though it is not labeled as such. (P 753)

Taslitz mentions burglary, i.e a specific intent crime, the definition of which mentions purpose. The substance of the question asked is one of motive.

Comment: This is very notable indeed. See Morsch, Murphy, Hurd, Hurd and Moore (among others). Is motive reducible to specific intent? The latter seems still to be a "what", and part of the action. Motives are generally easier to distinguish from actions.

Similarly with self-defence doctrines - "not only was there a purpose to kill, but why there was such a purpose - to prevent the offender's imminent death. "Indeed, motive plays a role in defining all specific intent crimes, as well as many defenses (such as insanity, duress, and necessity), and in sentencing” (p 754)

Comment: Two things: First: this, too, is formulated in a "what" way, not a "why" way. The distinction IS spurious, but the challenge remains. Second: some people think that motive may be relevant as a mitigating circumstance, but not an aggravating one. The former does not violate the rights of the offender. In that case he/she can have no complaint.

Taslitz continues that the critics are also wrong normatively. Motive does make criminal liability turn on character. "But character means more than a tendency toward evil thought: it means a willingness to act on that tendency - a willingness demonstrated only by our acts.” He invokes Murphy (see separate commentary): that character is relevant only as revealed in actions. Not in character (or thought) alone. This is reflected in the word "motive" as it enter into the explanation of behavior.

Taslitz goes on to argue that we punish hate criminals character - where this is part of their "core being" - not misguided fools making poor choices that send
offensive messages. "This common intuitions is one that criminal law properly
should reflect".

**Comment:** This, in fact, means ruling out a large number of crimes that
currently counts as hate crime. At least in Britain (See Iganski 2008. Separate
commentary). See also Perry (2001) on the ordinariness of hate crime.

Critics argue that there’s no evidence that racists are more culpable or inflict
more harm or are more dangerous than other wrongdoers. But again, the critics
are wrong.

The critic argues that a racist’s character is fixed by the time of his actions, and
thus has no control, no choice, and therefore no culpability. Taslitz argue that this
approach "improperly freezes the action at one point in time: the time of the act".
But racists have had the opportunity to change their characters.

Racists are "by definition" more dangerous than non-racist (racist - willing to
inflict harm on certain people). Thus most in need of deterrence. In addition -
criminal punishment can be justified in the face of determinism.

While there may be no free will in the sense of physical causation, we
view actions as chosen when, at the time they happen, they are rational
and uncoerced by immediately present outside forces

"Punishment is deserved according to the wrongdoer’s choice to disregard
another’s value". Choosing victims as representatives disregards their "special
value". A "hate criminal is culpable because he is the kind of persons whose
rationally chosen actions contribute to robbing the meaning of both the victim’s life
and our collective lives as American citizens.

**Comment:** But this would seem to hold for all crimes, or at least for a number
of crimes that are not hate crimes. Should they be regarded as such? This line of
argument seems to call for more comprehensive restructuring of law and
sentencing practices.

There’s also a special nature to the harm caused. The message is necessarily
**part** of the harm suffered. (See Murphy, separate commentary).
Comment: This does not speak to the harm being constituted by the motive. If anything, it supports hate expression as constitutive. Note that the harm can occur if the victim mistakes the motive of the offender. This shows that they are distinct.

Murphy is not sure hate crimes send worse messages than (some) other crimes (see comment above). Taslitz thinks that Murphy then ignores the human need to be judged as unique individuals, and hate criminals are worse in this regard. (Comment: This need is not established, and it’s not clear that only hate criminals violates it if it were.)

A more promising approach: the message sent to the larger group. (And, Taslitz argues, toward the larger political system).

Taslitz argues that hate criminals are more dangerous - because racism is a central part of their characters. And hate-motivated assaults will cause more harm than otherwise motivated assaults.

Comment: again, the first claim seems to go against the individualized jurisprudence assumed earlier. He does not add any reference to data on recidivism in support of this claim. Indeed, the claim is made by Taslitz, Crocker and Murphy (more hesitantly), but only as an assumption.

The last bit puts too much emphasis on assaults, a rare kind of hate crime.

Part II Racist Culture

The harm done to the group is done by contributing to a racist culture.

By definition, hate crimes are assaults on both the individual and his group. The assailant defines the individual entirely by his group membership, and does so to hurl the insult, "I hate the group for which you stand." The hate criminal’s goal, therefore, is to denigrate the social status of both the individual and his or her group." (P 758)

Taslitz claim that a group’s social status "is a valuable good in itself and in its capacity to garner power." Includes respect and approval. Demonstrated through symbolic activity. "Status is a kind of social agreement about value". (Example: Jim Crow-laws, system of daily degradations). Correlated with the ease with which you obtain jobs, money, and other forms of economic empowerment. The Supreme Courts (In Beauharnais v. Illinois) acknowledged that "harm to a group’s status harms its individual members" - see reputation. And harm to the individual harms the group.
(Comment: thus the suggestion to re-describe hate speech as "group-libel")

"Legislative action condemning group-directed violence serves a powerful symbolic function in asserting the subordinated group’s equal status with the dominant group" (p 760) And each criminal prosecution of a "violent hate crime" serves a function in "furthering minority group’s social position in light of the criminal justice systems unique role as moral educator". (Similar with the "rape culture" argument for increased punishment and special legislation).

Comment: the description of "rape culture" that follows does lend support to the view that rape should in fact be labeled a gender-based (possibly) hate crime.

Taslitz quotes Larry May, explaining how holding and expressing such "group-subordinating" attitudes itself imposes some measure of moral responsibility on the offending speakers” (p 762) : "as feelings of another group’s lower value become more shared and more intense, the greater becomes the risk that others sharing those attitudes will act on them to cause harm.” (See May "Sharing responsibility" (1992). Racist speech promote stereotypes that help justify such harm. A heightened risk for harm is the result. May argues that culpability is less than for intended or direct causing of harm, though - and the speaker may merit only shame or guilt. Taslitz points out that when combined with intentional infliction of concrete harm, things change.

Comment: This section is very important, but again it raises questions as to the proportion of responsibility assigned to the individual speaker/offender. The term "incitement to violence" seems more apt here.

Among the consequences of perception of risk is defensive behavior, which limits the groups political, emotional and social lives. May adds that passive tolerators of the dominant group share the moral blame for bias-motivated harms. They benefit from the harms, and their prejudices contribute to the climate of subordination. Many passive people could reduce the risk of harm, by challenging hateful messages, yet fail to do so.

A society that does not condemn hate crimes in law and in action makes many of us collaborators creating and perpetuating rape and racist cultures (p 765)
Comment: Taslitz has not yet provided an argument that the Law is the right way to approach this problem.

Part III A Despised Theory of Human Worth: The Fourteenth Amendment’s abhorrence of the Racist Personality

A historical sidetrack (American revolution was social as well as political) about the differences between Northern and Southern cultural forces as to their views on virtues. 14 amendment directed at protecting newly freed slaves from terrorism. But the North also saw racial offenders as revelatory of a deeply flawed character. Racism plays a role in Southern concepts of virtue. Northern virtue contrastive to this. The importance of self-control (more of a capitalist, free market system).

Comment: this section is not without interest, but glossed over in this commentary. Racism required in the south, were turning labor into capital undermined that particular conflict.

"Ultimately, the North acknowledged that extending political, in addition to civil, rights to blacks via constitutional amendment was essential to achieving a lasting change in the Southern character" (p 776)

This vision cannot be realized, however, by the courts acting alone and, perhaps, not by judicial action at all. Only legislatures are equipped to enact the broad-based measures that are required to combat the evils of Southern character. (...) Regulating hate crimes - which involve precisely the kind of racially-motivated violence that the Fourteenth Amendment meant to reject - requires legislative action. Hate crimes legislation thus merely embodies the moral judgment of the Fourteenth Amendment’s framers that violence intended to subordinate because of race evidences an unvirtuous character that merits our strongest condemnation(P 777)

Taslitz does acknowledges that this doesn’t mean that hate crime statutes was what the drafters had in mind. (See Jacobs and Potter - equal protection was intended. Not "special” protection). Taslitz admit that his "interpretive claims are themselves moral judgments.”
Comment: The claim about legislation being necessary is stated, not argued.

Part IV Hate Crimes and Identity Politics
Taslitz thinks it should be clear by now that critics are wrong: these statues do not contribute to "divisive identity politics". (See Jacobs and Potter (separate commentary) ID - individuals relating to one another solely as members of competing groups. Critics misconceive the social functions served by hate crimes legislation.

The legislation sends two messages
1) Persons deserve to be judged as unique individuals. A
2) The fates of the individual and the groups to which he belongs are linked, and all groups deserve equal respect.

"Such equal respect enhances the political, social, and economic prospects for us all"

HC legislation is based not on a model of competing groups, but on a model of abundance in which cooperating groups create "a larger pie". (P 781)

Comment: If this is true, it’s not in the interest of the dominating group to denigrate others. And if it’s not, then that basis of assigning blame false (see the section about Larry May above).

...The fact is that hate crimes legislation embodies the judgment that group hatred-motivated violence is fundamentally inconsistent with a republican government and culture.

Because of it’s consistency with the master-slave relationship. Domination is the ultimate evil in this tradition. (Petits analysis). "Slavery leaves the subordinate party "vulnerable to some ill that the other is in a position arbitrarily to impose"." (P 782)

Taslitz claims that when a victim is targeted because of group membership, everyone in the "victim’s vulnerability class" faces the "permanent possibility of such interference. - This is linked to the slavery relation.

Comment: Again, it’s not clear that similar things happens in other crimes, for instance when a gang terrorize a neighborhood. It is true that in those cases too, extra punishment may be meted out. But then the question is: why not treat these two as example of the same offence. Why not appeal to this harm directly? Why,
to use Hurd and Moore (2004) and Dillofs (1993) term, use hate motive as a proxy?

Further, it seems that the argument here have features in common with a human rights approach: it is, in fact, states that are the defendants in these cases, by allowing these crimes to happen. The question, then, is if states can remove responsibility by imposing it on individual offenders. This problem is not dealt with by Taslitz. There is, however, a very good point, that lack of status, given it’s influence on other things (including risk) is a harm and thus we have increased individual wrongdoing in (some?) hate crime cases.

Taslitz end the paper thus:
"Hate crimes legislation rejects not just racial hatred but racists. (…) Hate crimes laws reject both hateful messages and the haters who spew them while embracing respectful messages among equal republican citizens who pronounce and hear them. That is a recipe for uniting, not splintering, American society. (P 785)

Comment: Taslitz does not provide sufficient argument in this paper for the character interpretation of the function of criminal law. Moreover - his points about hate crime legislation does not require it. Or rather - it does so only if we want to take into consideration the criticism that hate crime legislation punished for something for which we are not responsible: motives. As previous comments points out - this connection between motive and character is controversial. Of course, if we’re not properly held responsible for character either, this solves nothing.
"Comparing gender to the other typically enumerated categories, we ask: what are the defining characteristics of bias crimes generally, and do gender-motivated crimes fit the mold?"

The Supreme Court, through a number of cases "has made clear that bias crime laws survive constitutional scrutiny so long as they do not constitute viewpoint-based speech prohibitions and do not merely punish "abstract beliefs"."

Whether "gender" or "sex" should be included in the list of categories in bias crime laws is disputed. Less than half of the (US) states with bias crime laws include gender or sex. The normative question: "should the law recognize a distinct category of offenses when women or men are targeted as victims of violence or other crime on the basis of gender-based prejudice?" (p 22). That’s the topic of this essay.

The inclusion raises many questions - are all (most) rapes gender-motivated? What about spousal abuse? (When no threat is made to other women/men). Would inclusion serve the purposes of bias crimes statutes?

**Part I Characteristics of Bias Crimes**

Generally defined, a BC is an "offense involving the intentional selection of a victim based on the offender’s bias or prejudice relating to an actual or perceived status characteristic of the victim. ”

Comment: it should be added that the object of the offense may be property or something of symbolic importance to the hated group

W&L (this is 1994, mind) point out that bias crime statutes have moved to the forefront of the legislative agenda. On the books since 1979, the Federal Hate Crimes Statistics Act was enacted in 1990 in order to collect data. At the time of writing, the Hate Crime Sentencing Enhancement Act was before Congress. At the time, the Violence Against Women Act was pending (recognizing certain violent acts against women as crime motivated by gender bias - a federal cause of action in tort for gender-motivated deprivations of civil rights).
W&L describes the current state of “bias crime” statutes in the US, among other things noting that a number of states have opted for a separate chargeable offense instead of a sentencing enhancement for an existing offense. About 31 states have followed the model bias crime statute of the ADL which is based on Intimidation.

Despite a number of critics, the supreme court has ruled that most bias crime statutes pass constitutional muster. In Wisconsin v. Mitchell it was concluded that bc statutes address amore harmful type of conduct that results from a particularly depraved motive, rather than punishing a type if expression protected by the First Amendment. (The court had earlier struck down a law that criminalized hateful symbolic expression - R.A.V. V. St Paul). The First Amendment means that punishment may not be based on the idea expressed, but instead must be part of a general, content-neutral prohibition of such action.

The Defining Characteristics of Bias Crimes

BC’s are a criminologically distinct category of offenses. The premise of the statutes is the a crime is more heinous and invidious when offenders select victims based on membership in a particular status category (thus establishing and enforcing a social hierarchy). BC statutes address the added antisocial component inherent in the crime motivated by bias. Some offenders admit to bias, but often the determination is difficult and usually based on circumstantial evidence. W&L add to the FBI guidelines a set of characteristics: A generally high level of violence, terroristic impact on victims and communities, offenders motivated by desire for power and domination over victims and their groups, random victimizations perpetrated by strangers, heightened psychological trauma to victim, serial nature of attacks, and invidious effect on the entire community. The defend this list in detail:

**Heightened Violence**

W&L write that BC’s are more violent than non-bias motivated offenses. They are four times more likely to involve assaultive behavior than are crimes generally. Disproportionately violent. (They offer some examples here)

Comment: it should be noted that these are not definitions. It does not mean that all BC’s are especially violent. It’s also notable that it depends trivially on comparison class. It also raises the question whether extreme violence can be committed (by non-psychopaths) without some sort of dehumanizing prejudice.
In which case it could indeed be used as evidence. (But unnecessarily as the amount of violence already provide grounds for aggravation).

The important thing here is that violence is the primary goal in bias-motivated crimes, rather than merely a tool to achieve compliance (like a robbery). Bias victims can’t comply in the same way.

Comment: This would seem to miss the possibility that the”primary goal” may be to intimidate the group. See below.

Terroristic Effect

BC’s instill fear among all members of the victim’s group. In Wisconsin v. Mitchell Chief Justice Rehnquist argued that bc’s creates greater individual and societal harm.

Comment: But note that this formulation does not limit the secondary impact to the victim’s group, but may include society at large.

The crime involves threat of further harm to members of the group.

"In fact, bias crimes fit the standard definition of terrorism promulgated by the FBI: "The unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof in the furtherance of political or social objectives” (p 24)

Comment: This is very important, as terrorism is usually viewed as either a separate offense, or as specific intent crime. Such terroristic intent or effects may be used as evidence of motive, but motive would seem to be the more common component in the definition. This is one point where definitions and evidence should be kept apart.

Victims of BC’s report on this terroristic quality, involving changes in attitudes and lifestyles. (More so than other abuse victims). It’s argued that an "unconcerned and undirected societal response to bias crimes lends a type of silent, implicit support to bias offenders, leading them to believe that their crimes are tolerable and, at least to a certain degree, socially acceptable." (P 24)
Comment: It is not entirely clear that a directed societal response is required for this effect, or at least not in the form of a specific punishment enhancement. (Rather than, say, making BC’s a matter of police priority).

Offenders Motivated by Desire for Power and Domination

BC offenders not typically motivated by tangible gains. The basis is something intangible: sense of superiority and dominance. BC offenders “target individuals they regard as weak, vulnerable, or deserving of punishment.”

W&L argue that offenders often use bias motivated violence as a means to bent stress and frustration. Projection onto the victim and their groups. (BC offenders often view themselves as victims). The majority are not hard-core hate mongers. Most are young males who offend merely for excitement as part of a social activity. Another common type seeks revenge against group for some perceived transgression or unfair benefit. The least common, but most violent, is the hard-core bigot. Linking all these offenders “is the personal validation and sense of power and domination that they receive from brutalizing those they perceive as worthy of degradation.” (P 25)

Vulnerability of Victims Due to Random Attacks, Typically by Multiple Strangers

Most BC offenders are strangers, and the attacks appear entirely random. “Because of this phenomenon, victims of bias crimes are in a position of constant vulnerability.” (P 25)

Comment: It’s not entirely clear why this is distinct from the terroristic effects mentioned above.

85% of all bc crimes committed by strangers, compared to 65% by non-bias crimes. (Comment: W&L does not comment on whether this may depend on the fact that known perpetrators make the question of motive more muddled (especially if bias is supposed to be the main motive). It should also be noted that W&L picks studies in support of their points here, but do not provide a motivation for why these studies are picked.

In addition: typically multiple assailants, with all that follows: more harm, more sense of inferiority etc.
Comment: W&L does not address the possibility that the "more harm" hypothesis depends on group-size. Have the studies they cite controlled for these factors?

**Heightened Psychological Trauma**

Because of the brutality of the violence, the degradation and the vulnerability, bc victims exhibit greater psychological trauma than non-bias victims. (According to NIAP&V - 21% more). The Supreme Court in *Mitchell* recognized that bc’s "inflict distinct emotional harms" on their victims. W&L write that "Because victims have been targeted due to their very identity, they tend to experience more dramatic and damaging self-blame" (p 25-6)

Comment: This claim is somewhat spurious. Why is this type of group-membership held to be part of the victims "very identity"? At the very least, in order to substantiate this claim, you need evidence. Ideally evidence of differences in impact based on how important group-membership is to the individual victim.

W&L further argue that "unlike those who can cope with their victimization by attributing it to behavior, bias crime victims realize that they were victimized due to element of character related to their status."

Comment: First, it’s not that clear that this is how it works. If victims cannot help belonging to the group, why would they blame themselves? Shouldn’t it be the other way around? Why is group-membership held to be part of someones character? (Character traits are often held to be acquired)

**Underreporting and Uncooperative Victims**

Characterized by severe underreporting, in some groups as high as 90%. Because of fear, embarrassment, shame, distrust, a sense of futility and a belief that authorities are unconcerned. Fear of "secondary trauma", and heightened visibility (thus risking further attacks).

**Serial attacks**

Tend to involve multiple attacks against the same victim or same class of victims. (Often starting with minor harassment.)
Invidious Effect on Community

BC’s "attack the social order of a community in a particularly divisive fashion. The distrust bias crimes cause between members of different racial or ethnic groups can polarize communities.” (P 26) Intergroup tension that can produce a violent cycle of retaliatory violence.

Purposes of Bias Crime Legislation

First - BC statutes are designed to ensure that all members of society are free to exercise their civil rights without undue public or private interference. The impact of BCs serves to chill many affected groups from the lawful exercise of their civil rights. BC statutes recognize that acts of terroristic bias-motivated violence infringe upon the civil rights of the entire status group.

Second - Deter would-be bias offenders. Active enforcement has a definitive impact upon the incidence of bias crime. (In Boston, it dropped by two-thirds - Wexler and Marx, 1986)

Third - a powerful signaling effect. A clear message that a discriminatory motivation for a crime is a proscribable evil in and of itself.

Part II The Epidemic of Gender-related Crime

Before the key issue is addressed, W&L spends a section describing the epidemic of gender-related crime as is presently exists. (Note the distinction between gender-related and gender-motivated crimes. The former term covers cases where the victims gender is a salient aspect of the offense). Gender-related crime is so so pervasive that it permeates all aspects of modern social life. The message is constant: a message of domination, power, and control. The weak societal response in opposition reinforces the message that women are legitimate victims, appropriate targets for rage or outlets for anger.

(The next few sections describe the situation with regard to homicide, rape and assault and battery. While important in themselves (although dated), these are not essential to the focus of this commentary).

Of importance here is the claim that even when the perpetrator is an intimate, the motivation is often "what they perceive to be a rejection of them or their role of dominance over the victim".
Comment: In general, the authors use of the term "epidemic" is somewhat loose. Is it the mere amount, or is it a fact that it is on the rise? When it comes to number of reported rapes, it is known that rape is very much underreported, yet an increase in reporting may signal a decrease in reluctance, rather than an increase in absolute numbers. This "problem" is also important for hate crime statistics.

Contrary to prior beliefs, it is likely, W&L argues (because of further underreporting factors) that the most common type of rape is not perpetrated by strangers. (Thus marking a difference from what is claimed for bias crimes above). Rape is associated with primary and secondary harms similar to those mentioned in connection to BC's above. (Fear of retaliation, of victimization by police and in the courts etc).

Part III Do Gender-related crimes fit the bias crime mold?
"With a foundational understanding of the defining characteristics of bias crimes and a general overview of some of the most extreme and violent types of gender-related crime, we now examine whether, as a theoretical matter, gender-related crime fit within the doctrinal framework of bias crime such that a gender-based bias crime category should be recognized. And if there is a fit, which gender-related crimes should be considered gender-motivated, and what are the practical implications for recognizing the category?" (p 33)

The theoretical "fit" between gender-related crimes and bias crimes
There is no consensus on this issue. The ADL has taken the position that gender-related crimes should be distinguished from bias-crimes. The Hate Crime Statistic Act of 1990 exclude gender. Some take an intermediary position. McDevitt and Levin argue that SOME gender-related crimes should be hate crimes. Such as cases where the offender is looking for any woman. (Thus excluding (probably) spousal and date rape.) "For McDev"tt and LEvin, victim interchangeability is the essential characteristic of gender-based bias crimes" (p 34)

Comment: presumably this (the interchangeability condition) would then hold for all hate crimes. Questions arise, however, when the offender is looking for something a little bit more specific. Say someone who behaves in a way that violate the offenders view on how "such people" should behave.
Catherine MacKinnon believe wholeheartedly in a gender category of hate crimes. She believes the treatment is "categorical and group-based”. At the time 12 states have enumerated gender as a protected category. (Prosecutions are virtually nonexistent, though). Gender is, however, included in virtually all anti-discrimination laws. (And gender trigger a form of heightened judicial scrutiny in the Supreme Court’s equal protection jurisprudence.)

"The conspicuous absence of a gender category in bias crime laws, while categories not recognized as suspect or quasi-suspect classifications in equal protection jurisprudence are included, appears particularly curious.” (P 34)

There is no reason to draw a line at the criminal threshold only for gender-based discrimination. The problem cannot be at the categorical level. The issue is rather which gender-related crimes can be properly characterized as bias crimes. There certainly are cases of discriminatory selection - where victims are chosen only on basis of gender. W&L consider these to be obvious bias crime. The obvious gender cases are analogous to other crimes motivated by bias in several other respects as well.

Non-stranger rape is more difficult - but still have may of the features (like offenders typically defining their victims as legitimate targets of aggression or domination on the basis of group status).

**Recognizing a Gender-Based Bias Crime Category: Answering the "Fit" argument**

Opponents suggest that gender criminals do regularly not "hate" all women, at least not in the same sense that a white supremacist hates all African-Americans. "There are several reasons why this argument should not preclude theoretical recognition of gender as a category in bias crime laws”. (P 35)

1. Some criminals do in fact hate all women. 2 Too much emphasis on "hate" as the motivating factor. "Hate Crime" is a misnomer. An offense can still be a bias crime "because it directly reinforces the subjugated status of women and has the effect of terrorizing the entire community” (p 36).

W&L argue that "the key to bias crime categorization is not really the hateful "specific intent" of the offender, but rather the offender’s discriminatory use of violence to enforce a particular social hierarch that is biased against the targeted status category. The perpetrators tends to have a conception of "proper” roles to be played out by members of the targeted (often subjugated) status category.” (P 36)
Often targeting "transgressors" (See Perry 2001, separate commentary)

Recognizing a Gender-Based Crime Category: Answering the "Interchangeable Victims" Argument

Most gender crimes do not involve strangers. The personal relationship is the salient characteristic in most gender-motivated cases. As interchangeability is a defining characteristic of bias crime, gender crimes does not conform. This is the ADL’s reasoning, for instance. Others have proposed that only gender-related crimes that involve interchangeable victims should be recognized as bias-crimes. (McDevitt, for instance). Only random attacks against women would be included.

While the argument has intuitive appeal, it does not hold up to scrutiny. Interchangeability is an inclusive factor, but it should not be a preclusive factor. This goes for other bias-crimes as well. (If this particular gay man is bashed, because lives in the neighbourhood etc). "To rigidly adhere to victim interchangeability as the dispositive criterion only in gender cases and not in other traditional bias crime cases imposes an inequitable gender-biased double standard" (p 37)

(MacKinnon argues that rape and sexual assault can be viewed as modern day analogies to lynchings).

The Personal-Relationship Dynamic in Gender-Based Crimes: A Problem for the Bias Crime Mold?
The personal relationship dynamic of many gender-crimes distinguishes it from typical bias-crimes. Some argue that these crimes primarily involve "individual as individual" vicimizations. "But even if there is an individual component to these gender-related crimes, that should not preclude bias crime classification when there is also a significant group component, Bias crime statutes do not require group bias to be the sole motivation. Rather, they typically require an offender’s bias motivation to be a "substantial factor" in the victimization… (p 38)

This line of argument relates to the public/private sphere distinction, and the recent trend is to move away from traditional conceptions and to protects individual rights within the family context. This opens up for bias-crime motivations even in personal relationship cases.
Comment: It it, however, likely that the main reason to stay clear of bias crime in these context is the difficulty of prying out different motivations in personal relationships.

The Group Component in Rape Cases
While rape is often sexually motivated, it is also motivated in significant part by prejudice or bias against gender. "What is dispositive is that the offender has the intent, explicitly or implicitly, to disempower, frighten and overpower the other into compliance by force or threat." (P 38)

The Intersection Between Gender and Other Enumerated Bias Categories
If gender is not recognized as an enumerated category, then the other bias categories may be undeserved (for instance if a white supremacist rapes an African-American woman). Difficulties in recognizing that a single crime can express/be motivated by different biases. "Some courts have interpreted Congress' intent to preclude allowance of an intersecting category to remedy discrimination of women of color".

On a while, the arguments against a gender-based bias crime category are not persuasive. At least some gender-motivated crimes are directly analogous to traditional bias crimes. "As a categorical matter, however, the presence of complex, borderline cases has never precluded categorical recognition in bias crime legislation." (P 40)

The question is, which gender-related crimes should be treated as being gender-motivated.

Defining the Gender-Based Bias Crime Category: Some Practical Considerations
While W&L are satisfied as to the theoretical legitimacy, the recognition poses some practical concerns. How, for instance, should legislatures codify the category given the unique nature of gender-based victimizations? Is penalty enhancement always the proper way to address them? Should there be an effect on records, investigations and prosecutions on gender-based criminal offenses? At the very least, the "obvious" cases should be included and treated in the same way as previous bias-crimes. Rape, while often sexually and personally motivated, is "inherently" gender-motivated, which suggest that all rape, except for statutory rape, is a bias crime.
Comment: This can be disputed. Some instances of rape would seem to be pure acts of violence. (Compare man-on-man rape committed by heterosexuals).

Penalty enhancement may by unavailable as rape is already one of the most severely penalized crimes. But as this is rarely used, there’s room for penalty enhancements.

A history of gender-based abuse should be viewed as evidence of bias-motivation (even in personal relations). Series of minor assaults may thus add up to a major penalty. (As happened in one New Hampshire case).

"But the key to characterizing rape and much domestic violence as a form of bias crime lies not necessarily with enhancing the sentence, because that can already be done without implicating the bias crime category, particularly when the law already recognizes those types of victimizations as separate crimes. Rather, an important purpose of bias crime legislation is to articulate the message that status-based victimizations are themselves worthy of individual treatment due to the perpetrator’s particularly depraved discriminatory motive.” (P 41)

Comment: But is that message sent without the enhancement? And if enhancement is not the way, is criminal law important to send this message? And how?

Bias crime recognition may also “focus judicial attention on attempts to rehabilitate the offender by forcing a recognition that rapists and domestic abusers have a problem with the way they view women generally”

A further practical hindrance is the absence of a coherent enforcement policy implemented by prosecutors. The states that do recognize a gender category, there are very few (if any) prosecutions. (Only one in California). Prosecutors lack a working definition of gender-based bias crimes.

There’s a fear that the number of gender cases will overwhelm the other categories and "deplete the limited resources allocated for enforcement of bias crime laws”. (P 42) W&L believe this fear is misplaced. The existing institutions and services organized to respond to gender-related crime should remain in place. Just modify their tasks. About data-collection, how should the gender category be
integrated? All non-statutory rapes and sexual assaults should be counted as bias crimes. Also all domestic assaults where there is evidence of repeated gender-related abuse, and any crime where these is explicit evidence that the offender was motivated by biased against the victim’s gender status (the "obvious" cases). Crimes should be marked as gender-based, and also marked according to type. Police should be trained to distinguish these types. "Separate data collection treatment is required because, statistically, a gender category would outnumber all the other traditional categories many times over.

Conclusion

"Bias crime laws are among the most recent members of a broader body of remedial legislation." They address status-based deprivations of civil rights (for cases where criminal conduct is used to express discriminatory beliefs). They send a message, and express support for equality. While the theoretical "fit" between gender-motivated and traditional bc’s is not exact, W&L believe it to be a substantial one.

Comment: In the "obvious" cases, the fit seems to be exact. It is the other, Non-essential features that vary.

"Recognition of a gender category would properly place gender-motivated deprivations of civil rights on equal legal footing with other analogous deprivations based on race, national origin, religion, and sexual orientation. It also would send a clear message that gender-motivated crime is not merely a "private" or "family" matter, but instead a status-based civil rights violation that has the effect of denying an entire class of citizens of their rights." (P 42-3)

End comment:
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