THE PHILOSOPHY OF HATE CRIME ANTHOLOGY

Part I

Introduction to the Philosophy of Hate Crime

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1. **Background**\(^1\)

The aim of this first part of *The Philosophy of Hate Crime Anthology* is to introduce the topic of its accompanying, second part, the annotated bibliography of the philosophy of hate crime authored and compiled by David Brax.\(^2\) Together, these documents provide a guide to the philosophical and theoretical issues underlying hate crime legislation and policy. These issues are rarely at the top of the news agenda, but are important to the assessment of various more concrete and readily debated questions. They are, as we shall attempt to demonstrate, crucial in order to achieve well-founded hate crime policies. In effect, this bibliography purports to explain such connections and to present briefly the debates about the philosophical issues as they are conducted within different fields of expertise, with pointers to relevant reading materials and what these contribute to the discussion.

The realisation of this aim is an outcome of the project *When Law and Hate Collide*, coordinated by the law school of the University of Central Lancashire, UK, and involving researchers from the Göthe University of Frankfurt, Germany and the University of Gothenburg, Sweden. This project was funded by the European Commission's Daphne III program (contract no. 2009-DAP3-AG-1221), which aims at providing the European Union with a strengthened basis for designing hate crime policies at the European level, as well as support member state initiatives of this nature.

The presentation of the items in part II is organised as a regular bibliography, where articles, chapters and books appear in the alphabetic order of author surnames. Each item is followed by a short introduction to its main content, a more detailed summary of the arguments and theses pursued (including critical points to be aware of) and a briefly stated conclusion. The content of the items fall under a number of broader as well as more specific themes of a general interest to anyone engaged in the design of or debate on hate crime policies. These themes are introduced and explained in this introductory

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\(^1\) We are extremely grateful for input and criticism received when a draft of this introduction was presented at the research seminar in practical philosophy and political theory at the University of Gotheburg. We especially owe Göran Duus-Otterström, who acted as special presenter and opponent on this occasion, for performing his task so meticulously and for his care to provide detailed commentaries. Further critical and useful input was provided separately and in writing by Marie Demker and Richard Aschcroft. Whatever shortcomings remain, of course, are our responsibility entirely.

\(^2\) Brax, D (2013). *The Philosophy of Hate Crime Anthology, Part II: Annotated Bibliography*. University of Gothenburg
essay, as well as indicated in the commentaries of individual items. In addition, this introduction presents some of our reflections on the philosophical debate, such as it has evolved, especially in relation to the range of policy issues actualised by the phenomenon of hate crime. At the end we present a number of suggestions for both issues to address in forthcoming philosophical work in this area, and theoretical frameworks for making existing debates useful for actual policy.

1.1 Subjects and Themes of Hate Crime Policy Debates

In general terms, the notion of a hate crime denotes an (1) independently criminal act (such as assault, theft, murder, rape, harassment, and so on) where (2) some sort of negatively biased, disparaging and/or discriminatory attitude on part of the offender towards a social group to which the offender links the victim, is (3) in some qualified way connected to, plays a role in or explains the occurrence of the crime. If more precision or specificity is asked for, we will immediately open a number of those issues which are pondered and discussed in the philosophical debate. The general definition thus connect at least three separate parts, and a more specific definition involves settling on more precise understandings of these three parts and their interconnections.

It is worth noting at the outset that the word "hate" (part (2) in the above definition) may not capture the sort of attitude that distinguishes these crimes from others and thus defines the domain of a hate crime policy. Exactly what sort of attitude this is (or should be) is one of the issues under debate. One expression that has gained some popularity among participants on all sides is the notion of a bias crime. This term signals that the attitude in question need not in itself be strongly affective, phenomenally vivid or emotively forceful, but rather consist in a disposition to believe, feel and behave in certain ways under certain conditions. The attitude thus described is more akin to prejudice than an occurrent emotional state, as normally denoted by the term "hate". While some hate or bias crimes may flow out of reasoned convictions or conscious sentiments about the lesser worth or right to protection of people belonging to certain social groups, many crimes categorised as such rather result from less conscious biases figuring among people's everyday attitudes. A hate crime may be seen as an expression of a biased dispositions which influences choices in a more mundane, spur of the moment fashion. These dispositions may not even be immediately recognised as biased or discriminatory by the offender him- or

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3 Or, alternatively via a property symbolically linked to the group (such as insignia, friendship with a group member, etc), as held out by the US Anti Defamation League, see Hate Crime Laws: A Comprehensive Guide.
4 See section 4.2 below.
6 Allport (1954).
7 Such as those of members of "hate groups". Such groups where, arguably, a significant part of the intended target of early hate crime policies, and still is in some European countries. Crimes committed by such persons may still form the "typical" hate crime. Not necessarily as the most common type, but in terms of recognizability and potential for successful prosecution. See Iganski (2008).
herself; and sometimes not even by the victim. Which subset of these attitudes and these manifestations that should be addressed by a hate crime policy and in what way is a question that immediately takes us into the sort of disagreements and debates, the nature of which is the topic of this introduction. Indeed, these are precisely the sort of fine distinctions that a philosophical analysis can help to make clear. The implications for legislation, policy making and monitoring are considerable.

General mentions of hate crime policy as a rule make people think about matters of criminal law – its design, application and enforcement. While hate crime policy indeed is essentially connected to the basic task of society to uphold security and keep the peace, contemporary hate crime policy connects to a wider set of social issues, concerns and developments. Arguably, the historical roots of today's hate crime policies and debates surrounding them are to be found in the 20th century civil rights movement of the USA, and the issue about unfair discrimination or selective persecution of specific social groups (based on perceived differences of race, ethnicity, gender, sexual orientation, physical and mental ability, and so on) continuously addressed in the European political context since the closing of the second world war. This point is sometimes made by describing hate crimes as human rights violations, and to be understood in terms of discrimination. But that is and remains a controversial point, especially in legal terms. Indeed, hate crime statutes have themselves been accused of violating established civil rights statutes. Nevertheless, the general phenomenon of hate crimes and the issue of how to respond to them is clearly embedded in a salient human rights context, where states are held responsible for developing sufficiently effective hate crime policies in order to live up to signed human rights charters. A state may be committing a human rights violation by not having an effective hate crime policy - but a distinct justification may then be required for punishment enhancement statutes based on what kind of additional wrong a hate crime involves.

The question of why a country should have a hate crime policy and, if so, how it should be designed and applied actualises decisive issues about the

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8 For the European Union’s take on this subject, see the framework decision on combating racism and xenophobia (2008/913/JHA), which has the purpose to "ensure that racism and xenophobia are punishable by effective, proportionate and dissuasive criminal penalties in the European Union (EU)". The connection between this decision and hate crime policy is developed in a recent report from the European Union Agency for Fundamental Rights, see Making Hate Crime Visible in the European Union.
9 Jennes and Grattet (2002)
10 See, e.g., the presentation of the area of hate crime on the webpages of the OSCE (Organisation for Security and Co-operation in Europe) Office for Democratic Institutions and Human Rights; http://www.osce.org/odihr/66388. Technically an individual crime cannot be a human rights violation, offence or breach, since human rights are held by individuals against states (or possibly state-like institutions). Framing hate crime policy in human rights terms is, however, quite natural given the aim and scope of organisations like OSCE and FRA.
11 See Gellman (1991-92), Jacobs and Potter (1998), Hurd and Moore, (2004). In short, the argument is that if there is differential punishment within sufficient justification, someone is being punished more (or less) than he/she deserves. This would then constitute a rights violation. We will return to this shortly.
design of criminal law statutes, court proceedings, police work, monitoring and so on. This since, as much as it connects to wider issues about fighting, preventing and responding to social bias and unfair discrimination in general, hate crime policy relates to crimes as defined by criminal statutes and these, in addition, may be defined from the point of view of policy categorisation, criminological taxonomy or crime statistics as a certain category of crimes (just as there are similar distinctions to be had between, e.g., rural and urban crime, violent crimes involving handguns and those not involving handguns, and so on). Such a category of hate crime, although not itself included in criminal law statutes, has to be defined with close attention to criminal law, its requirements, prerequisites, scope and possibilities. In addition, as a matter of fact, all countries declaring themselves to have a hate crime policy have, as far as we have been able to determine, chosen to base it on particular elements of criminal law statutes. However, it is not given that having such a "hate crime law" suffices for having an adequate hate crime policy, since laws alone may be seen as a "cheap" way to express commitment to certain values without being prepared to act in accordance (Jacobs and Potter 1998).

1.2 Types of Values and Reasons
It follows from this that the most profound issues connecting to hate crime policy are about values and proper response to values. In relation to the notion of hate or bias crime set out above as a loose conceptual frame, we may describe in general terms the sort of policy questions that arise when addressing the general issue of what a hate crime policy should look like, as well as the sort of values and reasons that may be brought to bear when trying to answer them. This totality is illustrated by figure 1, below.

Legal and political qualities and traditions

CONSTRAINTS: Legal security Legitimacy Rule of law

BASIC VALUES: individuals communities society disadvantaged

Protection against harm and injustice for…
While a hate crime policy must relate to and, as a matter of fact, tends to involve the criminal law system (as a rule in the form of punishment enhancement statutes, or sentencing guidelines), it should also involve keeping track of the occurrence of hate criminality (monitoring) and efforts to limit their occurrence and/or the individual or social damage that it may effect (prevention). While these parts of a hate crime policy may be thus distinguished, it is important to note their interdependence. As an example, the law is an incitement to police officers to pay attention to and report a certain kind of factor that would otherwise go unnoticed. It is also an incitement for victims to go to the police and to notice and report evidence of hate motivation. These reports, in turn, are used in most attempts to monitor hate crime. Preventive policies need assessment and evaluation (monitoring), as well as strategies for when efforts fail (criminal law), and so on.

As will be seen, there are aspects of the philosophical discussion that may be taken as reasons to ponder more seriously whether or not these other (non-criminal law) aspects of a hate crime policy have been given too little priority in actual policy solutions and/or scholarly discussion. Within each domain, further questions arise about the proper design of policy measures, albeit only a limited amount of these have so far been addressed at the philosophical level. Of course, these two types of questions (how the mix of domains should look like and how each domain should be designed) are interrelated. For instance, if criminal law specifies that particular hate crimes are to be responded to by the criminal legal system in certain ways, it would seem desirable to design a system for the monitoring of hate crime to be able to describe trends with regard to the actions thereby seen as hate crimes by the criminal legal system. Another example: if preventive policies are very weak, the need for more forceful

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12 The preventive aspect is not isolated to prevention of hate crime, but of all ills that follows from prejudices/bias/xenophobia (discrimination etc). There are, however, complicated issues regarding the connection between widespread attitudes (emphasised in Perry (2001), Iganski (2008), Making Hate Crime Visible in the European Union) and hate crimes. Hate crimes are committed by a very small minority of those who holds xenophobic or otherwise biased attitudes and these may be the least likely to give up on such attitudes by means of education and/or “clear messages sent” by authorities through legislation or policy. This issue hinges on matters regarding the best explanation of hate crime, and that area of research is fraught with difficulties. In particular, there is no solid data linking the spread of xenophobic attitudes to frequency of hate crimes.

13 Some states offer some such monitoring, but far from all, and the quality differs widely. An excellent overview and a sharp set of recommendations to rectify this problem was recently published (see. Making Hate Crime Visible in the European Union).

14 For instance, an alternative to enhancing penalties for hate crimes is to make them a matter of priority for the police. Such a policy is likely to have a similar preventive effect, to send the same sort of “counter-message” in support of targeted groups, and to be more effective when it comes to collecting data. Making hate crime a priority rather than a matter of penalty enhancement may be more effective in making hate crimes and hate crime victims more visible. In addition, such a policy may make these crimes less likely to be dismissed by courts because of a reluctance to apply penalty enhancement (or failure to report that one does and/or to prosecute because of the added difficulties in securing evidence of hate motivation).
criminal law policy measures may become stronger, and the other way around. Monitoring is obviously crucial when it comes to evaluating different hate crime policies.

Underlying any pondering, debating or suggestion with regard to this set of issues there has to be some values and normative standards that provide or underpin positive reasons in support of, as well as reasons for moderating or restricting policies. Such reasons will also influence how more precise concepts of hate or bias crime should be designed in relation to different policy domains, jurisdictions, suggested measures, and so on. That is, one desirable feature of a concept of hate or bias crime is that it pinpoints features that are indeed important according to the underlying reasons. The question of to what extent, in what way and why such concepts may be developed will be revisited several times below.

We have found that there are basically four types of related values appealed to in favour of having a hate crime policy and to guide its more exact design; protecting individuals against harm or injustice, or likewise protecting communities, society as a whole or certain especially disadvantaged groups of individuals. All of these values reflect respectable and well-entrenched perspectives on how to evaluate any sort of legal measure, public policy proposal or societal design and thus all express a broad social consensus on the primacy of well-being, liberty, justice and equal treatment in societal efforts, codified and expressed, e.g., in the European convention on human rights, incorporated into the constitutions of all EU member states. Below, these four values will surface in a large amount of details and variations, so at this stage we will just give some general pointers to their roles.

First, there is the perspective of society's responsibilities to its individual members: To protect them from harm, or – if harm is inevitable or to some extent acceptable – to protect them from undue, unfair or unnecessary harm. Included in this idea is the notion of having a fair restitution in the face of having been unduly harmed. This perspective is visible in the argument that "hate crime hurts more", or the idea that public recognition of hate crimes may serve to prevent some of this extra harm. It is also reflected in the idea of community effects being an important reason in favour of hate crime policies,

15 At the present stage of hate crime monitoring, increase of reported incidents are generally held to be a good thing, as it reflects variations in willingness to report, rather than increase in actual numbers (On the challenges for hate crime statistics, see Klingspor 2007). Indeed, because of the many problems (especially with the failure of most European states to gather data on prosecutions and verdicts) evaluation of policies remains exceedingly difficult.

16 In other words that the "social" kind "hate crime" tends to co-incide with a "moral" kind, i.e. a category of crimes that in virtue of intrinsic or extrinsic properties are morally worse than the basic crime to which the hate element is added. In the criminal setting, the additional question is whether, and how, to tie these moral properties to the individual offender.

17 See Harel and Parchomovsky (1999), as well as Making Hate Crime Visible in the European Union. The special protection that hate crime legislation accords certain groups is intended to offset or balance the increased risk, harm and/or wrong suffered by those groups.

18 See in particular Iganski (2001).
since one role of communities is to provide people with contexts for security, safety, shelter, identity, belonging and prosperity that the formal institutionalised apparatus of a nation state seldom manages to provide on its own. The community of the victim may thus be seen as a sort of amplifier of the immediate individual harm, where other community members may be harmed as well, because of a recognition of the hate or bias element of the crime potentially threatening each community member. In addition, through such processes, hate crime as a wider phenomenon undermines the just mentioned ability of the community to provide important public goods to its members.

The community perspective can also be expanded into a more basic and general societal perspective, where hate crime is targeted for policy due to classic state concerns – such as public order, social stability and cohesion, security and, ultimately, general peace – that have a bearing on everyone's prospects. From this level, hate or bias crime can be seen as a potential threat to such overarching public goods and thus to the ability of society to facilitate the flourishing of either individuals or communities. While a single typical hate crime may not plausibly be viewed as such a threat, the spreading in society of a readiness to transgress the law and harm other people due to negative attitudes towards the groups they belong to would indeed constitute such a threat. Therefore, having policies specifically aimed at responding to such tendencies, even though they may look unlikely to escalate, can be argued to be justified in view of the enormity of the values at stake when basic societal stability and peace is considered. But this type of reason may also be used to question hate crime policies for risking the cementing and worsening of existing inter-group animosities, subjection of certain communities or groups, and so on (Jacobs and Potter 1998, Gellman 1991-1992).

Although this may be claimed to be a special instance or reasoned consequence of those goods and societal tasks mentioned above, we want to hold out as a special and further reason, the idea of hate crime policy as being called for due to the apparent fact that hate crimes normally victimise people who are already at a disadvantage, especially vulnerable, marginalised, or

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19 A recurring idea in the sociological literature on hate crime – see Perry (2001), Iganski (2008) – is that it is the widespread prejudices in the general community that makes for the particular harm caused by these crimes. The protection offered by a social sense of security does not exist for victims belonging to minorities or otherwise marginalised groups, which make them vulnerable and more likely to suffer harm from targeted attacks. See Chakraborti (2010) and, more generally regarding disadvantage, Wolff and De-Shalitt (2007). It’s then argued that society can do better by, for instance, installing these statutes and meeting out these punishments, in order to create a better society (similar thoughts occur in Making Hate Crime Visible in the European Union).

20 This is reflected in Making Hate Crime Visible in the European Union, where it is recognised that hate crimes do not just involve the individual perpetrator and the individual victim, but the group represented and the group "hated". How group size influences the extent of the harm is, however, not well known. There is strength in numbers, and also a diminished risk for individuals to be targeted by such targeted violence, but then there’s also a greater number of people affected. As the FRA thus connects hate crimes intimately to incitement, the number of effected people would seem to be relevant. (This depends, however, on a contentious issue regarding whether the relevant audience is those likely to take to violence, or those that would fear it)
something similar\textsuperscript{21}. According to established ideas about equal treatment and basic justice, harm or injustice to already disadvantaged persons or groups is, morally speaking, worse and more important to respond to. This general idea may have important implications for the design of hate crime policies, since there is nothing in the conceptual framework of hate crime that excludes policies that target hate crimes perpetrated due to a bias against especially advantaged people (in terms of religion, race, social status or money, for instance). None of this implies, of course, that this or that hate crime policy is more or less supported automatically. Rather, this starting point would have to add facts about hate crimes and other crimes, perpetrators (who usually also belong to disadvantaged groups) and victims, and so on in order to make clear to what extent care for the disadvantaged actually supports special hate crime policies and, if so, what kind.

These four values (protecting individuals, communities, society and/or the disadvantaged) express related concerns fitting within basic ideas about the tasks and responsibilities of a civilised society. But it is important to recognise that they may also partly contradict each other and pull in opposite directions. For instance, the third reason may hold also in absence of any reason of the first, second or fourth sort. Or, in individual instances, the first reason may support completely opposite conclusions with regard to priority than the fourth one (since, in such cases, it may very well be that a hate crime against someone advantaged "hurts more" than one against someone disadvantaged. These are all examples of well-known tensions within the basic values of liberal democratic societies that continuously need to be negotiated. We will return later to the issue of what such balancing may involve).

In addition to the four basic values (protecting individuals, communities, society and the disadvantaged), there are other concerns that flow out of the more general pragmatics of having a working institutionalised society and legal system, which constrain what practical solutions may be justified on the basis of the basic values. These are considerations that may vary a bit regarding specifics between countries\textsuperscript{22} but which all have to do with basic qualities of the legal system, such as legal security and certainty, legitimacy and effectiveness in how legal solutions are in fact implemented, thus ensuring rule of law. In effect, lack of ability to effectively implement a proposed hate crime policy solution, for instance due to weak popular support, or lack of coherence between this proposed solution and basic constitutional or legal principles, will weaken the case in favour of this solution, even if the basic values have much to tell in its favour. At the same time, also here, there is sometimes a delicate balancing to be made between such pragmatic concerns and genuine moral considerations, such


\textsuperscript{22} See, for instance, the overview of the European policy situation worked out within the When Law and Health Collide Project, to be available through the When Law and Hate Collide project website: http://www.uclan.ac.uk/schools/lancashire_law_school/law_hate_collide.php
as when legitimacy is difficult to achieve due to widespread and deeply embedded prejudice and animosity between social groups in a jurisdiction. Examples here may regard, e.g., the situation of LGBTQ people in some Baltic and Eastern European countries, or Roma people in Hungary, Romania, Italy and France. A hate crime policy solution may very well be justified in spite of being initially impractical or ineffective, and many times the reasons in its favour may motivate changes of basic legal principles of a country. However, the possibility of the opposite also has to be acknowledged as a part of the realities of politics. If nothing else because of the reason that illegitimate policies are often highly ineffective, and may as a matter of fact serve to both hide and worsen the problems of marginalised groups, unless special pressures against countries are applied to effect more profound change.

Before moving on, we want to make a final, more general observation with regard to how the mentioned values and reasons are being put to use in actual debates. This holds in general with regard to policy discussions in this area, but can be observed as an important aspect of the specific philosophical debate that will be described in more detail below. Most arguments wielded in the discussions refer to the values in a broadly result oriented manner – i.e. the arguments are put in terms of proposed actions having actual effects of either (probably) promoting or (probably) reducing some value. However, sometimes, arguments are rather about relating to the values in a symbolic way: Without openly referring to chances or risks of influencing the actualisation of any of the values, claims are made in terms of the importance of, e.g., publicly expressing commitment to (some of) them, or to give voice to how serious society views any threat to (some of) them. Now, it may be that, sometimes, such ways of putting arguments are elliptic; they silently presuppose that symbolic, public displays of the sort mentioned will as a matter of fact have effects on the actualisation of the values. However, it may also be that sometimes what is apparently being said is exactly what is being intended to be said; namely, that the function of symbolically representing a value in the public sphere may be an argument in favour of an action that can be balanced against, e.g., facts about this action having the actual effect of reducing the very same value. We will return to these two ways of relating to the values in the final discussion.

2. Literature Selection: Bibliographic, Historical and Thematic Preliminaries
In spite of this anthology being an introduction to and a bibliography of the philosophy of hate crime, only a handful of the annotated papers are by philosophers of the trade and all of the books are authored by people with

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23 For some recent comments about the differences between Europe and the US, and the tensions between protecting freedoms and combating racism see Bleich, (2011), Nussbaum (2012) and Waldron, (2012).

other academic affiliations or credentials. In this area, the discussion of the philosophical issues takes place primarily outside of salient academic philosophy arenas, while the academic field of philosophy itself has remained rather passive\textsuperscript{25}. The selection therefore includes a number of authors and publications from other fields of study than pure philosophy. A large subset of the papers have been published in law journals, for instance, but are selected for philosophical relevance. The same selective rationale holds with regard to the books, together – of course – with attention to their influence on the general field and how it connects to actual hate crime policy designs, debates and developments.

As a consequence, the purely bibliographic aspects of the selection of material connects intimately to our interpretation and assessment of how different discussions of underlying philosophical issues attempt to make their connection to policy issues. So, for instance, with a few exceptions, purely sociological aspects will be largely kept out of the commentaries – themes like typology of offenders, victim impact statements and the mapping of specific characteristics of affected people in terms of socio-economic or cultural demographics\textsuperscript{26}. However, some such aspects are relevant also from a philosophical perspective and do enter the discussion of underlying issues\textsuperscript{27}.

Before we move on to the more specific themes and views pursued and debated in the philosophical part of hate crime scholarship, we will therefore briefly set out how – as a rule – in these works, theory is linked to relevant policy practice.

2.1 The Primacy of Criminal Law

As indicated earlier, \textit{legally} speaking, there is no such thing as a hate crime. Virtually no law or statute uses the term “hate” or defines a species of crime in terms of hate. ”Hate crime” is rather a policy term, used in documents, debates and decisions\textsuperscript{28}, and frequently employed in crime statistics (BRÅ\textsuperscript{29}, US federal hate crime statistics\textsuperscript{30}, the annual OSCE-ODIHR "Incidents and Responses" report\textsuperscript{31}). Nevertheless, issues about the design and justification of criminal law is the main focus of hate crime scholarship.

A number of commentators argue that criminal law is the strongest means that a society has to publicly express commitment to its values and disapproval of acts that go against them. This is one reason why the criminal legal system

\textsuperscript{25} It is notable that the philosophical literature on hate speech is much larger. See, for instance, Sumner (2004), Waldron, (2012), Brink (2001).
\textsuperscript{26} With the exception of Sullaway (2004), psychological aspects are also kept to a minimum.
\textsuperscript{28} Iganski (2008). See also the web-pages on hate crime of the British Home Office: http://www.homeoffice.gov.uk/crime/hate-crime/
\textsuperscript{30} http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes
\textsuperscript{31} http://www.osce.org/odihr/73636
functions as a theoretical hub to which the rest of hate crime policy discussion and scholarship relates. The term "hate crime" as a name for an academic field, this designates an interdisciplinary sphere of interest for legal scholars, criminologists, sociologists, activists, politicians and the like. Inevitably, concepts will differ between disciplines, legislations, and scholars, and a number of issues regarding communication and implementation arises.

The criminal law is of obvious importance to hate crime policy as an official expression of state support for targeted groups and individuals, and as expressing a deep commitment to combating xenophobia and promoting equality among its citizens. In section 3.6, we will expand on how hate crime laws in this way relates to other pieces of legislation and policy, such as hate speech/incitement, and discrimination more generally.

2.2 Roots in Statistics
While questions regarding criminal law are central to the academic hate crime field and discussion, this is not how the notion "hate crime" was originally introduced as a policy term. It was instigated by the US federal crime statistics in the 1990’s as a way of monitoring the incidence of crimes motivated by prejudice based on race and religion. There are two important things to note about this origin: First, as a category of crime, hate crime is relatively uncontroversial - there clearly are crimes that are caused or motivated by, or that in some other qualified way connect to, ”hate”, bias, prejudice or some similar attitude of the offender. It is arguably (for the general reasons explained earlier) important to keep track of these crimes, and to investigate what conditions may influence the rate of such crime. As a criminological category, hate crime is no different from, e.g., domestic crime, knife crime, or crime committed during the night or in public spaces. Monitoring efforts do not as such imply that there is a hate crime ”problem”, but rather help us to determine whether, to what extent and in what way there is such a problem. Whether incidents are increasing in certain contexts, for instance, such as in connection with political events involving the targeted group. Monitoring also allows for different ways of conceptualising hate crime; for instance, hate or bias motivated crimes and hate or bias expressive crimes could in principle be tracked separately. In practice, of course, there is likely to be only one concept operationalised and utilised in any large-scale monitoring effort, and it is important to get this right.

The other thing of importance with the origin in crime statistics monitoring efforts is that this means that the word ”hate crime” was not chosen to indicate

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33 For a critical assessment of hate crime statutes based on this observation, see Jacobs and Potter 1998.
34 See the history summary of FBI's hate crime web-pages: http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes/overview
35 It should be noted that this depends on treating ”expression” not as a mere causal relation between motive and act, but of the content of the act itself. In this sense, an act can express a view that does not correspond to the agents motives. See Blackburn (2001).
any particular degree of seriousness of individual criminal acts, or some special culpability of individual offenders. From the outset, hate crime was viewed as a societal problem. The development from attempting to monitor and detecting a societal problem to mobilising criminal law as a means to respond to this problem is not straightforward. As we shall see, a lot of the philosophical discussion concerns the justifiability of addressing societal problems using the instruments of the criminal legal system, rather than (other) policy measures.

2.3 Back to Criminal Law: Complexities, Values and Plurality

The relation between the design and application of criminal law, monitoring and other types of policy measures is complicated and intertwined. Most policy makers and scholars argue that criminal law measures constitute an indispensable part of both prevention and monitoring. The Swedish hate crime statistics (to pick one example) relies largely on police reports and started in relation to the introduction of what is commonly known in the country as the ”hate crime law”; i.e. a sentencing guideline prescribing punishment enhancement on the basis a certain connection between the criminal act itself and certain biased attitudes of the offender. Via the basic principle of the proportionality of punishment, criminal law thereby mark these crimes out as particularly severe and – in effect – as being of special interest to police, prosecution and the defence. The criminal law is also calculated to influence the tendency of victims to notice and mention these aspects when reporting crimes committed against them. Overall, the general message sent out as a consequence is that those crimes thus selected by the law are, in virtue of this very fact, being viewed by society as especially important to respond to in general. It seems to be a general assumption that this, together with measures such as punishment enhancement, may have preventive effects (if not on the incidence of hate crimes, so at least by mitigating the assumed extra harm of these crimes). That is, what may look like a technical adjustment of a very small part of criminal law may have traceable communicative impact all across the societal and policy board. To what extent the impact will go beyond such general messages, however, will depend on to what extent and how these are in fact being put to use by the mentioned parties, and what the actual outcome of that will be. This connects to the earlier mentioned distinction between symbolic and result oriented ways of arguing for and against hate crime policy proposals.

For this reason, when addressing deeper issues about the justification of hate crime policies in all of their complex aspects, starting with looking critically at involved criminal law measures will often be a key. The

36 Hate crimes are often supposed to be particularly likely to be underreported due to victims fear of secondary victimisation (by authorities) and desire to avoid conspicuous visibility.
37 Hate crime legislation and policy are often held to send a “counter-message” to the message sent by these crimes. Hate crimes on this conception is treated as very much akin to, perhaps even a species of, hate speech. See, e.g., Making Hate Crime Visible in the European Union.
concentration on issues about the design of criminal law with respect to hate crime present actual disagreements between qualified scholars. These disagreements must ultimately be settled, and are of particular importance. As indicated earlier, the criminal legal system comes with a strong tradition of general values and basic moral standards that will have to constrain and be worked into any idea of policy (ultimately connected to the fact that criminal law measures imply the use of force by the state). This tradition, among other things, brings with it an insistence on fine distinctions and careful justification and also for this reason, a focus on criminal law/jurisprudence becomes a suitable focus for developing a philosophical approach to hate crime. It is also here that philosophy - moral and political philosophy in particular - have the most to offer, in form of critical assessment of justificational grounds (including overarching issues of how and on what basis to justify and delimit criminal law and policy in general) and the contribution of conceptual clarity.

Now, while the aim of this bibliography is to give an overview of philosophical work on hate crime, which – as indicated – addresses quite general and foundational issues with regard to criminal law, it also relates to particular legislatures and jurisdictions that differ from each other in substantial and detailed respects. The expression "hate crime", when used to talk about the design of criminal law, is a loose umbrella term for a large number of different actual legal formulations, procedures, practices and other solutions developed in different political and cultural contexts and traditions – all of which are differences that may be philosophically very important indeed. This means that the justification and/or criticism of one particular "hate crime law" may not work for another. This is part of a more general issue addressed below in sections 4.2 and 4.3.

3. Themes of the Philosophy of Hate Crime: A Summary
This summary is structured thematically. Many of the publications cover more than one of these themes, so the structure does not divide the literature into neat piles. This summary will point out the problems with different formulations of hate crime legislation as they occur, but focus on as general, principled, issues as can be found pertaining to all or most of these laws. Some points will accrue more to certain states than others, and some patterns of reasoning may not be recognised from every context.

The main source of philosophical considerations of hate crime issues is debates between legal scholars and philosophers in the USA. This bibliography thus have a clear tendency towards legal questions, and to questions regarding hate crime legislation in the American context. As the "hate crime" concept has US origin, this is not necessarily a bad thing to be getting on with. But there are sometimes salient, sometimes subtle differences between continents, countries
and jurisdictions. As – indeed – there is between individual states in the US.\(^\text{38}\)

The first main thematic distinction is one that informs the rest of the structure. It comes out of the general pro and con question. I.e., a fundamental line is to be found between supporters and critics of the standard type of hate crime legislation in the form of punishment enhancement. This is an overarching theme as it brings out most of the other themes. In particular, criticism and defence of hate crime legislation has turned on the issue of whether motive should be directly relevant in the criminal law. The criticism, in short, is that offenders' basic rights are violated if they receive extra punishment not for what they did, but for why they did it. Hate crime, it is sometimes argued, criminalises thought, albeit thought expressed by criminally sanctioned actions. The conflict here relates to the sensitive matter of criminalising content, rather than expected and intended consequences - of actions and/or speech\(^\text{39}\).

While this is not the only philosophically relevant question about hate crime, discussing it leads into other philosophically relevant questions, which in turn may lead to more complex views on policy. It is a relevant discussion as it actualises the basic value conflict perceived to be inherent in hate crime legislation\(^\text{40}\), as well as giving rise to a number of alternative formulations of what a hate crime is, only some of which can be said to strictly speaking target motive as an object of penal measures. Criticism of punishment enhancement for hate crimes may, for instance, be compatible with support of hate crime prevention programs. Nevertheless, in defending and criticising hate crime statutes in their various forms, these and several other philosophical questions are brought out in the open.

### 3.1 Theme 1: Conceptual Analysis and Semantics

Most of the publications mentioned and annotated below includes a section on the meaning or content of the expression "hate crime". That is, one tries to elucidate what concept of hate crime is used by oneself and/or others involved in the discussion, and thereby clarify the semantics of the expression – what ideas and thoughts it is intended to communicate and what actual entities or events are to be counted as hate crimes, hate crime laws, policies, and so on\(^\text{41}\).

Barbara Perry has explicitly dealt with the semantics of the term "hate".\(^\text{42}\) As mentioned earlier, most commentators in the debate on hate crime policy point out that "hate" is a misleading word, given what the label is intended to cover, and in fact covers. Some suggest that "bias" or "prejudice" would be

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\(^{39}\) These tensions particularly noticeable in the North American context due to the 1st amendment of the US constitution.

\(^{40}\) For a recent account of the conflict between values of freedom and equality in relation to hate speech matters, see Bleich (2011)

\(^{41}\) This applies, for instance, to the case of whether Germany has a hate crime law or not.

\(^{42}\) Perry (2005).
preferable and Perry has offered a long list of alternative suggestions. Repeated observations are that virtually all "hate crime laws" are formulated without use of the term "hate" and that no monitoring tool requires the presence of the emotion "hate" to be established in order for a hate crime to have occurred. Hate crimes are, almost all scholars agree, not a species of "passion crimes".

The apparent fact that the expression "hate crime" is in this way a misnomer is often downplayed by scholars and experts, who tend to hold that, since it happens to be the established term, as long as the real or proper meaning is explained, there is no problem to keep using it. Against this, Swedish criminologist Eva Tiby (interviewed in the Swedish magazine for professional solicitors, *Advokaten*) has argued that the wrongful associations of the word "hate" may actually be more problematic than thus acknowledged: Even if scholars, prosecutors and judges are aware of the fact that "hate" does not designate an emotion, police officers (who receive very little training on these matters) and victims may not be and the possibility that different groups have different ideas about what counts as a hate crime in this way may create problems. For instance, reporting of hate crimes may become seriously flawed from the outset due to a de facto conceptual pluralism, where the same expression make people think about very different things. In effect, a desired degree of conceptual clarity might have to involve terminological reform, and this would hold regardless of exactly what concept of hate crime is seen as the proper one.

3.1.1 The Importance of Conceptual Analysis
Conceptual analysis lies at the heart of contemporary philosophy, and conceptual clarity accounts for a large part of what philosophy can contribute to hate crime scholarship. Hate crimes, to attempt a most general, minimal and inclusive, definition, are crimes that in some way are connected to bias. This definition does not say (1) which these so-called "basic" crimes are, it does not say (2) how they are connected to bias and it does not say (3) what counts as bias in this context. These variables need to be filled in if the concept is to be applicable in a specific legal or monitoring context. Some vagueness is may be inevitable, as in all legal and political contexts, but a modicum of clarity will be required if the law is to provide sufficient guidance. This minimal conception is intended to be maximally inclusive in order for it to be possible to assess and

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46 See for instance the almost universal experience (especially in Europe, see *Making Hate Crime Visible in the European Union*) of great variation in hate crime data from police report-based hate crime statistics and victimisation surveys.
47 Must the bias be entertained by the offender, or merely be expressed by his/her actions, or merely provide a social explanation of those actions?
48 I.e., what mental attitude may be involved and towards what or whom it may be directed.
compare the different hate crime concepts that fall within its scope.

There are hence a number of potential "hate crime concepts", and anyone involved in designing, debating, thinking about or using a hate crime policy will on different occasions have to choose between them. From a policy assessment and debating standpoint, this choice is essential. As Jacobs and Potter (1998) and Hall (2005) points out: whether we chose an exclusive or inclusive definition determine how widespread the hate crime "problem" is. If hate crimes are all crimes committed by offenders that have some bias or other towards the victims group, virtually all (at least all *inter-group*) crimes may very well be hate crimes. If we have a stricter definition, so that the bias of the offender need to be the single or dominant cause of the crime, clearly expressed by the offender, or something similar, much fewer crimes may qualify. Such more exclusive concepts are often criticised as being too narrow and misleading – distracting from the "ordinary" nature and mundane circumstances of most crimes that from a more overarching perspective of social policy may seem to belong to the hate crime problem. But, of course, this claim presupposes yet another hate crime concept, with a wider extension that would then have to be explained and defended. The discussion and ultimate choice of concept to employ turns on what *function* it is supposed to have in law and policy. Is it, for example, primarily intended to address extremism, political violence, or is less blatant criminal expressions of bias part of what a policy is targeting as well?

There are two main reasons why the choice of concept is essential: First, if we are unsure about the justification of hate crime legislation, or only believe that one particular kind of hate related crime is the one relevant as a societal problem, we want to pin point that particular concept, or go through a number of such concepts, to see if a justification can be had. Second, a number of essential components of hate crime policies, such as monitoring, and having legal rules that satisfy basic legal security and rule of law standards, require that there is some determinate concept guiding those aspects of policy, but perhaps not that important *which one*, as long as basic requirements of clarity, uniformity and usefulness are satisfied. This is important not only within jurisdictions, but also for the possibility of international comparison of hate crime statistics, cooperation in law enforcement, and so on.

The choice of concept is not arbitrary. For instance, it is inadvisable to have a concept the extension of which is very difficult to keep track of. If the "hate" or bias element is allowed to be too subjective, i.e not manifest, we would have to rely on spurious circumstantial evidence to establish it, and monitoring as well as legal certainty and security may suffer as a result. In addition, there is a particular issue regarding concepts as applied to monitoring: Changing a

49 Dillof (1997) similarly argues that there is an acceptable version of hate crime that seem to warrant punishment enhancement, but it is a much more narrow concept than the one "on the books"

concept, even if it involves improving on it, is problematic at it renders comparisons with previous data more difficult and less exact. Considering the flaws recognised in current hate crime data, and the fact that international comparisons are virtually impossible because of current conceptual (and methodological) variations, this should prove less of an issue, but it does involve a concession of the limitations of previous work.

3.1.2 Particular Concepts and Models
Frederick Lawrence has made a useful and often utilized distinction of two models for explaining what a hate crime is: *The Victim Selection Model* and *The Racial Animus Model*. This distinction is employed by many organisations, but is too crude to account for more subtle variations in how concepts of hate crime are designed. Such variations are central from the perspective of moral philosophy and philosophy of law. There are ways of conceiving of what a hate crime is where it is not clear if either of Lawrence's models fit very well. In the literature, we can distinguish at least six broad types of hate crime concepts. The first three are all within the frame of the racial animus model, the fifth is identical to the victim selection model, and numbers four and six may be may perhaps be loosely related to either, depending on how the respective notions of a racial animus and victims selection are interpreted more precisely. These concepts take hate crimes to be...

(1) Motivated by hate/bias/prejudice.
(2) Caused/explained by hate/bias/prejudice.
(3) Intended by the offender to cause a certain harm/have a certain effect more generally (e.g. incite fear)
(4) Causing/risking additional harm of a particular sort.
(5) Involving a discriminatory selection of victims.
(6) Involving expressions of hate/bias/prejudice towards the victim's group.

Allowing for further internal variations (e.g., regarding what exact "hate" or bias attitude is intended and the nature of the sort of group towards which this attitude may be directed, i.e. what the criteria for inclusion are), as we shall see, these concepts are at the heart of the "hate crime debate". For instance, a number of critics argue that hate crime legislation explicitly targets motive (concept 1), that motive cannot be boiled down to specific intent (concept 3), and that motive is not a proper ground for punishment. There is also, as will be

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52 For instance, the OSCE-ODIHR, see *Hate Crime Laws - A Practical Guide*.
53 A number of scholars and authorities, including the OSCE-ODIHR, argue for restricting protected characteristics on grounds of immutability. This is not entirely clear, however, as the mechanism connecting targeted crimes to particular harm may rather work via subjective importance of characteristics. See Garland (2010)
seen shortly, a strong tendency among scholars to tailor or choose the general concept they use to identify what the hate crime issue is about to fit the normative point (for or against hate crime laws) that they want to make. To take a very fresh example, two hate crime scholars arguing the point that EU hate crime policy should be directed more by attention to the extent to which different groups are vulnerable to victimisation (regardless of other aspects, e.g., if the group is a minority or previously subjected to persecution or discrimination or not), do this in terms of recommending a new concept of hate crime described in these terms. This strategy implies that these scholars will be talking about different things than scholars adopting other concepts, so they may not disagree with someone proposing another way of making priorities in hate crime laws, since they mean different things when using the expression "hate crime". A more wise strategy, therefore, may seem to keep a common concept of hate crime that is distinguished from the criteria for what is to be required of a good or justified hate crime law. Such a concept may then allow for having more specific concepts put to work in the form of certain formulations and criteria in specific hate crime statutes and law enforcement solutions guided by the requirements of good policy, e.g. the ideal of Garland and Chakraborti to protect vulnerable groups.

It is important to see that neither of these specific concepts, while they are indeed related, are necessarily co-extensive, and that they may sometimes pull in blatantly opposite directions. An action that is not motivated by bias may nevertheless express bias, for example. Hate expression will tend to be part (and frequently parcel) of the evidence of hate motivation, however, and it is quite possible that crimes which satisfy both the hate motive and the hate expression condition are the only, or the most likely, to be successfully prosecuted. Still, as independently argued by Perry and Iganski, this idea of the “typical” hate crime may be misleading. A crime may be caused by bias, while not necessarily being consciously motivated by it nor involve a discriminatory selection. These distinctions carry moral and legal significance and make differences in actual cases, as well as affording various defences. A number of legislations use definitions where a hate crime is implied to be a crime committed, or the victim targeted, "because of" bias, or even "because of" those of the victim's characteristics that triggers such bias. This formulation is consistent with a large number of the more specific concepts listed above, and seem to involve a mixture of the discriminatory selection model and racial animus model.

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55 Garland and Chakraborti (2012)
57 This is the notion referred to earlier of the bias of the offenders of hate crimes sometimes being channeled via specific features of the victim that effectively function as symbolic markers of the victim's perceived membership of whatever social group that the offender is thus biased against.
58 See the OSCE-ODIHR working definition in Hate Crime Laws: A Practical Guide, as well as the US Anti-Defamation League's model hate crime statute, which has had a considerable influence on North American legislation, Hate Crime Laws: A Comprehensive Guide.
However, even such attempts at very inclusive hate crime concepts exclude some of the more specific ones, such as numbers 4 and 6 above. In a European context, the latter exclusion may seem particularly problematic since that would concern, e.g., the UK hate crime law, which in practice employs an expressed hate/bias/prejudice clause as its hate crime criterion (the legal term is "hostility"). We will return to the prospect of clearing up the seemingly very messy conceptual situation in section 4.2.

3.2 Theme 2: Moral Considerations
The introduction of hate crime statutes in many jurisdictions across Europe and the rest of the world during the early 1990’s suggests that crimes connected to bias in the qualified way taken to make it into a hate crime were viewed as a particular problem, worthy of special political attention and of separate legal treatment. But are hate crimes worse than so-called ”parallel” crimes? The fact that so many state policies favour punishment enhancement for these crimes suggests that they are held to be morally worse than the 'same' crime, absent the 'hate' element. The 'hate' part is treated as an aggravating feature that makes the crime legally more severe, e.g. for the purpose of sentencing.

As mentioned earlier, hate crime is generally recognised as a particular instance of a more general problem of social prejudice. Prejudice in this context refers to false or unfounded dispositions to believe and behave in certain denigratory manners towards people because of some of their social characteristics (Allport 1954). Prejudice thus understood limits social interaction, causes unfair discrimination and unwarranted and socially corrosive inter-group hostility, and is likely to have negative economic, emotional and social impact not only on the individual directly exposed to it, but on his or her community, the wider society and occasionally on the holder of the prejudice as well. The passing of hate crime laws is generally held to be part of the general societal response in order to limit the occurrence and mentioned impact of prejudice. Hate crime laws are held to express a commitment to equality by offering protection to groups frequently targeted because of their affiliation, and so on. But this, in itself, does not show that all hate crimes are worse than parallel crimes in the way that hate crime laws seem to suggest to us that they are, or to be worse in a manner that justifies punishment enhancements.

So what is it about hate crimes that makes them more morally serious than parallel crimes? If, indeed, they are (or tend to be) more morally serious – perhaps they are not, in spite of the apparent general societal interest in responding to them. In policy documents it is common to find this question being answered by lose formulations about hate crimes targeting people because

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59 A similar conception seems to be employed by the FRA, see Making Hate Crime Visible in the European Union
60 Consider, for instance, the employer who fails to hire the best applicant because of a prejudice against his/her race/religion, etc.
of their “identity” or because of “what they are”. While this type of phrasing, may capture the general spirit behind the idea of why hate crime is important and why it is worth having hate crime policies, it’s insufficient for more specific analysis. Distinguishing between various ways in which the general idea of hate crimes as attacks against people's social or cultural identities, and how that makes them extra noteworthy from an ethical point of view, must be elucidated if it is to make further assessments of more specific policy proposals possible.

There are a number of ways in which one may try to systematise the presentation of ideas on this issue, of which we will here mix two different ones. One is the distinction between (1) the question about the moral seriousness of an act, or a type of acts, and (2) the question of how society should respond to this act in terms of law in the light of its seriousness. The second of these issues will be addressed in the next section as theme 3. The other road to systematisation is the idea of seriousness as, in turn, consisting roughly of two dimensions, connecting to, on the one hand, (1) the badness of the behaviour and/or its (expected) outcome and, on the other, (2) how that badness relates to the acting party (in this case the offender of a crime). Readers familiar with jurisprudence or legal theory will recognise these two dimensions as related to the distinction between the harm done (in a wide sense that includes any type of interest of a person, including that of being fairly treated by others) through an unlawful act and the culpability of the perpetrator of this act, together making up the legal seriousness of an offence. In the next section we will return to these particular notions. However, a similar distinction may be made also in the basic ethical classification of the morality of an act. We may distinguish between those of our moral judgements that respond more to the nature of this action or its consequences, or to the mental features or personal character of the agent. In different ethical theories, these two dimensions of moral response can be more or less emphasised and interconnected in a multitude of different ways. Therefore, all the standard ethical theory packages (consequentialism, virtue ethics, deontology, rights-based ethics) can potentially treat hate crimes as a morally separate category, if they can be connected to what is held to be of basic moral importance according to these theories. And, of course, the other way around: closer analysis may reveal that the "hate" element of hate crimes does in fact not make them more morally serious.

3.2.1 Hate Crimes are Morally More Serious than Other ‘Parallel’ Crimes
In the literature, grounds for holding out hate crimes as especially morally

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61 One way to make more specific sense of this formulation is to say that the victim is interchangeable for anyone else sharing that particular characteristic. A victim in this sense need not “identify” particularly with the characteristic in question, though it may be important that others do in order for the to be a group harm effect.

62 As described, e.g., in Lawrence (1999), Iganski (2008), or Hate Crime: A Practical Guide.

63 See Harel and Parchomovsky (1999) and Hurd and Moore (2004). This is basically the common law distinction between actus reus and mens rea (guilty act and guilty mind).
serious include the following ideas, of which the first five are clearly about the badness of the behaviour or its consequences, and number six to eight are clearly about the moral quality of the person committing the crime.

(1) They cause more harm to the primary victim
(2) They cause more harm to the targeted group/community
(3) They cause more harm to the wider society
(4) They violate (additional) rights (e.g. against undue discrimination)
(5) They are especially unfair or unjust
(6) They have especially bad motives
(7) They express especially bad values
(8) They are expressions of especially bad character

Whether or not – or to what extent – these arguments hold with respect to hate crimes depends in part on which of the hate crime concepts (listed earlier) that are being used. For instance, if the concept of hate crime is a crime that necessarily involves the expression of bias or prejudice is applied (i.e. the concept listed as (6) under 3.1), arguments (7) and (8) seem to be natural grounds for their moral status. Similar observations hold for the other definitions: If hate crime is defined in terms of bringing or risking a special type of additional harm – arguments (1), (2) and (3) are likely grounds for treating hate crimes as morally worse than other crimes. If and when there is such a connection between the concept and the grounds for its moral status, this pattern emerges: what makes a crime a hate crime is also what makes it particularly severe. The benefit of such a close connection is that hate crime becomes not just a social, but a moral category/kind, which means that there is a prima facie moral justification for special treatment via law and/or policy. The drawback of such a close connection is that differences between scholars, authorities and other interested parties on either normative or conceptual grounds will tend to

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71 Taslitz (1999).
72 If the jurisdiction in question also has a hate speech legislation, it may then be that hate crimes become a species of hate speech crimes (or something very closely related to such crimes) The relation between hate crime and hate speech laws is further discussed in several places below. The recent FRA report (Making Hate Crime Visible in the European Union) basically treat hate crime as expressive, or "message", crimes. I.e. as hate speech or incitements where the crime is the speech/inciting device.
73 Cf. Levin (1999). Note, however, that, for instance, harm-based arguments in favour of hate crime legislation are often empirically, not conceptually connected to hate crime. Even if you hold, say, an expressive view on hate crime, the moral diagnosis may appeal to the harm that such expressions tend add to the harm caused by the base crime. The various patterns of interplay between normative arguments and choice of concept also appear among critics of hate crime laws. See also the jurisprudential discussion that will be outlined below as theme 3.
render the discussion impossible. As observed in connection to theme 1, a regrettable side-effect of the connection between normative outlook and conceptual scheme is that seemingly disagreeing debaters may in fact not disagree about the described situation but rather, in spite of using a similar expression ("hate crime"), they are talking about different things. At the same time there is, as expressed by suggested more inclusive concepts, e.g., by the OSCE-ODIHR, also a general sense of there being something fairly determinate that is hate crime and that is worthy of normative inquiry and policy development.

3.2.2 Hate Crimes are Not Morally More Serious than Other 'Parallel' Crimes

Critics of the idea that hate crimes are especially morally serious usually agree with supporters that hate crimes in general are indeed especially bad, harmful, serious, et cetera, and that the general phenomenon of hate crime is clearly undesirable. However, they point out, this does not imply that every, single hate crime is thereby extra bad, harmful or serious. Having the "hate" or bias element trigger extra legal severity (thus motivating harsher sentencing) would therefore amount to routinely punishing an offender for a general tendency of the type of crime committed or for some general motivational state of this offender (such as being prejudiced). Alternatively - it is a bad thing, but one that we are not allowed to legally punish. For a number of different reasons it has been thus argued that such a practice of retribution would be unjust, since it would mean meeting out a more harsh punishment than what the offender deserves and/or to do so on the basis of a thing (a person's thoughts, convictions or general feelings) that is not the business of the criminal law. Also in this case, we can see that some arguments clearly deal with the question of the badness of the act or its consequences (1) and others with the moral quality of the offender (2) and (3).

(1) Hate crimes do not necessarily cause more or additional harm than 'parallel' crimes
(2) Prejudice or bias are not worse than (all) other motives
(3) We are not responsible for our motives or characters (in general)

All of these variants of the standard ethical arguments against hate crime laws

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74 Hate Crime Laws: A Practical Guide.
75 We will return to this phenomenon of trying to "solve" the hate crime policy problem by way of definitions and the parallel striving to formulate an all-inclusive concept in the section Many Concepts, One Frame, below.
76 It may also be claimed to be unjust in virtue of a resulting basic inequality of treatment being built into such a sentencing practice, where different offenders will be punished differently in spite of having committed equally severe crimes.
rest on assumptions about the proper connection between the moral qualities of acts and agents and the responses to these by the legal system. They raise important concerns regarding how to fit hate crime laws into legislation. This motivates a move to the next stage of the analysis.

3.3 Theme 3: Jurisprudence

The philosophy and theory of law – often called *jurisprudence* – deals with basic issues about the nature, function and justification of legal rules, systems and sanctions. It is primarily the latter of these aspects that has been deemed relevant for the hate crime debate. The reason for this focus is that the matter under discussion is the justification of applying enhanced punishment due to the presence of a hate or bias element in connection to a crime. Among the more general issues in jurisprudence is the possibility that the different functions of the law may occasionally come into conflict. Hate crime legislation seems to be one area where such conflicts exists.

There are two broad traditions with regard to how one should approach the issue of justifying the institution of criminal punishment. One of these, often called *retributivism*, applies a backward-looking perspective, focusing on desert and the aim of providing all parties with "their due" in relation to a past event, and thus underscoring proportionality between the seriousness of a particular offence and the severity of the sanction applied to the offender. The other tradition focuses on the expected consequences of (a system of) punishment (thus it is often called *consequentialist*) in terms of, e.g., deterrence, crime prevention, rehabilitation of offenders and/or restitution of victims. In practice, supporters of these basic perspectives tend to agree (for different reasons) on a lose "standard model" of proportionality, where the harshness of the punishments should track both how much of harm (in a broad sense that includes also risks of harm, psychological damage and, e.g., unfairness or public humiliation) the criminal act involves, and how culpable the offender is for the occurrence of this harm. I.e. even if, in a single case, there would be good expected consequences of punishing an innocent, or non-culpable, person, there are reasons not to do so, directly or indirectly based on the fact that punishment is not deserved. The standard model is accepted in one form or another by most of the writers represented in this bibliography.

Some critics have questioned the wisdom of hate crime statutes on consequentialist grounds - arguing that they may make things worse. But in general, critics seem to lean more towards a strict retributivist view of

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80 Honderich (2005).
81 On the centrality of harm to the criminal law see Mill "On Liberty" (1859) and Feinberg (1984). For a recent assessment of the role of harm in criminal law, see Tadros (2011).
82 With the notable exception of Harel and Parchomovsky (1999), who contrast their view, "the fair protection paradigm” with this "standard model". As we shall see below, fairness violations may be understood in terms of risk of harm.
proportionality, where it is important to have a strong link in every individual case between the harm done or risked through the offence, the culpability of the offender for this particular harm, and the harshness of the punishment. This is where the debate on the relevance of the hate or bias motive that we encountered under theme 2 comes into it. Does the idea of enhancing punishment on the basis of the presence of such a motive amount to the introduction of a novel mens rea (i.e. a mental or attitudinal aspect of offenders that influence the nature or severity of the offence) beyond the traditional list of purpose (to do harm), knowledge (of harmfulness), negligence (of taking care to be aware of the probable harmfulness of the act), and recklessness of performing the act in spite of such awareness)? And if so is this justified or does it run afoul of freedom of thought? Some critics argue that hate crime laws punish offenders for general tendencies of extra harmfulness of the type of crime they have committed, but is not caused (or risked) by the particular crime committed. A further criticism along these lines is that, as some accounts imply, the extra harm is caused mostly by social developments and widespread societal attitudes and thus by factors outside of the offender's control. This line of criticism may be related both to such questioning of the presence of proper culpability and to the claim that this extra harm cannot justly be laid on the offender, since it is not a part or consequence of his or her particular offence.

With a less purely retributivist or, possibly, a more clearly consequentialist idea of what may justify punishment, however, it becomes possible to apply a more flexible idea of the notion of proportionality, e.g. by having a less strict interpretation of limitations set up by the mens rea types just listed. Consequences do not depend on mere motives, however, but rather on reasons made public either by expression or by being inferred by most people as the best explanation for the crime taking place. Consequentialists may also take a broader view of what may make an act harmful. For instance, it is possible to argue that the harmfulness of an offence may indeed be partly about general or potential tendencies of the type of act it is – for instance, in terms of risk or the values that would be at stake if many people would perform such acts. Similarly, the way in which an individual offender is thought to be culpable for such harm can possibly spelt out at least in terms of negligence or recklessness. The arguments for hate crime laws largely seem to apply such a more relaxed or less strictly retributivist view. The general tendency of these arguments is forward-looking and broadly consequentialist. In comparison, only one (6) of the arguments against hate crime laws clearly applies such a perspective and another (5) may (but must not) be given such an interpretation.

Looking at the rest of the critical arguments, they are all about an alleged

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84 As argued by Hurd (2001). See also Kahan (2001).
85 Card (2001)
86 Indeed the presence of incitement laws (particular in Britain) suggests that you can be held responsible for creating such a risk. (Again, see Making Hate Crime Visible in the European Union for a strict application of incitement to hate crime)
absence of (the retributivist type of) proportionality between the seriousness of the crime and the punishment enhancement of hate crime laws. Arguments (1) to (3) stress the point that the sort of personal feature or mental state targeted by hate crime laws, or the supposed additional harm linked to this feature or attitude, is not something for which we are plausibly held responsible - or not in a sense that should carry weight in a court of law. Argument (4) stresses a proposed injustice in that hate crime laws introduce enhanced sentencing for "bad motives" in a random or arbitrary way (since other bad motive-types are not used in a similar way for punishment enhancement). Rather than the relationship between the offender and the criminal law system as such, this alleged injustice thus is about an inequality before the law with regard to different offenders whose offences are claimed to be alike in relevant respects. Argument (5), besides being read as a consequentialist worry about hate crime laws not being possible to implement in a functional way, may also be understood within a retributivist framework and would then stress a supposed unacceptable risk of disproportional sentencing.

In short, the arguments can be summarised as follows:

3.3.1 Hate Crime Legislation is Justified
(1) Hate crimes are getting more frequent\(^87\)
(2) One or several of the moral reasons 1-7 above\(^88\)
(3) Hate crime laws are effective means to limit the occurrence or effects of these crimes, or to limit hate/prejudice in general\(^89\)
(4) Hate crime laws send a societal message of tolerance and equal value\(^90\)

3.3.2 Hate Crime Legislation is Not Justified
(1) It punishes motives/ thoughts rather than actions\(^91\)
(2) It punishes character for which individuals are not culpable\(^92\)
(3) Offenders are not responsible for the additional impact the hate or bias aspect of a hate crime\(^93\)
(4) It randomly picks out hate or bias as worse motives although other motives may be as bad\(^94\)
(5) It cannot be made sufficiently secure and certain\(^95\)
(6) It is not needed to adequately respond to the hate crime problem, and may

\(^87\) Levin and McDevitt (1993).
\(^88\) Iganski (2008).
\(^92\) Hurd (2001).
\(^93\) Card (2001).
\(^94\) Murphy (1992), Jacobs and Potter (1998).
\(^95\) Jacobs and Potter (1998).
actually contribute to the problem and increase tensions between groups.  

3.4 Theme 4: Protected Groups

As mentioned earlier, one central aspect of what needs to be made more specific when actual hate crime policies are designed is what (sort of) social groups that the policy targets and involved laws protect. (Garland 2010, Jacobs and Potter 1998). This, in turn, actualises an underlying philosophical issue of what is supposed to be the basis of such decisions. Jacobs and Potter (1998) argue that, if not based on principles, the selection of protected groups will rather follow from "identity politics", i.e. be an outcome of a process of political lobbying and bargain, where those most disadvantaged usually have poor chances to become recognised. For similar reasons, organisations, such as the OSCE-ODIHR have provided some considerations to use for selecting relevant groups to protect and the subject has been revisited recently in hate crime scholarship motivated by the particular variability across Europe in this respect.

It is interesting to note that, so far in the evolvement of hate crime laws, there has been a gradual broadening of focus and inclusion of new (types of) groups (from only race/ethnicity, political opinion and religion to, e.g., sexual identity or orientation, economic status, philosophy or world view in general), but so far no decision anywhere to exclude formerly protected (types of) groups. At the same time, it is obvious that some suggestions for principles to select groups based on the typical basic reasons and values justifying hate crime policies mentioned earlier might motivate exclusion as changes in society makes a (type of) group lose features motivating special protection (such as being disadvantaged). Similarly, there is some apparent reluctance to let too many (types of) groups into the sphere of protection of a hate crime law, as evidenced by the debate of whether or not to let sub-culture or life-style in general be a matter for hate crime policy. If hate crimes are especially bad because they are based on false and unfounded views, the law should presumably not provide protection for groups "deserving" to be the object of disparaging attitudes. This is an area where we have found the philosophical discussion to be most underdeveloped. Criteria for inclusion are clearly needed.

Here are a number of possible principles, selected both on the basis of standard motivations for actual hate crime laws and suggestions in the academic philosophy of hate crime literature. It is possible to combine the types of criteria,
as evidenced in a recent suggestion to use a combination of numbers two and three\textsuperscript{103}.

(1) History of persecution, exclusion or discrimination (slavery, racist politics, religious oppression, discrimination of, e.g. sexual minorities or disability, et cetera)
(2) Actual risk or trend of persecution, exclusion or discrimination (is the group being more frequently or more severely targeted?)\textsuperscript{104}
(3) Vulnerability (to what extent hate crimes will harm individuals belonging to the group, and undermine important community functions)\textsuperscript{105}
(4) \textit{All} (types of) social groups
(5) Innocence and desert: no group that "deserves" being the object of biased or disparaging attitudes should be protected\textsuperscript{106}.

Because of the rather meagre philosophical treatment of the issue of criteria for group selection, it is interesting to briefly assess these ideas on the basis of the basic values and moderating reasons set out at the outset of this introduction. It is easy to see how (1) to (3) may all be connected (instrumentally or conceptually) to either of the four basic values (protecting individuals, communities, the disadvantaged or society as a whole against harm or injustice). (1) may receive extra support by considerations of legitimacy, but if the general population is unwilling to recognise a history of persecution or to view it as an injustice, it may work the other way. (2) connects to the function of criminal law to address community issues. It also connects to an economic analysis of criminal law that argues that if a type of crime becomes more frequent, the price is not high enough\textsuperscript{107}.

Presumably, legitimacy may strongly support (5), provided that a widely embraced notion of who deserves to be the object of negative attitudes is applied. At the same time, for this very reason, legal security and rule of law would tell strongly against such a group-selection criterion, since it would bring strong risks of upsetting basic equality before the law and having populist prejudice direct the working of criminal law, or to effectively allow legal disfavours beyond what is prescribed by statute. This is illustrated by the often repeated case of a convicted child molester who has served his or her term and is now observing all prescribed measures not to commit further offences, but who becomes the victim of a crime where the offender is clearly acting on a negative attitude towards pedophiles or child molesters in general. To avoid the grave problems implied by such a case, the idea to exempt those "deserving" negative attitudes is evidenced in a recent suggestion to use a combination of numbers two and three\textsuperscript{103}.

\textsuperscript{103}Garland and Chakraborti (2012).
\textsuperscript{104}Weisburd (1994), Garland (2010).
\textsuperscript{105}Chakraborti (2010).
\textsuperscript{106}Mason (2001), (2007).
\textsuperscript{107}Posner (1974). Note that an economic analysis may just as well favour police priority over punishment enhancement.
treatment from the protection of hate crime laws would have to be very individualised, thus taking the rather disturbing form of the notion of particular people deserving less of legal protection against, e.g., vigilante mobs or other forms of targeted violence. All of the basic values would seem to provide strong reasons against that, as would all of the moderating consideration, except perhaps legitimacy. Somehow deserving to be the object of a negative attitude does not imply deserving to be a crime victim selected on the basis of such attitudes. (5) does not suggest that selecting on these bases should be a mitigating factor, only that it is not one of the aggravating ones. However, especially from a general societal perspective, it is still a major concern when people take the step from entertaining (however well motivated) dislike to allowing such attitudes to motivate or lead to transgression of the limits of the criminal law.

Such patterns of reasoning should, then, rather speak in favour of suggestion (4). However, that suggestion may be criticised for lack of priority in light of legitimate and important considerations, such as the ones mentioned by (2) and (3). On the other hand, that would mean that any type of social group where an actual trend of persecution or vulnerability in the face of such persecution can be demonstrated may qualify for hate crime law protection. What particular groups would be selected on the basis of that could then be allowed to vary depending on the context and actual situation of a jurisdiction. We will return to how this sort of flexible basis for policy may be developed further in section 4.2.

3.5 Theme 5: Explanations – Structural and Individual
We are now leaving the philosophy debate that directly addresses the justification of hate crime laws. However, there is a theoretical discussion about the frame for understanding and explaining hate crime as a phenomenon that is of relevance to a more broadly conceived debate on hate crime policy. As previously mentioned, no matter what our view on the moral and legal status of hate crimes, hate crime makes sense as a criminological or policy category, just as ”crimes committed because of jealousy or greed”, ”crimes committed in a public space” or ”crimes committed while under the influence of intoxicants”. The question of what explains the occurrence of hate crimes is of obvious interest, quite independently of the issues discussed earlier, but also if one wants to address what would be suitable preventive policies in this area.

Why do hate crimes occasionally become more frequent and occasionally less so? What are the conditions and the causes of these crimes? By virtue of terminology alone, it is easy to assume that there is a straightforward causal

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108 An apt illustration is provided by the recent example of a French, local, self-appointed mob ”evicting” and burning down the housing of a group of Roma settlers. See: Vigilantes burn Roma camp in Marseille, France.
110 It does hold indirect relevance for issues of criminal law, as it pertains to the matters of causation and responsibility; see Moore (2009).
relationship between hate motive and criminal action in these cases. A attacked B because A hates the group to which B is perceived to belong. This idea is congruent to the view that counteracting hate crimes is part of the larger project of limiting prejudice/bias/hate in general. If we can rid people of their prejudices we can, presumably, stop this causal chain, while also making discrimination etc. less likely. This is also the idea that the important causal chain runs from the prejudice of offenders to their actions. Preventive efforts that starts from prejudice reduction often presuppose that those likely to commit hate crimes are among those who would lose their prejudices if exposed to the right sort of evidence/contact with the hated group.

This model, to repeat a complaint raised by Barbara Perry (2005) individualises the hate component in hate crime. It takes away focus from prejudices pervasive in the population, and from the role of racist, homophobic etc structures in instilling those values in potential perpetrators. Iganski (2008) also acknowledges this aspect and argues that the actual target of hate crimes laws should be these more widespread norms and structures. The message sent by hate crime legislation has a wider audience than just would-be offenders. The justification for targeting the prejudices of those that would not themselves commit such crimes is twofold. (1) Widespread prejudices form the basis for potential offenders’ subjective sense of justification. And (2) widespread prejudices are the reason why these crimes hurt more - as the victims lack the broad societal support that others enjoy.

The subject raises a number of connected issues. For instance, what does it means for bad values, motives and characters to cause the often supposed extra harm of hate crimes? The foundational question here is whether hate crime should be viewed primarily as a societal or as an individual problem. This, presumably, shifts the balance when it comes to the relative importance of criminal law versus other policy measures. The psychology of hate crime is also of importance for framing the discussion of responsibility and culpability addressed under themes 2 and 3 above, but also for matters of prevention involving the potential for rehabilitation of offenders - especially if prejudice is seen as a cognitive failing, which would suggest diminished responsibility for the consequences of these crimes.

The individual and social or structural takes on the explanation of hate

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111 The relation to more widespread xenophobia as measured by surveys has not yet been established scientifically, one reason of which is that hate crime statistics is still in such sorry state. So far, theory is all we have to go on - one can also make the argument that violence is a desperate mode of action which may well be inversely related to attitudes and developments in the rest of society. In sum, this is an empirical, albeit difficult, matter.
112 See the contact hypothesis developed by Allport (1954). For a review of prejudice reduction methods, see Paluck and Green (2009).
116 Al Hakim (2010).
crime may thus not only compete, but just as well complement each other in relation to central policy discussions. From a general philosophy of science perspective, both approaches to the explanation of hate crimes are valid, and connected via the fact that the prejudices held by individuals clearly come from somewhere. While people may be born with the tendency to form ill-founded attitudes, or develop (or fail to develop) the disposition early in life, the content of those attitudes is in all probability culturally formed.

One obvious focus of hate crime scholarship is thus the psychological make-up of offenders. Is the ”hate” that drives them compulsive or otherwise clearly pathological? Is it a character trait, a ”standing disposition”, or is it a more temporary state? Is it a conviction, or may it be a sub-conscious state? Whatever it is more exactly, could the disposition to transgress strong social norms that is involved in the psychology of hate crime offenders – by being understood to be unwarranted and irrational – amount to a dysfunction? This medicalised, individual outlook is certainly one sort of explanation that these crimes can be given. Another approach suggests that the prejudice or bias at work in the case of hate crimes stem from prejudices that are pervasive in society, and that this pervasiveness provides apparent justification and background conditions for the offender. Choosing the blend of such drastically different explanatory pathways will frame any further discussion of what measures are likely to have a preventive impact and to what extent they may be justified.

The explanation of hate crime also involves inquiry into establishing what function hate crimes are supposed to perform for offenders. If it is part of a project to protect a privilege and keep the people who are different in a state of apprehension and marginalised by fear, it may for instance provide fuel for the notion of the hate or bias element as being a specific intention that fits well into standard ideas about proportionality between punishment and the legal seriousness of an offence. Similarly, it would provide fuel for the ”hate crimes hurt more” argument. It also would underline hate crime as bordering on terrorism, something that we will discuss more below.

3.6 Theme 6: Neighbouring Areas: Hate Speech and Terrorism

In order to narrow in on the concept of hate crime, and address the legitimacy of hate crime statutes, it is relevant to describe its relation to other acts that spring out of or relate to inter-group conflicts, hostility or prejudice and that are treated as worthy of special criminal law responses. Exactly where in this neighbourhood of laws hate crime as an object of policy is situated depends on which of the interpretations of hate crime listed above is ultimately chosen.

119 Levin and McDevitt (2002).
120 Hate speech/incitement is, for example, one of the most common forms of hate crimes in Sweden, as reported by the Swedish crime prevention agency, BRÅ. See: http://www.bra.se/bra/brott--statistik/statistik/hatbrott.html
This is of interest both from the point of view of the conceptual issue and the issue of what kind of hate crime policies can be justified. Clarifying how hate crime is similar to phenomena from which it is still distinct helps us understand exactly what features may be left out of a definition of hate crime and what features that are essential in that respect. This is so since a comparison of this sort can illuminate how arguments used to justify or question these other laws also apply to hate crime. This is especially useful for such areas where a specific philosophical discussion attached.

Based on this strategy, it is useful to situate hate crime somewhere between \textit{hate speech} and \textit{terrorism}. In fact, on certain interpretations/conceptions hate crimes can be understood as an instance of either. While most of the commentators mentioned in this bibliography keep clear of hate speech, as it involves further controversy especially regarding first amendment issues in the US context, the relevance should be obvious. Hate speech laws too have been criticised as an attempt to "criminalise thought", for instance. Controversy looms in terrorism laws as well, with their focus on draconian measures motivated by keeping and protecting exactly the same sort of peace and social stability that hate crime laws connect to in their justificational basis. There are international guidelines in both cases, but no universally approved definitions. A common feature of all three areas is that, according to critics, applied laws bring risks of serious misuse by oppressive regimes.

\textbf{3.6.1 Hate Crime and Hate Speech}

Some jurisdictions that include hate crime statutes also provide so called \textit{hate speech} or \textit{incitement} statutes, i.e. certain limitations on free speech, like intimidation of or incitement to hatred against particular sorts of social groups. Hate speech laws involve the criminalisation of certain speech acts.\textsuperscript{121} The reasoning behind these laws is usually based on the claim that speech of the type targeted by the laws can cause a certain kind or amount of harm.\textsuperscript{122} Formulations differ, but considerations that apply regard, first, to what extent a direction to a wider audience is necessary, if this audience needs to include the targeted group or potential offenders, thus creating a risk of actual violence or taking offence. The latter is emphasised in some jurisdictions, while others (like Sweden and Germany) include in the legal definition of the offence also the public display of symbols, such as nazi style uniforms, swastikas, et cetera.

Hate speech laws target the (open or symbolic) expression of prejudice, bias or hostility and thus relate particularly close to the expressive view of what

\textsuperscript{121} Based merely on content or, more frequently, dependent on mode of expression and intention in a way that ideally allows all types of content to occur in reasonable discussion. (Note that while the U.S does not have incitement laws, the "fighting words" doctrine, while remaining controversial and virtually never applied, still exist on the books. See Waldron (2012) and Bleich (2011). The EU has generally taken another view on the matter.

\textsuperscript{122} The origin of this line of thought and the legislation that followed may be assigned to the case against the editor of \textit{Der Stürmer} – see Waldron (2012).
a hate crime is and also the expressive view of what is wrong with hate crimes. In both cases, ideas about what is wrong with these sorts of expressions may appeal to the harm done, to the inherent wrongfulness of the attitude expressed, or even to a supposed badness of character thus manifested. If hate crime is defined according to the expressive analysis, and this also tracks what accounts for the extra wrong committed or culpability revealed, we are basically counting the crime as a mode of speech. Indeed, hate crimes are occasionally called "message crimes" or "symbolic crimes". Hate crime can, on this analysis, be understood as a "parallel crime" that as such involves also a hate speech offence (due to the presence of the bias or hate element). This is to be contrasted with a view that say that a hate crime is a basic crime that is connected in some other way to a bias or hate element (such as a biased motive) which makes it as a rule be accompanied by a hate speech offence. This since hate speech is one type of documentation often used as evidence of, e.g., a hate motive.

The latter view of relating hate speech to hate crime may be favoured by those accepting hate crime laws but being critical of hate speech laws due to freedom of speech considerations. On this notion, criminal hate speech becomes a hate crime only if it has the additional motivational element of undue bias (rather than, say, being motivated be the need to create a diversion). Hate speech and hate crime legislation is closely related with regard to the underlying political rationale and the connection to human rights considerations, not least on the international policy level.

There is discussion of philosophical, ethical and jurisprudential aspects with regard to hate speech that may be brought to bear on the hate crime context. For instance, the critical views on hate crime laws that centre on their apparent nature of criminalising speech or underlying motivation could be compared to ideas that have influenced views on the limits of free speech. There is, with regard to this, repeated points being made that speech is not, should not and have never been, totally free, and that the act - speech distinction cannot be upheld. This could be brought in to problematise the criticism against penalising expression or motivation in addition to the criminal act itself. At the same time, many scholars seem reluctant to make the connection between hate crime and hate speech very tight, e.g., due to the difference invoked by the broader social importance of free speech from a constitutional, basic political and/or ethical point of view.

The relevance of considering the philosophy of hate speech, also actualises the philosophical basis of libel law and laws against intimidation and harassment due to social identity. This comparison appeals to the wider harms (physical,

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123 This conception may be what the FRA has in mind in Making Hate Crime Visible in the European Union.
124 Some commentators complain (reference?) that as hate speech is virtually the only acceptable evidence, speech is in fact criminalized in these cases. Of course this is not formally true.
125 Crocker (1992), Lawrence (1993)
emotional, societal and/or structural\textsuperscript{128} that are supposed to be added by the bias element of hate crimes according to basic reasons in support of hate crime policies. These parts of law may thus be related to each other by expressing the interest of society to limit and respond to factors that may promote strong feelings of animosity and hostility between groups in society.

Speech is not, arguably cannot be, and never has been, entirely free. Legal limitations exist for libel, advertising, fraud, threat, causing panic, inciting riots and so on. These limitations are determined by assessing the seriousness of the harm caused or risked in these cases, in addition to the judgment that no disproportional harm is caused by the regulation. In addition, a clear distinction between acts and speech is difficult to uphold, especially when it is acknowledged that consequences of what one is doing may motivate legal limits.\textsuperscript{129} The classic liberal argument for free speech concerns certain protected modes of speech in certain contexts and hate speech is an established example of what is not considered worthy of protection on this type of basis.\textsuperscript{130}

Many hate speech laws do not appeal to merely the intellectual content or public context of the speech, but requires a certain tone or mood to be present (thus making the speech in question "hostile", "inflammatory" or "inciting"). Any intellectual content can then be seen as possible to formulate in a reasonably conducted debate, also in the presence of people who may not take some points very well. Other cases stress that also speech that is not thus affectively or emotionally loaded, may still be obviously aimed at intimidation of the people addressed in a way that qualifies as hate speech.\textsuperscript{131} In addition, hate speech laws may be compared to libel – indeed, Jeremy Waldron argues for re-introducing the term "group libel".\textsuperscript{132}

The comparison between hate speech and hate crime laws appeals to the wider harms (personal, social and societal) assumed to be caused or risked by these crimes and these forms of speech. Hate crimes may have an impact on the targeted group's behaviour, and the public perception of that group – perceiving it to be weak, abnormal or socially dysfunctional; somehow deserving the treatment they are subjected to and thereby further escalating the problem.\textsuperscript{133} Similarly with hate speech, of course. Hate speech laws formulated in terms of incitement are even more to the point, as they expressly address the causing of societal and group harm. At the same time, it would seem that a larger audience is required by hate speech than by hate crime, for something worthy of the state's attention via criminal law to have occurred. If hate crime statutes would

\textsuperscript{128} That is, in addition to harming victims, their communities and undermining societal security and stability, hate crimes may have an impact on the behaviour of individuals of the targeted groups (e.g., for protection, they may isolate themselves from the rest of society), and as a result affect public perception of that group in a way that further strengthens bias.
\textsuperscript{129} Gellman (1991).
\textsuperscript{131} Hate Crime Laws: A Comprehensive Guide
\textsuperscript{132} Waldron (2012).
\textsuperscript{133} Taylor (1994) calls this "the special treatment dilemma".
be found to be acceptable merely on grounds of harm “indirectly” caused by how they may function as acts of a hate speech of sorts (through strongly expressing the biased attitude of the offender), there might seem to be a case for a similar moderation of hate crime laws. However, for most commentators, this is not the only reason in favour of these laws.\textsuperscript{134}

So, although there are areas of overlapping concern addressed by hate crime and hate speech laws, the problems targeted by these laws are not identical. An important difference between hate crime and hate speech statutes which illustrate this is the fact that the latter is a unique offence in its own right that is surrounded by a number of careful qualifications, whereas the former is an aggravating circumstance attached to any independently defined offence. There is therefore a significant difference between criminalising speech that express certain attitudinal features (bias or prejudice in a qualified way and/or context), on the one hand, and using similar features as either an aggravating factor or as evidence of an aggravating factor to be attached to any type of crime. In both of the latter instances, it is possible for a case of hate speech to both be and not to be a hate crime. This, as mentioned, will depend on both how, more exactly, the aggravating factor is defined in the law (whether it is defined in terms of a motive or in terms of what is expressed by the offender) and the more exact circumstances of the individual case. Since due to the public nature of meaning, we may express messages or mental states that we do not agree to or share, the mere expression of inflammatory or hostile bias or prejudice may be consistent with the absence of a biased or prejudiced attitude or motive of the offender.\textsuperscript{135}

3.6.2 Hate Crime and Terrorism

According to one of the interpretations of how the bias aspect of hate crimes connects to the "parallel" crime presented under theme 1 above, hate crime is a \textit{specific intent crime} in that it is taken to be committed with the further intention to instil fear in, or undermine the social standing of, a targeted group. We also saw (in that context as well under theme 2) that the notion of hate crimes causing additional and special harm is often spelled out in terms of the creation (intentional or not) of fear and insecurity throughout the victim's community. This reading of the concept of hate crime and/or what is especially problematic with such crimes suggests that a hate crime is something akin to terrorism in the classic sense: The attempt to instigate political change by violently or otherwise unlawfully instilling fear and insecurity throughout a community or society, thereby sabotaging the ability of its socio-cultural mechanisms or political institutions protect and care for its members.\textsuperscript{136}

\textsuperscript{134} Lawrence (1993), Perry (2001).
\textsuperscript{135} See Blackburn (2001).
\textsuperscript{136} This particular take on the hate crime problem is particularly dominant in the German legislation, which targets crimes based on includes political or religious activist extremism, but not, as of yet, hate crime in any of the more wider senses listed earlier.
If hate crime is defined as a specific intent crime, the link to acts of terrorism is thus conceptual and thus very strong. Hate crimes, simply put, is by definition a political strategy that consciously employs unlawful acts to try to scare people and communities into submission. However, as has been argued by many commentators, such a narrow definition miss a lot of instances where similar harmful effects occur, and bias plays a pivotal role, but where such a specific and elaborate intention is absent. The specific intent interpretation is moreover rather difficult to press onto the aggravating factors employed in actual hate crime laws. It should at the same time be mentioned that the distinction between a more broadly conceived motive and specific intention is not obvious.137

More important, even if a wider understanding of hate crime is accepted, the specific intent instances (where the link to terrorism is conceptual and very strong) will not be excluded, but form a particular subspecies of the hate crime problem. At the same time, other hate crimes can be acknowledged as akin to terrorism, as their actual effects are of a sort typically sought by terrorists. Even if the connection is not conceptual, therefore, some reasons for hate crime policies connect to reasons behind anti-terror policies – namely concern for overall societal peace, security and stability.

3.7 The Role of the Philosophical Discussion so Far
Our take on the overall tendency of the philosophical discussion of hate crime policy so far is, to simplify, that the deeper it has ventured into underlying philosophical issues, the more it has tended to be a rather narrow reaction to an agenda – actual hate crime laws and policies – set by someone else. This in contrast to contributions that aim to take a more proactive or constructive grip on hate crime policy discussion, but where problematisation of underlying philosophical or ethical assumptions has been less developed.

In both cases, there is the further challenge that there is no philosophical consensus on the function/scope of criminal law and/or the function and justification of criminal punishment. There are, as indicated, several more exact stances on these matters and the choice among these will be relevant to whether different types of hate crime laws are justified or not.138 Punishment, criminal law and related policies can be justified on consequentialist grounds, deontological grounds, retributivist grounds, expressivist grounds. In other words, the classic spectres of basic ethics and political philosophy remain as challenges to be specifically dealt with in relation to the hands-on of actual policy making in this area.

138 For overviews, see Feinberg (1988-90), Honderich (2005).
4. Final Discussion
To conclude this introduction, we would like to point to some areas where we think that there is substantial food for thought to be had, either for further philosophical work regarding hate crime policy, or to take home from the existing philosophical works related in this bibliography into the further work on policy design in and across different countries and jurisdictions, especially with regard to Europe. We will start by highlighting some remaining ambiguities and vaguenesses that have been assessed to warrant further attention. On the basis of that, we will then address two related questions regarding policy pluralism and variability in this area – regarding concepts, and regarding values used to justify solutions in terms of these concepts.

4.1 Fringe Cases and Areas of Future Interest
Any area of policy or lawmaking will be confronted with difficult cases where it is unclear if they should either fall under the policy or in some other way be regarded as important on a similar basis as the cases that are seen as clearly belonging to the area of this policy. There will also be areas of application that have (yet) not been as attended to as others. So also in the hate crime case. The former phenomenon becomes visible in hate crime policy debates foremost through the issue of what social groups or features should be protected by a policy. But also in debates regarding whether racial slurs thrown around at the time of the crime is enough proof of bias held by the offender. While vagueness may be unavoidable in these cases, the risk is that a very small portion of hate crimes are successfully prosecuted. And the perceived openness of the question ”what counts as a hate crime?” may quite likely hold back effective policy measures due to difficulties of matching effective actions to a type of crime that is so variable. Due to the concentration in many debates on the criminal law side of hate crime policy, attempts to decide the limits of hate crime policy mostly takes the form of debating about the exact design of a proposed or actual punishment enhancement statute, where over time and between jurisdictions there are notable differences. For instance, while some countries display the bare minimum of possibility to enhance punishment in case of crimes biased with regard to race, ethnicity or religion (Cyprus is an example in Europe when this is written), others concentrate on explicit political motivations (Germany being the prime example) or add more recent highlights in anti-discrimination policy, such as sexual orientation and/or identity, disability and so on (for instance, the UK), while yet others present long lists of types of features adding to the already mentioned such things as language, financial status or lack of religious affiliation (Belgium and/or Poland). There are also debates and law cases pointing to possible additions, such as that of the quite inclusive categories of sub-cultural belonging or life-style (e.g., the Sophie
Lancaster case, debated in the UK\textsuperscript{139}). Some countries, like Sweden, have tried to handle the resulting fringe problem by including in the statute an open-ended formulation allowing anything of sufficiently relevant similarity to qualify. In any case, this sort of fringe issues challenge the design of existing hate crime laws, for instance, by asking why only some and not all social-group types typically included in equal treatment or anti-discrimination legislation are not taken into the "protected" group-types in hate crime laws.

\subsection*{4.1.1 Gender Based Hate Crimes?}
Particular criticism has been directed against the omission of including gender violence as a sort of hate crime in existing hate crime laws\textsuperscript{140}. This omission may seem particularly odd in light of an obvious ideological link between the thinking behind hate crime laws and the evolvement of legal or general policy thinking about sexual abuse/harassment/violence as constituting partly an attack on the victim's social (gender or sexual) identity – thereby affecting fundamental aspects of his or her sense of security and belonging (on top of the other obvious harm inflicted)\textsuperscript{141}. The increasing trend of including sexual orientation as a protected group-type in many hate crime laws adds further strangeness to this omission. Looking at the basic values underlying hate crime policies it is also difficult to explain the omission of gender or sexual identity (the latter being a more inclusive term admitting also identities not fitting into official gender taxonomies) as a protected group category in hate crime laws.

Perhaps it has been felt that gender violence, which is mostly made up by men's violence against women, will be difficult to distinguish in a legally secure way from violence between, e.g., spouse that comes out of individual conflicts and feelings of animosity, albeit partly dependent on existing gender or sexual identity structures or "roles" or domination patterns, and the expectations and conflicts they create. In domestic violence, the victim is not interchangeable in the way he/she is in a typical hate crime – but in many instances of sexual assault or rape where the offender is unrelated to the victim, this condition seems to be fulfilled, so possibly only those cases should count, even though gender bias arguably play a role in domestic violence as well. The difficulty to secure a legally secure protection on the basis of gender in hate crime laws would not seem to be different to the challenge of a court to distinguish between a private quarrel of neighbours that happen to belong to groups between which there exists a documented prejudicial or biased hostility and when criminal acts resulting from this quarrel are based on biased or prejudicial presumptions (and/or express these) about the victim's group. It would, it may be noted, also

\textsuperscript{139} Garland (2010). See also the webpages of the Sophie Lancaster Foundation: \url{http://www.sophielancasterfoundation.com/}.

\textsuperscript{140} Weisburd (1994).

\textsuperscript{141} This connection can even be expanded to (the public display of) pornography, which in a recent analysis has been held out as being problematic in a way that reminds very much of how hate speech is problematic. See Langton (2009).
be particularly fitting to all of the basic values underlying the very idea of hate crime policy to affirm sexual violence (such as rape) or harassment connected to prejudicial or biased views, e.g., of how women are allegedly supposed to be dressed, talk or otherwise behave themselves.\textsuperscript{142}

Another fringe problem instead has to do with how to demarcate the general phenomenon of hate crime to related ones in criminal law policy. As noted earlier, there is a salient relationship between the defining characteristics of hate crimes and those of political or religious acts of terror or terror-like criminal actions (such as violent campaigns against particular groups instigated by states qualifying as human rights or war crimes), but how much should policy design and thinking in these different areas be guided by similar rationales? Another example discussed at length above is the phenomenon of \textit{hate speech}, and in the former paragraph we connected to another related area of policy, namely gender discriminating or sex-related criminality.

\textbf{4.1.2 Honour Crimes}

A further example that does not embody the complex question of how to relate national and international law or demarcate the constitutional protection of free speech, is that of so-called \textit{honour crimes}. In these cases, someone is typically being victimised due to a perceived membership of a social group to which certain (moral) norms are taken to be attached, but not due to a general dislike of that group, but of a dislike of his or her behaviour in relationship to the perceived membership. The victim him- or herself, however, may not share any of these perceptions, quite beside not authorising the criminal act itself. Clearly, this is related to the typical case of a hate crime – where the offender allows him- or herself to transgress the limits of the law in connection to how he or she perceives and judges the victim in terms of membership to some social group\textsuperscript{143}. At the same time, since hate crimes are as a rule occurring between people perceived (by themselves or just one of them) to belong to different social groups, there is that difference to the typical honour crime. The question is, to what extent is that a relevant difference from a policy justification perspective? If the main reason for hate crime policy is the care for social stability and related concern to prevent or respond to inter-group frictions it may indeed be relevant. If the main reason is instead the avoidance of particular harm due to the attitude of the offender in these cases, the relevance may disappear, since an honour

\textsuperscript{142} It should be observed that a gender or sexual identity group-category in a hate crime law may very well be neutrally defined in relation to what identity or group an individual belongs to (or is taken by an offender to belong to). So, if sexual harassment can be a hate crime if adequately connected to bias against a gender or sexual identity, this holds regardless of what gender or identity is considered.

\textsuperscript{143} Barbara Perry’s (2001) conception of hate crimes as “doing difference”, where someone is attacked because, according to the assailant, the victim or his or her group peers behave “improperly”, this type of connection becomes very close.
crime may confer extra degradation and insecurity very similar to many hate crimes.\footnote{A recent ruling on attacks and harassments within the US Amish community exemplifies a case with several rather typical honour crime elements (where an orthodox part of the community tries to unlawfully punish or restrict a less orthodox part of the community for straying from the ‘right path’), where the legal system chose to classify the offense as a hate crime. See: Jury Convicts 16 Defendants on Federal Hate Crimes Charges for Religiously-Motivated Assaults on Members of Amish Community. Press release of the United States Department of Justice, September 20, 2012. Online access: http://www.justice.gov/opa/pr/2012/September/12-crt-1141.html}

4.1.3 The Philosophy of Hate Crime Prevention

A final fringe problem (though not necessarily the only one remaining) concerns the issue of how to mix the basic ingredients in a sound hate crime policy – those of criminal law, monitoring and prevention. While it seems easy to motivate that possible criminal law statutes should be designed so that actions in their name can be effectively monitored, and that monitoring systems should be set up to accomplish that in a reliable way,\footnote{Effective monitoring of how these cases are treated may favour punishment enhancement statutes over sentencing guidelines for hate crimes (see \textit{Making Hate Crime Visible in the European Union}).} it is less clear what should be included in hate crime \textit{prevention} and how the monitoring system should possibly be expanded in light of that.

Two things may be pointed to as food for forthcoming thought in this area. First, the basic concerns or values underlying the case for hate crime policies in the first place that were mentioned earlier in this introduction (protecting individuals, communities, society and the disadvantaged) do seem to be possible to use to motivate action of a broader sort than merely targeting what are clearly (potential) crimes. In particular, action to fight prejudice, bias, discrimination and inter-group animosity in general would seem to be possible to hold out as clearly belonging to the area of hate crime policy, thus integrating it with many other policy areas attended to for similar underlying reasons. This idea assumes that there is a correlation between these types of attitudes in the general population and the frequency (and severity) of hate crimes - an assumption that is not well established, but nevertheless underlies many initiatives in this general area and is apparently viewed as a sensible view by many policy makers. However, that viewpoint also brings into hate crime policy debate the well-known problems of how far policies aimed at shaping people's values and beliefs should go in light of the fact that the very same values of protecting individuals from harm and injustice, communities and society from destructive structural developments that may undermine public goods and attending to the special needs of the disadvantaged would seem to motivate that people, within the limits of criminal law, are allowed to develop and hold their own views on society and each other, even if these happen to include a lot of prejudice and bias.

To be be clear, liberal democratic societies may – and, of course, do – consistently push for its population to embrace a general attitude of tolerance of
pluralism with regard to thoughts and opinions, not least through their educational systems. There is nothing paradoxical in having as a central tenet the toleration of such plurality and to mind especially about this tenet being a widely embraced thought and opinion, e.g., through educational policies. It is also well within the limits of a liberal democratic ideals to actively uphold and remind citizens of the crucial line between opinions and sentiments and acts based on opinions or sentiments (for the latter there are limits, defined by law). However, the idea of having a preventive hate crime policy that helps to forestall inter-group prejudice and bias would seem to be possible to push beyond such well-established measures. Given that we have the types of policy that have just been mentioned, but still have a hate crime problem, it may be tempting to consider further actions, such as state-run campaigns to promote more particular positions with regard to the values and qualities of this or that world-view, life-style, tradition, and so on. The question is how far such attempts at hate crime prevention through the active promotion of certain ideas may plausibly be taken if, at the same time, society is to apply typical liberal standards and values, according to which a basic value is for the state to celebrate and respect diversity of opinion and the ability of adult people to decide and express responsibly their own view and way of life.

4.2 Many Concepts, One Frame
There are several hate crime concepts, and several partly conflicting reasons why any of these would or should be applied in law and law enforcement, in other types of policy measures or in scholarship. This sort of conceptual plurality threatens to create confusion and unintended – even unwitting – disparities, and thus be seen as a weakness of a policy. In the area of hate crime, we have especially pointed to, e.g., the differences between hate crime laws in different jurisdictions and the apparent mismatching of what is picked up by monitoring systems and what is held out as or hinted to be the problem that hate crime policy is intended to address. In scholarship, the main problem created by plurality is uncertainty to what extent different scholars are discussing the same thing and, as mentioned, such uncertainty can be attended to with the standard tools of improved terminology, clearer definitions and meticulous explanation of usage. A problem with improving on a concept, however, is that one may lose comparability with previous research. This is a concern that has to be addressed or, at least, accepted. If data from different countries are to be compared, it means that at least some of the authorities collecting data have to change their concept, and thus loose perfect comparability between new and old data. If we believe that there is a considerable benefit in getting a better overview of these crimes on a European level, this should be the best conceivable reason to

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146 This is a commitment of the European Union, as expressed in the 2008 framework decision on racism and xenophobia
instigate such a change, and provide a perfect opportunity to improve on current practices.

In the reality of policy, the confusions resulting from lacking a common concept, while also needing different concepts for specific functions and countries are not easily repaired in any similar way and may severely undermine the effectiveness, reliability, justification and legitimacy of hate crime policies. This may become especially pressing in complex and flexible jurisdictions like that of the EU. Without a common concept\textsuperscript{147}, there will be no such thing as a European hate crime policy or problem, but choosing any of the more particular ones on display in the scholarly market threatens to exclude existing policies in member states as being "real" hate crime policies. This has been addressed in the attempt of OSCE-ODIHR to formulate a working definition of hate crime for monitoring purposes\textsuperscript{148}. However, as we saw earlier, even this attempt may exclude some jurisdictions, such as the UK, if applied strictly. On the other hand, trying to formulate a concept that is even more inclusive, giving room for all existing policies may be viewed as too allowing, and to forestall justified criticism of countries that offer very minimal responses to hate crime, e.g. with regard to what types of social groups are protected.

The problem arising out of these conflicting tendencies has been addressed in a recent contribution\textsuperscript{149}, where it is argued that a hate crime concept that is construed out of a victim vulnerability idea could overcome some of the problems of finding a pan-European solution to what group-types are to be awarded protection in hate crime laws and other policies. A particular point made is that, due to variations between EU member states as to which groups are in fact especially threatened and/or vulnerable, it is possible to allow a lot of variation while still allowing all of these policies to be hate crime policies, without sliding into an anything goes position.

While we believe that this suggestion is a step on the way to manage the conceptual problem, it still suffers from a flaw in that it confuses, on the one hand, the issue of what policies are to be counted as hate crime policies and, on the other, what policies are to be viewed as justified. As pointed out under theme 1 earlier, if everyone defines hate crime in terms of those aspects that they think make hate crime policies justified (or not justified), there is risk of creating a situation where no one agrees or disagrees about anything, since everyone insist on using different pet concepts, thus talking past each other. For this reason, Garland's and Chakraborti's victim vulnerability account of what justifies a group to be protected by a hate crime law together with their presentation of this account as a new concept of hate crime is risky. Simply put, anyone whishing to deny their suggestion with regard to justification can simply chose another definition (and thereby talk about something else). If one then

\textsuperscript{147} See Charkaborti and Garland's aptly named "divided by a common concept" paper (2012).
\textsuperscript{148} And is a main concern of the recent FRA report Making Hate Crime Visible in the European Union.
\textsuperscript{149} Garland and Chakraborti (2012).
responds with the claim that they are in that case not talking about "real" hate crime, it has suddenly become conceptually impossible for a hate crime policy not to be a justified hate crime policy. For, according to the concept then proposed, if a policy fails to protect vulnerable victim groups, it simply is no hate crime policy in the first place. But clearly, any concept of hate crime must allow for the conceptual possibility of bad or unjustified hate crime policies. At the same time, Garland and Chakraborti has an important point: specific concepts of hate crime at work in national laws and other policies, need to target groups that are indeed important to target on the basis of the values and reasons motivating these laws and policies in the first place.

Based on this observation, the obvious solution is to insist on keeping apart the conceptual and the justificational issues on an overarching level, where we set out what we are talking about when talking about hate crime across different countries, laws and policies. At the same time, the conceptual issue must be solved in a way that is of use for the further discussion of what hate crime policies are justified and why. To do this, the concept must be able to describe what a hate crime is in a way that sets it apart from other types of crime, it must allow for different views on the justification issue to be consistently formulated without resulting in triviality or paradox, and it must allow for different solutions at different policy levels and in different jurisdictions that are as a matter of fact counted as hate crime policies (albeit not necessarily agreed on as ideal ones) to be included by the concept.

We believe that it is possible to thus describe a loose conceptual frame that captures a single, albeit sufficiently variable and relevant idea of what a hate crime is. The way in which this ideas is then varied in the form of actual policies in different areas and jurisdictions may then be assessed on the basis of the framework of values and normative perspectives presented earlier together with facts about the situation in a country, the prerequisites of effective monitoring, and so on. In relation to that, we view Garland's and Chakraborti's vulnerability idea as a fruitful development and illustration of how this base of values may be employed to assess the choice of protected groups in a national hate crime policy. Our suggestion with regard to the conceptual issue is the following:

A Framework Hate Crime Concept

If a country has some sort of policy with regard to crimes committed having a normatively adequate sort of connection to a negatively biased attitude of the offender towards the victim in virtue of a perceived social group-membership of the latter (or other connection), then this country has a hate crime policy. To be adequate, the connection mentioned has to take the form of either a state of the offender that contributes to the explanation of the offence (such as an intention,
a motive or a disposition), or something expressed by the offender through or in connection with the offence.  

Whether or not such a specific hate crime policy is a justified, good or efficient policy is a different matter, to which the many considerations we have presented apply. Similarly, within a single jurisdiction or policy region, if it has policy measures to prosecute and punish, prevent and/or monitoring crimes committed with an adequate connection to a negatively biased attitude of the offender towards the victim in virtue of a perceived social group-membership of the latter, this jurisdiction will have a hate crime policy in the corresponding area (criminal law, monitoring and/or prevention). Again, whether the content and mix between these areas in the policy is a good one or not is another matter, and depends on the normative issues under discussion.

Viewing things in this way makes it possible to adopt what we believe is a fruitful starting point for further work of use in more specific circumstances and jurisdictions much as Garland and Chakraborti describes. We can embrace the notion of having several different and more specific operational hate crime concepts performing distinct but related functions within the frame of one hate crime policy. What makes it a hate crime policy in the first place is the fact mentioned in the framework concept. However, distinct operational parts of the policy will have to use much more specific and precise notions than that of a crime committed in adequate connection with a negatively biased attitude of the offender towards the victim in virtue of a perceived social group-membership of the latter, although all of these notions will fit within this loose conceptual frame for what designates a hate crime. For instance, the criminal law part of a hate crime policy will have to apply solutions and instruments that fit the legal tradition and context of its particular jurisdiction, thus making possible justifiable variations between states, e.g. with regard to what more exact among possible adequate connections between offender, bias and crime should be used in statutes. Moreover, states may find reasons to delimit the more exact target of the policy differently, depending on what social groups are in fact being targeted in criminal actions fitting the loose frame for what a hate crime may be. From this perspective, if nothing else, the framework concept, together with the basis of values and reasons, will serve as tools to create greater clarity and transparency of what solutions that are in fact adopted and what reasons may justify them.

Similarly, if preventive measures are to be applied with any success and possibility of evaluation, they will have to address themselves more specifically with regard to what exact types or instances of hate crimes are being targeted, 

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150 The latter clause includes what is probably excluded by the working definition presented by OSCE-ODIHR (see Hate Crime Laws: A Practical Guide) through its use of expressions such as hate crime being crimes committed "because of" or "out of" bias or prejudice, while still including everything that this suggestion includes.
what type of prevention is aimed for, and so on. Moreover, they will have to be operationalised in manners promoting the qualities aimed for in measurement and statistics, such as precise quantifiability, reliable detectability and commensurability between areas and jurisdictions. Again, it is quite conceivable that hate crime policies will be found to vary (as they in fact do) between different states or regions within states. Finally, depending on what exact such variations are in fact occurring, monitoring systems will have to adapt in order to monitor that which hate crime policies as a matter of fact relate themselves to, again allowing for quite some variation. None of these variations, however, cancel the fact that policies made up of such parts are hate crime policies – as long as they continue to relate to crimes committed with an adequate connection to a negatively biased attitude of the offender towards the victim in virtue of a perceived social group-membership of the latter. - this is the minimal conception needed to start with. We can then say that a particular case falls under this most general conception and ask why a particular jurisdiction does not treat it as such.

On this conceptual basis – and the range of possible hate crime policies on different levels that it provides room for – we can then discuss how the policies should be designed, changed, developed, or perhaps repealed in particular aspects, parts or larger sections. Similarly, an overseeing body like the EU in relation to its member states, can decide more precisely what it demands of them in the hate crime policy area and to what extent to allow them to vary policy details in relation to national need, culture, legal system and so on. This weighing of considerations is possible from the EU perspective by relating local concerns to the basic normative framework of fundamental human rights on which the union rests. It should be noted, however, that such rights may come into conflict, and careful ethical analysis is required when they do. Similarly, a federal government can oversee the policies of its states according to a similar assessment, or a nation's central government can oversee its regions and municipalities. Doing that, the overseeing central body will have to take a stand on how to weigh the various value aspects and pragmatic reasons for restrictions or moderation pointed out earlier. This brings us to the last final remark of this introduction.

4.3 Value Plurality, Conflicting Reasons and Policy Compromise
As indicated at the outset, there is a complex, multi-layered collection of suggested or hinted values, reasons and possible bases for restricting otherwise motivated measures that may be taken as relevant for deciding the scope and content of hate crime policies. Protecting people from harm and offering justice and restitution when they have been unduly harmed, minding about equality and protecting the disadvantaged from further downsides, caring for the basic stability of society and its ability to produce public goods such as liberty, security, peace and prosperity, taking care not to have the eagerness to attend to
those values lead to undermining of the rule of law, legal security and certainty or ignorance of the importance of legitimacy for the legal and political system to function well. All of these are, we suggest, perfectly sound and important considerations. However, as we have seen, sometimes some of these considerations pull in opposite directions, or partly undermine or counteract some of the other considerations. This creates a challenge for hate crime policy, that is an instance of a more general one: how to decide in which way and on what basis to resolve conflicts between initially and apparently sound considerations.

Within philosophy – in particular ethics and political philosophy – attempts are made to simplify and systematise this picture, usually by means of distinction and reduction. For instance, one may distinguish questions about what to aim for in hate crime policy from questions of to what extent legal security or rule of law may be tampered with to realise important social goals; or between practical considerations of implementation, such as to what extent people will adhere to a policy, and more abstract questions about the desirability of this policy. As for reduction, it is time-honoured practice within philosophical ethics to construct theories where one or a few among a multitude of seemingly plausible considerations is appointed the role as fundamental; sometimes inspiring the invention of novel, more general types of consideration that are claimed to explain or justify the other considerations, thereby providing basis for priority setting in cases of conflict. Many of the arguments to and fro on various issues outlined above (and detailed below in the annotated bibliography itself) illustrate such attempts, mirroring some among a family of competing general approaches within ethics, such as consequentialism, deontology, theories of rights, social contract theory, and so on.

At the more practical policy making level, such work can help elucidate how patterns of reasoning may be applied in support of some policy designs over others, and to provide a deeper and clearer understanding of political conflicts that are actualised when policy is debated. For instance, above we have tried to explain how different concrete questions with regard to hate crimes and hate crime policy design and implementation awake basic tensions within a structure of norms and values generally subscribed to by states across Europe. These tension, in turn, can usually be understood more clearly by presenting how they relate to worked-out theories from ethics, political philosophy or the philosophy of law – something we have attempted a bit above and is continued below in the bibliography. Some of the ones highlighted have been about: How the liberal core value about everyone's equal right to form his or her own life and world-view as he or she sees fit may both support the idea of having a hate crime policy and question how far such a policy should be taken, e.g., regarding prevention. The same idea about equal treatment may go for a much broader outlook on how to define the proper scope of such a policy (e.g. with regard to what types of groups are protected in a hate crime law) than, e.g. general reasons
to protect overarching social stability and functionality or reasons to attend to special interest considerations attached to particularly vulnerable groups. Attention to formal qualities of the legal system having to do with efficiency, security and general equal treatment of people may lead to much less strong support of criminal law solutions in hate crime policies than what is supported by reasons referring to the harms and injustices related to hate crimes. This attention may also, on the basis of formal equal treatment norms, question solutions that allow for differences between areas or jurisdictions, e.g. with regard to what type of groups enjoy the most explicit protection in hate crime laws on the basis of considerations of equality that allow for adjustments of policy to differences of need between countries or regions. And so on.

Philosophy may in this way indeed continue to promote better understanding of the differences between positions and argumentative patterns in the hate crime discussion – sometimes perhaps revealing some differences to be more apparent than real, sometimes adding clarity to what is at stake in various policy decisions and debates, sometimes pointing out the need for debate in cases where shallow consensus or mere inattention prevails. However, it would be unrealistic to think that philosophical work could make the general tensions and deeper conflicts revealed by philosophy go away for those policy makers that ultimately need to decide the issues. The other side of that is the conclusion that when we come back to the actual policy issues actualised by hate crimes from the depths of philosophical analysis, we have still not lost any of the initial general reasons to affirm the multitude of values possible to appeal to when justifying particular designs of hate crime policy. This plurality then has to be handled by policy makers also when these values pull apart, necessitating compromises between values which all may appear to have a claim to being non-negotiable.

Such compromises are, of course, well-known to experienced politicians and others involved in policy making. However, what is perhaps less developed is the art of making clear exactly what compromise has been struck and why. This is due to the side of politics where reason, argument and clarity is looked upon as problems that tend to create practical problems for the other aspects of politics, where decision makers seek to protect themselves from too much of accountability. In short, it is very easy to strongly affirm all of those basic values and reasons that we have mentioned (protecting individuals from harm and injustice, protecting social stability, attending to the disadvantaged, guarding rule of law and legal security) in a public speech or general declaration of intent, but as we have seen, very difficult to fully live up to such proclamations in practice. An important role for the philosophy of hate crime is to continue to deliver conceptual and intellectual tools that may help going beyond and unpacking that which in public political presentation is often glossed over, and thereby provide fuel for further debate and development to the benefit of a more transparent, well-founded and legitimate politics in this area.
One particular aspect of this that we have underscored above is the way in which the philosophical reasons and analyses put to work in the discussion about sentencing enhancement for hate crimes could do a lot of good when it comes to broader issues about how to adequately mix such "hate crime laws" with desirable prevention and suitable monitoring systems. It may then be asked whether, on reflection, this broader outlook may give reasons to focus less on the issue of punishment and more on law as a vehicle for public communication and education to the benefit of the basic values underlying the importance of hate crime as a policy area.
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