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RESEARCH ARTICLE

Hate Crime Legislation as an Antidote to Hate Ideology

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Abstract

Given the prevalence of hate ideology, a concerted, multipronged effort to combat it clearly seems in order. In this essay, I explore whether hate crime legislation is a permissible and advisable component of this effort. In particular, I consider whether it is morally permissible to impose enhanced punishments upon criminals who select their victims at least in part because of an animus toward members of the group to which the victim belongs. Would it be permissible to punish more severely a White supremacist who attacks a person only because she is Black, for instance, or an anti-Semitic thief who selects her victims at least in part because they are Jewish? After sketching a preliminary defense of this type of hate crime legislation, I note some potential concerns, including vexing questions about the likely effects of imposing such laws under the present, nonideal circumstances in the United States.

Keywords: ideology; hate crimes; punishment; rights forfeiture; culpability

Introduction

The Southern Poverty Law Center (SPLC) distinguishes twenty-four types of hate ideology and alleges that it tracked 733 hate groups across the United States in 2021.[1] The SPLC defines a hate group as an "organization or collection of individuals that ... has beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics."[2] While the SPLC does not explicitly define hate ideology, I will presume for the purposes of this essay that anyone in the grips of hate ideology is not fully responsive to reasons. I do not insist that those who conceive of ideology differently misuse the term, but I take

[1] This information is available at the Southern Poverty Law Center's website: https://www.splcenter.org.

[2] "Frequently Asked Questions about Hate and Antigovernment Groups," *Southern Poverty Law Center*, February 16, 2022, https://www.splcenter.org/20200318/frequently-asked-questions-about-hate-groups#hate%20group.

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it that my understanding aligns with standard usage. It is consistent with the "adverbial" account of ideology that Molly McGrath advances, for instance, when she suggests that "[t]hinking ideologically involves some type of closedness to evidence or a disordered disposition preventing us from considering evidence honestly." Among the core features of thinking ideologically, according to McGrath, are that "we close ourselves to counterevidence" and "we neglect the need for evidence of our own claims."[3] Along similar lines, Allen Buchanan emphasizes that the "belief-management mechanisms of ideologies contribute to the development of more extreme views by screening out beliefs that challenge the beliefs that help constitute the ideology. Ideologies also tend to promote loyalty and solidarity, which can deter people from associating with those who might question shared beliefs."[4] Thus, while I would not hesitate to characterize a White supremacist's hatred of Blacks as ideological, I would not label someone who hates losing money in the stock market an ideologue.

However one defines hate ideology, it appears to be motivating a great deal of crime. The Department of Justice reports 8,263 hate crime incidents in 2020, up from 7,314 incidents in 2019.[5] Because the Department of Justice's statistics rely upon data voluntarily reported by law enforcement agencies, the actual numbers of bias crimes may be substantially higher. Given the scale of this problem, a concerted, multipronged effort to combat hate ideology seems in order. In this essay, I explore whether hate crime legislation is a permissible and advisable component of this effort. In particular, I consider whether it is morally permissible to impose enhanced punishments upon criminals who select their victims at least in part because of an animus toward members of the group to which the victim belongs. Would it be permissible to punish more severely a White supremacist who attacks a person only because she is Black, for instance, or an anti-Semitic thief who selects her victims at least in part because they are Jewish? After sketching a preliminary defense of this type of hate crime legislation, I note some potential concerns, including vexing questions about the likely effects of imposing such laws under the current, nonideal circumstances in the United States.

Doling out enhanced punishments to hate criminals appears potentially helpful for a variety of reasons. First, given that the criminal law is one of the chief mechanisms a society has for communicating its core moral values, meting out enhanced punishments for hate crimes allows the state publicly to convey that it regards these heinous offenses as particularly abhorrent. As such, it is a

[3] Molly Brigid McGrath, "The Insidious Ambiguity of 'Ideology'," elsewhere in this volume.

[4] Allen Buchanan, "The Explanatory Power of Ideology," elsewhere in this volume.

[5] The 2020 statistics are available at "2020 FBI Hate Crimes Statistics," *U.S. Department of Justice*, https://www.justice.gov/crs/highlights/2020-hate-crimes-statistics. The 2019 statistics are available at "2019 FBI Hate Crimes Statistics Report," *U.S. Department of Justice*, https://www.justice.gov/crs/highlights/FY-2019-Hate-Crimes. As a reviewer for this journal helpfully emphasizes, we do not know how many of these crimes involved violence against persons. The U.S. Federal Bureau of Investigation defines a hate crime as a "criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity." "What We Investigate: Hate Crimes," *U.S. Federal Bureau of Investigation*, https://www.fbi.gov/investigate/civil-rights/hate-crimes. According to this definition, a racially motivated criminal act of graffiti and a physical attack on a person would both qualify as a hate crime.

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way for society both to morally educate its citizens and to express its solidarity with, and support for, the victims of these crimes. Imposing these stiffer penalties also helps society to maximally deter those in the grips of hate ideology who might be tempted to commit these ghastly offenses. In sum, hate crime legislation could potentially reduce the number of citizens who embrace hate ideology, decrease the likelihood that those who harbor animus toward various groups will commit bias crimes, and lessen the damage done to the victims of hate crimes.

This discussion will venture into relatively esoteric territory and force us to negotiate contestable issues in the domain of criminal law, but we can begin with a few relatively uncontroversial suppositions of commonsense morality and their implications for punishment. I assume without argument, for instance, that each of us has moral rights that we can waive and forfeit. As Jeff McMahan puts it:

> In common sense morality, what it is permissible to do to a person is not determined solely by what the consequences of one's action will be for all those affected. It depends also on what rights the person has and whether he or she has done anything to waive or forfeit them. Domestic criminal law and the law of torts have inherited this concern with rights and liability. Thus, very few people suppose that criminal law should be designed simply to minimize harm overall, assigning the same weight to harms suffered by criminal aggressors and those suffered by their innocent victims.[6]

This observation is relevant to our analysis here because it highlights that, even if hate crime legislation is beneficial, it would not be permissible if it violates moral rights.

To see this, notice that few moral convictions are more widely shared than the intuition that it is morally impermissible to punish someone one knows to be innocent. If we follow Douglas Husak (as I believe we should) in saying that "a response amounts to a punishment when it deliberately imposes a stigmatizing deprivation or hardship," we can see that the best way to capture this conviction is in terms of rights and rights forfeiture.[7] Even if framing and punishing a few innocent citizens would help us curb a crime spree, for example, these benefits would not justify treating innocent individuals this way. We may be called upon to make sacrifices on behalf of our fellow citizens during times of crisis. For example, there might be nothing wrong with a jurisdiction imposing a temporary curfew, if it could not otherwise effectively address a spike in violent assaults occurring at night. However, publicly condemning and imposing hard treatment upon an innocent person would ordinarily violate her rights. The right against punishment is not necessarily absolute; if one could eliminate all future crime by framing and punishing one innocent person, this may well justify the rights infringement. It is certainly weighty, though, so one should not adopt a policy of deliberately punishing innocent folks in order to marginally reduce crimes.

[6] Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), 107.

[7] Douglas Husak, "Does the State Have a Monopoly to Punish Crime?" in *The New Philosophy of Criminal* Law, ed. Chad Flanders and Zachary Hoskins (London: Rowman and Littlefield, 2016), 98.

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The moral calculus changes when someone commits a crime, however, because wrongdoers forfeit their rights against punishment. To emphasize this point, as much as we might want to punish someone in order to deter others from committing crimes, it typically remains impermissible to do so unless the defendant has done something to make herself morally liable to this public condemnation and hard treatment. In view of this, it is widely accepted that the state may not punish anyone unless it has established *actus reus* and *mens rea*—that is, that the defendant has committed a bad act with a guilty mind.

In addition to our conviction that the innocent are not liable to punishment, we believe that the guilty should not be punished too much. Put in terms of rights forfeiture, rather than allege that wrongdoers completely lose their moral standing, we contend more modestly only that they forfeit their right against a *proportionate* punishment. Whereas a murderer presumably becomes morally liable to a severe punishment, for instance, someone who steals an orange from a fruit stand forfeits her right against a much more mild punishment. In addition, the mental state of the wrongdoer matters. Just as someone who kills two people cannot complain about being punished more harshly than someone who kills only one, it is worse to intentionally kill someone than to do so recklessly. Thus, while it may be that reasonable people can disagree about whether a person who recklessly kills two people is morally liable to a greater or lesser punishment than someone who intentionally kills one, it is clear that the extent of one's liability to punishment is a function of both the magnitude of one's bad act and the mental state with which one commits it. In other words, whether or not one may permissibly be punished and the extent to which one forfeits one's right against punishment are both a function of one's culpability. Someone who has done nothing wrong or someone whose wrongdoing is fully excused is not culpable and therefore has not forfeited her right against punishment. Wrongdoers who culpably steal fruit or kill others render themselves morally liable to moral condemnation and hard treatment and thus cannot complain if they are subjected to proportionate punishment.

While those who work on criminal law generally agree that only the culpable forfeit their rights and that the extent to which a wrongdoer is morally liable to punishment is a function of how culpable she is, there remains room to disagree about culpability. Even if we assume that culpability is related to the rights of others, for instance, theorists can disagree about whether one cannot be culpable unless one actually violates another's right. Is one any less culpable if one unsuccessfully attempts to violate another's right, for instance? Is the person who unsuccessfully attempts to murder an innocent victim any less morally liable to moral condemnation and hard treatment than someone who succeeds? I do not believe so, but I will not defend this contested claim here, because our discussion of hate crime legislation does not depend upon it.[8] What I do want to emphasize, though, is the distinction between culpability and deplorability.

[8] John Simmons argues that only those who actually violate the rights of others forfeit their rights against punishment. A. John Simmons, "Locke and the Right to Punish," *Philosophy & Public Affairs* 20, no. 4 (1991): 311–49.

Because morality concerns much more than respecting the rights of others, one can fall far short of the moral ideal even if one has a perfect record of respecting the rights of others. Consider, for instance, Judith Jarvis Thomson's famous distinction between acting unjustly and acting indecently.[9] To motivate this distinction, Thomson asks us to imagine that a boy refuses to share any chocolates with his younger brother. If the box of chocolates was a Christmas gift given jointly to the two brothers, the older brother's hoarding of the chocolates is unjust. However, if the chocolates were given exclusively to the older brother, his selfishness may be criticized as indecent, but would not be unjust. On Thomson's view, justice requires that you respect the rights of others; because the younger brother does not have a right to any of the chocolates when they were given exclusively to the older brother, the older brother violates no rights when he keeps them all to himself. Along these same lines, Julia Driver coined the term "suberogatory" to capture actions that, although permissible, reflect badly on one's character.[10]

In keeping with this important distinction, I reserve the term 'culpable' for those who (at least attempt to) violate the rights of others. Distinguishing sharply between culpability and deplorability, I use the term 'deplorable' to refer to nonculpable persons who nonetheless merit moral criticism. To be clear, I am not alleging that this distinction tracks common usage. Rather, I employ it because it allows us to distinguish those who forfeit their rights against punishment from those who do not make themselves morally liable to punishment despite their morally deficient characters. Imagine that I am a virulent White supremacist who would not hesitate to assault a Black person, but I have not done so only because I have not yet had the opportunity. Imagine, instead, that I am horribly anti-Semitic and thus go to great lengths to avoid associating with Jewish people. In both cases, it seems appropriate to say that I am deplorable but not culpable; I am deplorable because my racism and anti-Semitism are clearly character flaws, but not culpable because I have not violated anyone's rights. Importantly, despite undeniably being deplorable, I am also not morally liable to punishment because only the culpable forfeit their rights against punishment. I thus utilize the distinction between deplorable and culpable to capture the familiar point that Alec Walen explains as follows: "[L]iberals think such matters of virtue and vice (or sin) are best left to the autonomous individual, and are not proper bases of punishment."[11]

I appreciate that the average rider on the Clapham Omnibus may not be familiar with the terms suberogatory, *actus reus*, and *mens rea*, and would not distinguish between deplorable and culpable as I do, but I hope that nothing to this point has been too controversial, because the preceding analysis has merely been to set the stage for our exploration of the permissibility of imposing stiffer penalties for hate crimes. In particular, if I am right that one's culpability is a function of *actus reus* and *mens rea*, then hate criminals are morally liable to stiffer

[9] Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy & Public Affairs* 1, no. 1 (1971): 56–60.
[10] Julia Driver, "The Suberogatory," *Australasian Journal of Philosophy* 70, no. 3 (1992): 286–95.
[11] Alec Walen, "Retributive Justice," in *Stanford Encyclopedia of Philosophy*, ed. Edward Zalta (2014), http://plato.stanford.edu/archives/sum2015/entries/justice-retributive/.

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punishments only if they commit worse acts or have guiltier minds than their generic criminal counterparts. As I will now explain, a presumptive case can be made that a wrongdoer commits a worse act and has a worse mental state when she selects her victim at least in part because of an animus toward members of the group to which the victim belongs.

A plausible defense of the permissibility of hate crime legislation

Beginning with *actus reus*, why think that hate criminals commit worse acts than their generic counterparts? After all, if we hold everything else constant, what difference does it make if one is motivated by group animus? To isolate this variable, let us compare two scenarios featuring Peter and Paul. In the first scenario, after a night of drinking, Peter resolves to punch the first person he sees after he leaves the bar. In the second scenario, after a night of drinking, Paul resolves to punch the first Black person he sees after he leaves the bar. Finally, imagine that the first person Peter sees after leaving the bar, Victor, just happens to be Black. Thus, in our two scenarios, Peter and Paul both maliciously and without provocation punch Victor, the first person they see upon leaving the bar. The only differences between our two scenarios, then, are motivational and counterfactual. Peter and Paul both sucker punch the first person they see in the stomach and then run home, but Paul punches Victor at least in part because Victor is Black. If Victor had not been Black, Paul would have continued walking down the street until he encountered a Black person.

Given that Peter and Paul both punch Victor, why think that Paul's act is worse merely because Paul was motivated at least in part by the fact that Victor is Black? In his excellent book *Punishing Hate*, Frederick Lawrence offers three reasons to think that hate crimes are especially destructive: (1) they are more harmful to their victims, (2) they claim vicarious victims by harming all members of the targeted community, and (3) they harm society as a whole. As he puts it: "Harm may be examined on each of three levels: the immediate victim of a bias crime, the broader target community of the crime, and society at large. On each level, the bias crimes cause a harm that is greater than that caused by parallel crimes."[12]

En route to explaining these claims, it is worth recounting a story that Lawrence shares to illustrate the more general point that, depending upon its cause, the same event can have very different effects. After a synagogue in Boston was destroyed, the members of this synagogue were understandably worried that the fire might have been set by an anti-Semitic arsonist. No one would be surprised to learn that everyone was thus mightily relieved when it was determined that the fire was caused by an electrical issue. While the financial costs of rebuilding would have been identical, it does not take much imagination to see why the psychological damage would have been far worse if the fire had been set by someone determined to destroy a Jewish place of worship. In

[12] Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law* (Cambridge, MA: Harvard University Press, 1999), 29.

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anticipation of our discussion to follow, let us contrast the damage that might be done by a hate criminal versus her generic counterpart. As outraged as people might have been if the fire had been set by a member of the congregation who was angry at the Rabbi, this crime would presumably not make the members of this synagogue (and Jewish people more generally) feel as vulnerable as they would have if the fire had been set by an anti-Semite who specifically sought to destroy the property of Jews. With this in mind, let us consider whether hate crimes might be distinctively harmful.

In addition to noting that bias crimes are more likely than parallel crimes to target strangers, more likely to be violent, and more likely to do serious physical damage than other violent assaults, Lawrence emphasizes two reasons why the victims of hate crimes tend to suffer greater emotional and psychological damage than do the victims of parallel crimes, even when we hold constant all three of these variables. First, insofar as the victim of a hate crime is selected for being a member of a group rather than for something she has done, she has no way to minimize the risks of being attacked again. As Lawrence explains:

> A bias crime thus attacks the victim not only physically but at the very core of his identity. It is an attack from which there is no escape. It is one thing to avoid the park at night because it is not safe. It is quite another to avoid certain neighborhoods because of one's race. This heightened sense of vulnerability caused by bias crimes is beyond that normally found in crime victims. Bias crime victims have been compared to rape victims in that the physical harm associated with the crime, however great, is less significant than the powerful accompanying sense of violation .... One study of violence in the workplace found that victims of bias-motivated violence reported a significantly greater level of negative psychophysiological symptoms than did victims of nonbias-motivated violence.[13]

In addition to the increase in symptomatology experienced by all victims of bias crimes (even those who are targeted because they are White, for instance), members of minority groups tend to experience heightened psychological damage because "the very nature of bias motivation, when directed against minority victims, triggers the history and social context of prejudice and prejudicial violence against the victim and his group."[14] As Lawrence explains: "Minority victims of bias crimes therefore experience the attack as a form of violence that manifests racial stigmatization ... [which] brings about humiliation, isolation, and self-hatred."[15] In sum, even if we hold everything else constant as we did in the two scenarios featuring Peter and Paul, the victims of hate crimes tend to suffer more than the victims of parallel crimes, especially when they are targeted because of their membership in a minority group.

Hate crimes are also especially harmful because of their distinctive ability to claim vicarious victims. As Lawrence explains, "[m]embers of the target

[13] Lawrence, *Punishing Hate*, 40.
[14] Lawrence, *Punishing Hate*, 41.
[15] Lawrence, *Punishing Hate*, 41.

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community of a bias crime perceive that crime as an attack on themselves directly and individually."[16] This point is easy to appreciate; indeed, it is what led me to first explore the moral permissibility of hate crime legislation. In autumn of 1998, I was talking with Craig, a friend who was extremely upset by the brutal attack on Matthew Shepard, a gay twenty-one-year-old student at University of Wyoming. While I was of course horrified and saddened by this crime, learning of the attack and Shepard's subsequent death did not impact me nearly as much as it did Craig, who is gay. Given all of the challenges Craig had faced over the years as a gay man in a heterosexist society, it is not surprising that he was so much more wounded than I by this incident. One way to describe this profound psychological impact is to say that Craig was a vicarious victim of the bias crime against Matthew Shepard. In other words, while anyone is liable to feel sadness, outrage, and disgust upon hearing of someone being brutally beaten and then left tied to a fence, a member of a minority group is vulnerable to distinctive psychological damage when he learns that another member of this group has been targeted specifically because he is in this group.

Finally, Lawrence argues that hate crimes are more harmful to society as a whole than their generic counterparts because they "implicate a social history of prejudice, discrimination, and even oppression."[17] As he acknowledges, the extent to which a bias crime has a negative impact on society depends upon cultural context. Imagine, for instance, that rather than deciding to punch the first Black person he encounters after leaving the bar, Paul had resolved to punch the first hazel-eyed person he sees. If Paul had an antipathy toward hazel-eyed people, he would still be committing a hate crime, but assaulting a Black person has the potential to be far more destructive in a society like the U.S. that struggles mightily with racism but does not generally discriminate against hazel-eyed folks. Societies fall short of the egalitarian ideal to the extent that members of certain groups are treated like second-class citizens. When Paul punches a random hazel-eyed person, this does virtually nothing to render our society inegalitarian, because this isolated incident has no discernible impact on the broader community of hazel-eyed people. However, just as a pedestrian can do more damage to the grass when she walks along the same path as many others, when Paul singles out a Black person for attack in a racist society like the U.S., this assault resonates to a much greater degree and thus has a greater impact on the larger cultural context. Admittedly, Peter's decision to punch the first person he comes across after leaving the bar also negatively impacts society as a whole because society would be better off if it had fewer crimes of any description, but Peter's generic offense is less harmful than Paul's bias crime because of the latter's distinctively inegalitarian impact.

Let us now take stock of Lawrence's claims in terms of Peter and Paul. While one might describe Peter and Paul as having acting identically in that each exited the bar, sucker punched Victor in the stomach, and then ran home, Paul's hate crime was in three ways more harmful than Peter's generic crime. Because Paul

[16] Lawrence, *Punishing Hate*, 42.
[17] Lawrence, *Punishing Hate*, 44.

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was motivated to punch Victor at least in part because he is Black, (1) Paul's attack causes Victor to experience greater psychological pain and suffering, (2) it vicariously harms other Blacks, and (3) it contributes to society's already problematic racism. All three of Lawrence's claims about the distinctive harmfulness of hate crimes seem plausible, but only one needs to be true in order to justify stiffer punishments for those who choose the victims of their crimes at least in part because of an animus toward members of the group to which the victim belongs. Even if none of them is true, however, stiffer penalties for hate crimes would be permissible if the *mens rea* element of hate crimes is worse. With that in mind, let us turn now to the question of whether hate criminals have guiltier minds than their generic counterparts.

The mental state with which one causes harm is relevant to one's culpability because someone who intentionally kills another person is more culpable than someone who does so recklessly, who in turn is more culpable than a third person who kills someone negligently. The question, then, is whether Paul has a guiltier mind than Peter even though both intentionally punch Victor in the stomach. The difference between Paul's and Peter's mental states may not be as stark as the difference between someone who intentionally punches Victor versus someone who recklessly does so, but I believe that Paul is morally worse than Peter, and I would be no less convinced of this even if Paul's act were no more harmful than Peter's.

I am not sure how to argue against someone who denies this claim, but it strikes me as plausible to suppose that no matter how bad a generic criminal's mental state is, it would be made worse if she selected her victim at least in part because of an animus toward members of the group to which the victim belongs. To underscore this point, consider the story of Ronald Shanaburger, a memorably loathsome wrongdoer. Shanaburger learned of his father's death while on vacation with his partner. Shanaburger was horribly offended that his partner was unwilling to cut her vacation short when he told her the news, so Shanaburger devised a plan to exact revenge. Over time, Shanaburger married his partner, had a child with her, gave her time to bond with their son, and then suffocated their seven-month-old infant on the eve of Father's Day, all so that she would experience the grief Shanaburger felt when his father died. I presume that no one would deny that Shanaburger was an utterly despicable person for committing such a terrible crime. As blameworthy as Shanaburger was, though, it seems to me that his mental state would have been even worse if he had been motivated by group animus. If Shanaburger were an anti-Semite who carried out this sinister plan simply because he wanted to make a Jewish person grieve, for instance, then he would have had an even guiltier mind than the actual Ronald Shanaburger. Again, I believe that the hypothetical, anti-Semitic Shanaburger's mental state would be worse than the actual Shanaburger's mental state, even if his actions were no more harmful to his wife, other Jewish people, or society as a whole. In sum, if I am correct that hate criminals have guiltier minds than their generic counterparts, then it would be permissible to subject hate criminals to enhanced penalties, even if it turns out that hate crimes are not in fact more harmful than their generic counterparts.

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Concerns about the permissibility of hate legislation

While I was once convinced by both prongs of the foregoing case for the permissibility of hate legislation, I have since come to question them. In this section I will explain why I am now unsure whether hate criminals really do commit worse acts with guiltier minds.[18]

The first thing to notice is that it is not strictly true that hate crimes cause more damage to their immediate victims, members of the target community, and society at large; more accurately, *perceived* hate crimes do. To appreciate this point, notice that Peter and Paul appear to act identically. While Paul's motivation for punching Victor is different from Peter's and while Paul would not have punched Victor if Victor were not Black, Victor does not know this. Victor may *suspect* that Paul's assault was racially motivated, but he has no more reason to suspect this of Paul than of Peter, who is an equal opportunity assaulter. Of course, if Paul screamed a racial epithet as he punched Victor, then Victor would have good reason to believe that Paul's attack was racially motivated, but this deviates from our case, which was specifically designed to hold constant everything but Peter's and Paul's differing motivations. But what if we vary the races? If Peter is Black and Paul is White, then it would not be surprising if Victor were more suspicious that Paul may have punched him at least in part because he was Black, but I have not yet specified whether Peter and/or Paul are White or Black. Also, notice that if Peter is White and Paul is Black, it would not be surprising if—in a society in which White Supremacists overwhelmingly tend to be White—Victor (and others) believed that Peter specifically targeted Victor because of his race and that Paul was indifferent to his victim's race. If so, then even if all of Lawrence's empirical claims are true, we should expect Paul's hate crime to be less harmful than Peter's parallel assault. With this in mind, recall my gay friend, Craig, who was so hurt by the vicious attack on Matthew Shepard. Some have alleged that there is evidence that this assault was not actually an anti-gay bias crime. Without commenting on the merits of this allegation, the important point is that, whether or not Shepard's attacker was motivated by the fact that Shepard was gay, Craig was so hurt because he *believed* that Shepard was targeted as a gay man. In sum, while actual hate crimes may be more likely than their generic counterparts to be perceived as such by the victim, the target community, and society at large, there is no necessary connection between a criminal's motivation and how the criminal's motivation is perceived.

Second, while I am no less convinced by the empirical claim that members of the targeted community are negatively affected by (perceived) hate crimes, I have come to question whether this type of consideration is morally relevant to criminal sentencing. To see why, imagine that Peter punches me, whereas Paul punches George Clooney. While my friends and family are invested in my well-being, few would note such an attack. In contrast, Clooney is adored by a large swath of the public. Thus, virtually no one cares when Peter punches me, but masses of people hold their breath when Paul strikes Clooney. Even so, has Paul

[18] I offer an unqualified defense of hate crime legislation in Christopher Heath Wellman, "A Defense of Stiffer Penalties for Hate Crimes," *Hypatia* 21, no. 2 (2006): 62–80.

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made himself morally liable to punishment in a way that Peter has not? May Paul not complain about being punished to an extent that would clearly be disproportionate for Peter? I doubt it. It seems more plausible to suppose that the emotional investment that others have in Clooney and the way others empathize with him is simply not relevant to what rights are forfeited by those who assault him.

Along these same lines, imagine that Peter and Paul commit the same crime, but Peter is a relatively affluent bachelor, whereas Paul is a working-class father of three. Does the fact that Paul's children will suffer if Paul is punished to the same extent as Peter mean that it would be wrong to punish Peter and Paul identically? Again, I doubt it. I would not object if a prosecuting attorney or judge considered the plight of Paul's children when deciding how to punish Paul, but I do not believe that it would violate Paul's rights or the rights of Paul's children if they did not. Using Thomson's language cited above, it might be indecent to be entirely unmoved by the ramifications for Paul's children, but it does not seem unjust. If the fate of vicarious victims of punishment does not affect the extent to which a wrongdoer forfeits her rights, symmetry suggests that the harms to vicarious victims of the crime might be similarly irrelevant. Combining these two points, if the extent to which others identify with Clooney does not affect the extent to which Paul forfeits his rights when he punches Clooney, and if the fact that Paul's children will be vicarious victims of Paul's punishment does not diminish the extent to which Paul is morally liable to punishment, one might question whether the possibility that Paul's hate crime could harm other members of the targeted community really enhances the extent to which Paul is morally liable to punishment.

Finally, consider Lawrence's contention that hate crimes are more harmful to society as a whole because they "implicate a social history of prejudice, discrimination, and even oppression."[19] I do not deny that bias crimes that target members of historically oppressed groups can be especially harmful, but it is important to recognize that this applies to only a proper subset of hate crimes. According to my definition, a wrongdoer commits a hate crime whenever she selects her victim at least in part because of an animus toward members of the group to which the victim belongs *whether or not that group has historically been persecuted.* If Paul resolves to punch the first White man he encounters after leaving the bar, for instance, Paul would commit a bias crime, even though White men are not a vulnerable group in contemporary America. Even if Lawrence's point captures an important element of some attacks, it does not apply to all hate crimes. Thus, in addition to the observation that perceived rather than actual hate crimes tend to be more harmful—which undermines all three of Lawrence's claims about the distinctive harmfulness of hate crimes—we see that there are reasons to doubt the relevance of vicarious victims and harms to society as a whole to proportionality calculations of punishment.

One might also question whether hate criminals have guiltier minds. Recall that I alleged above that Paul's *mens rea* is worse than Peter's because, in addition

[19] Lawrence, *Punishing Hate*, 44.

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to all of Peter's flaws, Paul harbors an animus toward Blacks. A standard objection to imposing stiffer penalties for hate criminals is that it wrongly punishes Paul for his beliefs. The idea here is that, given that the only difference between Peter and Paul is that the latter is a White supremacist, any additional punishment imposed upon Paul must be because of his racist views. But clearly it is wrong to criminally punish someone merely for her beliefs, however odious we may find them.[20]

I believe that this objection can be countered by considering Pedro and Petra, who share Paul's racism but never violate anyone's rights. Pedro is jealous of Paul, because he would love to punch a Black person in the stomach, but he has never done so only because no Blacks live in his village. Petra admires Paul's action and would also love to punch a Black person, but she has never summoned the courage to do so only because she is petrified that she might be sent to prison where she would be confined in tight quarters with numerous Black inmates. Clearly, it would be wrong to punish Pedro and Petra; despite their horrendous racism, they have not made themselves morally liable to punishment. Thus, as much as we might object to their beliefs, we must find some means other than punishment to try to get them to change their views. Most importantly, the cases of Pedro and Petra demonstrate that we are not punishing Paul merely for his beliefs, because he would not be morally vulnerable to punishment if he had not violated Victor's rights. In sum, because the state may not punish Paul without establishing *actus reus* and *mens rea*, it is wrong to say that Paul is being punished merely for his beliefs.

Even if this response suffices, though, there is a more sophisticated version of this objection that cannot be so easily dismissed. To appreciate this more nuanced concern, recall my earlier distinction between culpability and deplorability. The key point emphasized above is that even utterly deplorable people may not permissibly be punished unless they are also culpable, where one is culpable just in case one at least attempts to violate the rights of others. Despite being deplorably racist, Pedro and Petra have not forfeited their rights, for instance, because neither is culpable. The more sophisticated worry is that, even if hate criminals are morally worse than their generic counterparts, they are not worse *in the way relevant to punishment* because they are not more culpable; they are merely equally culpable but more deplorable. Put in terms of Peter and Paul, one might insist that the two are equally culpable; the only difference between the two is that—in addition to sharing Peter's culpability—Paul is also deplorably racist. However, given our insistence that Pedro's and Petra's mere deplorability does not render either agent liable to punishment, should we not also conclude that Paul's deplorability cannot be an aggravating factor that makes him morally vulnerable to enhanced punishment? Put succinctly, this objection insists that *mens rea* is a function of the wrongdoer's culpability and, even if deplorable agents merit moral criticism, their deplorability does not make them more culpable.

[20] As the FBI emphasizes in "What We Investigate: Hate Crimes," "Hate itself is not a crime—and the FBI is mindful of protecting freedom of speech and other civil liberties."

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How one responds to this objection may depend upon one's level of confidence in competing convictions. Those more confident in the distinction between deplorability and culpability may be inclined to deny the permissibility of punishing Paul more strenuously than Peter, whereas those more confident that hate criminals are liable to stiffer penalties will likely be tempted to question my sharp distinction between deplorability and culpability. Is there any way to retain both of these views? Perhaps one can do so by insisting that, even if deplorability alone does not render one morally liable to punishment, culpability plus deplorability can make one vulnerable to enhanced punishment. This might be either because (1) the addition of deplorability makes agents who are otherwise culpable more culpable or because, (2) even though deplorability always remains distinct from culpability, it is a morally relevant aggravating factor that may permissibly be taken into consideration when sentencing those who are independently culpable. Either of these approaches allows us to retain our convictions that Peter and Paul (but not Pedro and Petra) may permissibly be punished and that Paul may be punished more severely than Peter. Is either (1) or (2) correct, though? Each strikes me as plausible, but I must confess that I do not have clear convictions regarding these subtle distinctions. Perhaps the best I can do is admit that these appear to me to be matters over which reasonable people can disagree.

Where does all of the preceding analysis leave us? What should we say about the moral permissibility of hate crime legislation? I wish that I could be more definitive, but it strikes me that the most we can say is that, while prima facie plausible cases can be made that the *actus reus* and *mens rea* of hate crimes are both worse, on reflection there are also reasons to question the adequacy of both of these cases. If hate crime legislation would be highly beneficial, we should want a far more definitive answer about its permissibility, but as I will now argue, it is also not clear how beneficial such laws are in America's current cultural context.

Is hate crime legislation advisable?

In this section, I will set aside principled questions about the moral permissibility of hate crime legislation in ideal circumstances in order to focus on the practical question of whether U.S. citizens should want such laws in America's current context. If the net benefits would likely be negligible or even negative, then it is far less urgent that we resolve the difficult philosophical issues outlined above. To see why this might be the case, consider how one might question the practical advantages of capital punishment, affirmative action, and/or the criminalization of recreational drug use.

First, consider the death penalty. There are plenty of issues over which abolitionists and retentionists can disagree, but the key philosophical point of contention concerns whether wrongdoers can forfeit their right to life. While some allege that all rights can be lost, others insist that no matter how badly wrongdoers act, they retain their right to life. People also disagree about the marginal deterrent value of the death penalty. I see no reason to deny either the

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principled point that (1) some wrongdoers forfeit their right to life or the empirical claim that (2) the threat of death can deter some prospective criminals who would not be deterred by the threat of life in prison. However, I worry that once we design a system that satisfactorily ensures that innocent defendants are not wrongly convicted—and selects from among the guilty on the basis of their heightened culpability rather than the mere prejudices of the police, prosecuting attorneys, judges, and jurors—we will have an extremely expensive institution that capitally punishes only a tiny fraction of those who commit capital offenses after a lengthy series of appeals. Given how incredibly expensive it would be to operate such a system, it is difficult to believe that the marginal deterrent value of capitally punishing so few convicts would be worth the enormous costs. Rather than spending a fortune on elaborate judicial processes designed to minimize the prospects of bias and false positives, perhaps those concerned to reduce crime should invest more in recruiting and training police officers or spend the money on early education programs that promise to enhance the prospects of those who are most likely to be tempted by a life of crime. In sum, even though I believe that it is possible to forfeit one's right to life, I am no cheerleader for the death penalty, because I am skeptical that we can design an institution for the real world that generates enough benefits to justify the costs.

Second, think of affirmative action, which remains controversial because philosophers, judges, and the general public remain divided over whether giving preferential treatment in admissions and hiring to members of historically excluded groups unjustly harms White males (among others) who would otherwise have been selected. It is worth noting that, in *The New Jim Crow*, Michelle Alexander laments how much time and energy defenders of preferential treatment have dedicated to this issue, because she speculates that this singular focus on affirmative action has distracted us from the emergence of mass incarceration.[21] In Alexander's view, given the limited resources of those concerned about the plight of contemporary African Americans, it is regrettable that such a great proportion of our attention has been given to affirmative action. Without denying that preferential treatment is a just and important cause, she sees this issue as having had an unjustifiably steep opportunity cost insofar as it caused the U.S. to neglect the even more pressing problem of the mass incarceration of young Black men.

Finally, consider the so-called "war on drugs." Many believe it is unjust to criminalize recreational drug use, but even if they are wrong, one might question whether the wholesale effort to reduce drug use has been sufficiently effective to justify the costs. Even worse, this campaign may have been counterproductive if it created more dire problems than widespread drug use. As Husak notes, for instance:

> [T]he enforcement of drug laws has eroded privacy and civil liberties .... [T]he health of users is unnecessarily damaged because buyers do not know the strength or purity of the substances they consume .... [E]fforts to slow

[21] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012).

> production where drugs are produced have caused unbelievable violence and corruption, especially south of the U.S. border .... [A]rrests and punishments cost billions of dollars of tax resources that could be put to better purposes .... [The enforcement of drug prohibitions has disproportionately harmed minority communities because] [a]lthough minorities are no more likely than whites to use illicit drugs, they are far more likely to be arrested, prosecuted, and punished when they do.[22]

In light of these practical critiques of capital punishment, affirmative action, and the criminal prohibition of drugs, what should we say about Judy and Dennis Shepard, who in the wake of their son's tragic death founded the Matthew Shepard Foundation, which (among other things) lobbies on behalf of hate crime legislation? It is difficult not to have enormous admiration for this couple. My two sons are not that much younger than Matthew was when he was attacked, and I cannot imagine having the strength to do anything remotely constructive if either of them were so viciously killed. Even so, as the foregoing practical critiques of various legal reforms illustrate, working on behalf of apparently noble causes can sometimes have unintended effects. Unlike with capital punishment, the financial costs of imposing stiffer legal penalties for hate crimes do not seem exorbitant. However, even if hate crime legislation has the potential to morally educate the general public, help deter prospective hate criminals, and support immediate and vicarious victims of bias crimes, it may be that there are substantial opportunity costs to focusing on this issue. Even more importantly, hate crime legislation may be counterproductive.

To see why, consider why hate ideologies appear to be on the rise. Part of the answer, I believe, is the emergence of the internet. The stakes of clicking on a link to a website that may or may not promote hate ideology from the privacy of one's own home are much lower than personally asking another human being whether she shares your animus toward members of another group. Given this, one unfortunate effect of the "information age" is that it has become much easier for those inclined to embrace hate ideologies to connect with like-minded folks. It seems plausible to suppose that this phenomenon has (1) led many people who might otherwise have been merely hate-curious to embrace hate ideology, (2) led many who already espoused antipathy for others to be more confident that their views are correct and widely affirmed, and (3) led some who would not otherwise have acted on their prejudices to commit hate crimes.

Another possible reason that hate ideology is on the ascent may be as a backlash against what many Americans perceive to be the unreasonable emphasis on supporting historically marginalized groups. Putting this point in highly stylized terms, while some Americans were reveling in all that President Barack Obama accomplished during his eight years in the White House, others were quietly seething as he used the power of his position to pass executive orders that would not have been affirmed by the U.S. Congress. It may be that

[22] Douglas Husak, "In Favor of Drug Decriminalization," in *Contemporary Debates in Applied Ethics*, 2nd ed., ed. Andrew I. Cohen and Christopher Heath Wellman (Malden, MA: Wiley Blackwell, 2014), 339. Parenthetical phrase was added.

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Donald Trump never would have emerged as the Republican nominee in 2016, for instance, if it were not for the resentment that many Americans harbored toward his predecessor in the Oval Office. Focusing more specifically on the apparent rise in hate crimes, the current animus toward members of the lesbian, gay, bisexual, transgender, intersex, asexual, plus (LGBTIA+) community may in part be a backlash against the fact that it seemed to some Americans that leaders like President Obama signed so many executive orders designed to provide special protection for members of this community. If so, the trans community in the United States might have actually been better off today if President Obama had never lifted a finger to protect them. To be clear, I cannot be certain that this is the case, but it *might* be that President Trump never would have been elected and that the members of the LGBTIA+ community might have been the object of far less group animus if President Obama had not so zealously pursued social justice issues.

These speculations underscore that even if imposing stiffer punishments for hate criminals would be highly beneficial under ideal circumstances, we cannot take for granted that hate legislation will necessarily help its intended beneficiaries under nonideal circumstances. In particular, while philosophers dating back to Plato have emphasized that the criminal law has the potential to morally educate citizens, it is important to recall that ideology can interfere with our responsiveness to reasons.[23] As noted above, McGrath stresses that, when thinking ideologically, "we close ourselves to counterevidence."[24] As Buchanan emphasizes, the "belief-management mechanisms of ideologies contribute to the development of more extreme views by screening out beliefs that challenge the beliefs that help constitute the ideology."[25] We thus need to be alert to the possibility that laws that would otherwise morally educate citizens might fail to do so or, even worse, provoke a harmful backlash in the presence of so much ideology. At the very least, then, we should pause to consider whether there might be other, less risky options.

With that in mind, it is worth asking who stands to benefit from the growth of hate ideology. I would like to believe that ultimately no one is genuinely better off in a world with more ideological hatred, but it seems as though the wealthy may at least financially benefit from a cultural context in which there is so much animosity among groups. After all, fanning the flames of group animus makes it much less likely that the poor will be able to unite and work toward a more egalitarian society. In a world in which the relatively poor believe they have diminished economic opportunities, their frustration with their life prospects may render them more prone to vilify others, which in turn makes them more susceptible to hate ideology. Put in terms of Peter and Paul, in a society in which there is ample economic opportunity for all, we would not expect many people to harbor frustrations that lead them to fantasize about punching the first person they encounter on the street. However, in a cultural context in which many

[23] See, for instance, Jean Hampton, "The Moral Education Theory of Punishment," *Philosophy & Public Affairs* 13, no. 3 (1984): 208–38.

[24] McGrath, "The Insidious Ambiguity of 'Ideology'."

[25] Buchanan, "The Explanatory Power of Ideology."

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White men believe that their economic prospects are declining while some prominent figures are vociferously lobbying on behalf of special protections for minority groups, we should not be that surprised that a White male might resolve more specifically to punch the first Black person he sees. Thus, in a highly inegalitarian context in which the relatively poor are disposed to look for someone to blame for their frustrating circumstances and where the promulgation of hate crime legislation has the potential to enhance latent group animus, passing such laws may do more harm than good. All of this suggests that those motivated to protect potential victims of bias crimes should consider whether they might do more good by working instead to promote a more egalitarian economic order.

Despite all of this, for several reasons I would not urge Judy and Dennis Shepard to reorient the Matthew Shepard Foundation to focus on economic reform. First, even if it would do more good to reverse our inegalitarian trends than to enact hate crime legislation, there are better prospects for those who hope to advance stiffer penalties for hate crimes than for those who seek to reorder our basic economic institutions. It does not strike me as unduly pessimistic to presume that the affluent will not soon be surrendering their relative advantage or that hate ideology will not recede in the foreseeable future. If this lack of optimism is warranted, then the crucial question is what we should expect the net effect of hate crime legislation to be in the current, nonideal context where an apparently large number of people seem tempted to commit hate crimes. In particular, how much do we expect the legal enactment of stiffer penalties for hate criminals in the current context to (1) morally educate those who most need it, (2) deter people who would otherwise commit hate crimes, (3) support the immediate and vicarious victims of hate crimes, and/or (4) generate a backlash that leads to the expansion of hate ideology and an increase in hate crimes? While it seems reasonable to anticipate all four of these effects, I would expect (3) to be the most pronounced. In a context in which many U.S. citizens are apparently attracted to hate ideology and literally thousands of bias crimes are committed annually, American society's official response to these horrific attacks can make an enormous difference to those targeted by this hate. It must have been unfathomably painful for Blacks living under Jim Crow to know that despite the wording of the laws on the books, the courts in some jurisdictions would virtually never convict White defendants for their racially motivated attacks on Black victims. It must also have been excruciating for members of the LGBTIA+ community to know that they could be attacked with impunity. While it is obviously regrettable that we live in a world where they need this support, we should not underestimate how psychologically important it can be for victims of hate crimes to know not only that those who wrong them will be zealously pursued, prosecuted, and duly punished, but also that the state will single out hate criminals for having committed especially heinous crimes.

Conclusion

In the presence of hate ideology, it is tempting to lobby in favor of stiffer penalties for criminals who select their victims at least in part because of an

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animus toward members of the group to which their victims belong. Without denying that there are plausible arguments on behalf of hate crime legislation, I have questioned whether such laws are indeed permissible and advisable. I do not claim to have produced a decisive case against imposing stiffer penalties for hate criminals, but I hope that my reflections reveal that there is room for critics credibly to raise principled objections to hate crime legislation and to question whether imposing these types of laws will necessarily have their desired effect, because the very conditions that currently make hate crime legislation so tempting may also render it counterproductive.

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