CHAPTER 13

Hate (or Bias) Crime Laws

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Introduction

Enhanced criminal punishment for hate or bias crimes, a relatively recent legal phenomenon, continues to grow both in popularity and in scope, in the United States and around the globe. Almost all American states and a significant number of nations impose higher punishment if a crime (such as a murder, robbery, assault, or defacement of a building) is committed because of the actor's hatred toward, or prejudice against, a member of a protected group or because the actor used the group characteristic as the basis for selecting the victim. The groups most commonly protected by hate crime laws are groups defined by race, ethnicity, nationality, religion, sexual orientation, gender, or disability (Jenness 2012).

But enhanced punishment for hate crimes also continues to raise controversial questions about the proper scope and severity of the criminal law, including the following: whether such punishment amounts to punishing for thoughts or character; whether enhancement can be justified, on a retributivist, consequentialist, expressivist, or distributive justice account of the principles underlying the criminal law; deciding which groups should be "protected" by such laws (in the sense that bias against the group is the trigger for greater punishment); whether hatred or bias is the relevant criterion and whether this criterion is best framed as requiring animus toward the disfavored group or a discriminatory method of selecting the victim; whether, if motive is indeed required, the motive must be a necessary cause of the actor's conduct, a sufficient cause, a primary cause, a sole cause, a substantial cause, or some disjunctive or conjunctive combination of these or other possibilities; and whether authorized pun-

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ishments (which sometimes greatly exceed the permissible punishment for the parallel crime) are disproportionate to the harm or wrong or to the actor's culpability. An additional question, rarely raised, is whether the law should require (as it typically does) that the actor's conduct, apart from the bias motive or selection criterion, constitutes a crime.

In surveying these issues, this chapter demonstrates their interrelationship and offers some tentative answers.

Do Hate Crime Laws Punish for Hate, for Bias, or for Both?

A preliminary question about the topic is worth addressing at the outset. Do "hate" crime laws punish for hate, for hate plus something else, or simply for something else? On closer inspection, actual statutory schemes focus on whether an actor selected his victim or displayed animus toward the victims on the basis of group bias. For this reason, many have plausibly suggested that such laws are better characterized as addressing bias and thus should be labeled as "bias crime" laws (Jacobs and Potter 1998; Lawrence 1994, 1999; Brax 2016; Brudholm 2018). After all, these statutes do not criminalize hate in the absence of bias. If the statutes were this broad, they would encompass a huge number of domestic disputes, gang killings, and anger-fueled assaults. Indeed, on this view, many or most killings that are mitigated from murder to voluntary manslaughter on the basis of "heat of passion" would at the same time qualify for sentence enhancement as "hate crimes."[1] That is certainly not what supporters of hate crime laws envision. At the same time, hatred is arguably a justifiable emotional reaction in some circumstances—for example, when a victim resents an offender for seriously wronging him.[2] Even hatred of a group might sometimes be justifiable—for example, if a particular gang has been terrorizing a community. Acting on the basis of bias or prejudice, by contrast, is seemingly always unjustifiable.

But the question remains: do these laws require proof of *both* hate and bias? May an actor receive an enhanced punishment for a crime prompted by bias but not by hate? This is not merely a theoretical possibility. Consider three examples.[3]

First, suppose D1 selects a victim on the basis of race and punches him in order to impress D1's fellow gang members, but D1 harbors no personal hostility toward the victim. Many jurisdictions would permit punishment of D1 even though he lacks the intense, passionate emotional attitude distinctive of "hate" or "hateful" conduct. Second, suppose D2 is opportunistic: he attacks women, or the elderly, or undocumented immigrants because he believes such victims are less likely to repel his attack or less likely to report him to the police. D2 does not hate the groups that he is victimizing. Indeed, he is grateful for their existence, since they facilitate his criminal success.

Nevertheless, these two examples alone might not be especially telling against a "hate" requirement. In the first, D1's conduct seems condemnable in part because he knowingly gives effect to the hatred of others. In the second, some might object that the conduct is not highly condemnable, or at least not sufficiently condemnable to warrant a greater punitive sanction.

But now consider a third example. D3 selects blacks, or Catholics, or gays, to victimize, not because he has antipathy toward members of that group, but because he is indifferent to whether members of the group suffer. They simply do not register as human on his moral compass. In his view, their physical, economic, and emotional well-being are of no more importance than the well-being of a gnat or a blade of grass.[4] In principle, if an actor who genuinely hates the group that he preys upon deserves an enhanced punishment, this also seems to be true of D3 (*see* Simons 2002).[5] Practical difficulties in defining the precise contours of "selective indifference" and in proving such an attitude might explain and even justify criminal law's reluctance to expand the category of bias crimes in this manner. Nevertheless, this analysis suggests some important and perhaps surprising conclusions: in principle, hatred is not a necessary condition of what is conventionally called a "hate crime," and it is often not a sufficient condition, either.

In the remainder of this chapter, I usually refer to "bias crime" laws, but the reader should understand that some statutory schemes may indeed require proof of a "hateful" animus.

Justifications for Bias Crime Laws

A variety of justifications have been offered for bias crime laws (Dillof 1997; Hurd and Moore 2004). I focus on four.

Greater Harm

One common rationale for enhanced punishment focuses on the greater harm caused by a bias crime than by the parallel crime. A violent act targeting a member of a minority or religious group might cause: (a) more physical harm to the direct victim than an act not so targeted, (b) more psychic harm to such a victim, or (c) fear and outrage in the entire minority or religious community. A standard objection to this rationale is that such a consequence is empirically contingent; moreover, the rationale is arguably insufficient to justify a categorical bias crime enhancement (Hurd and Moore 2004, pp. 1085–1093; Brax 2016, p. 237; Al-Hakim and Dimock 2012, p. 593). Not all bias crimes have all or indeed any of these effects, and even if the effects do ensue, evidence of the effects can and should be admitted in the individual case. Conclusively presuming that such an effect will occur would frequently result in excessive punishment, according to this argument.

This rationale is indeed imperfect but the objection is overstated. The criminal law frequently employs rough proxies for harm. Almost any legislative definition of criminal conduct is inevitably an imperfect surrogate for the harm or wrong that the conduct might bring about or constitute. Sex with a person under age 16 does not invariably result in or amount to exploitation of a person too immature to understand the significance of the act. Assault with a deadly weapon does not invariably cause more physical harm or more fear than simple assault causes. Yet these proxies for the underlying harm are not usually viewed as problematic, in light of the need to develop criteria for punishment that give fair warning to potential defendants and that legal actors can consistently apply.

I do agree that version (a) of this rationale, greater physical harm to the victim, is weak, for it is easy enough to measure such harm case by case. But the subtler effects of (b) causing psychic harm to the immediate victim or of (c) causing fear and outrage in the victim's community are not at all easy to measure. There is thus much to be said for a categorical legislative solution here, under which the legislature considers these effects when identifying and defining those bias crimes that are proper objects of punishment enhancement, rather than an individualized solution, under which we ask a judge or jury to consider these effects only as questions of fact to be investigated and proven case by case.[6]

Perhaps the real objection to this rationale is that punishment enhancements for bias crimes demand stricter scrutiny (as both a moral and constitutional matter) than run-of-the-mill criminal law prohibitions require because of concerns that such enhancements infringe on freedom of speech or thought. I address this deeper objection in the section "Do Bias Crime Laws Improperly Punish for Thoughts or Character?" below.

Finally, whether bias crimes cause greater harm depends crucially on how one characterizes harm. If harm includes social division and personal insecurity *on the basis of race or religion or sexual orientation*, for example, then bias crimes undoubtedly may cause such harm. Members of disfavored groups, as well as other members of society, subjectively do suffer such harm. On the other hand, some might question the propriety of relying upon this type of harm to justify bias crime laws. Thus, some believe that these laws will only inflame racial, ethnic, and social divisions, not reduce them (*see* Lawrence 2007; Jacobs and Potter 1998). If this is so, and if the justification for criminal law is exclusively or partially consequentialist, this inegalitarian effect surely counts against bias crime laws. Moreover, even a nonconsequentialist might find the fact (if it is a fact) that these laws send an inegalitarian message to be relevant to their justifiability. Some nonconsequentialists might also conclude that the state's use of explicit racial, ethnic, or religious categories is simply intrinsically wrong (at least prima facie), in the same way that many believe that affirmative action programs are intrinsically wrong. Nevertheless, it is not plausible to deny that bias crimes can cause group-

specific (including racially specific) harms. Thus, the "greater harm" argument is weightier than many critics of bias crime laws believe.

Greater Culpability

Another justification for enhanced punishment is that an actor who is motivated by bias, or who intentionally selects a victim on the basis of the victim's membership in a protected group, is more culpable than an actor not so motivated. Just as a purposeful killing is more culpable than a reckless or negligent killing, and a purposeful defacement of another's property is more culpable than a reckless or negligent defacement, a purposeful killing or defacement that is motivated by bias is more culpable. And both consequentialist and retributive principles support greater punishment for more culpable conduct.

This justification has some plausibility. Although some opponents of hate crime laws suggest that aggravated punishment for aggravated motives has little precedent in the criminal law, in fact this practice is more widespread than they acknowledge. Many states permit increased punishment if the intentional killing of the actor was motivated by a further purpose or aggravated motive such as pecuniary gain. Specific intent crimes such as burglary elevate criminal punishment if the actor possessed a designated further purpose: the actor must not only intentionally enter another's dwelling but must do so for the purpose of committing a crime therein (Hessick 2006; Simons 2000; Steiker 1999).

Thus, the objection that bias crimes improperly punish motives, not actus reus or mens rea, is undermined by existing criminal law doctrine. To be sure, motives are more often treated as relevant when they mitigate rather than aggravate punishment, but it hardly follows that it is illegitimate or unjustifiable for the criminal law to identify especially culpable motives as a proper basis for punishment enhancement.

Nevertheless, this objection does prompt three related concerns. The first is that enhanced punishment for bias motives is indefensibly selective. Such motives arguably are not more culpable than other especially culpable motives that do not automatically or systematically trigger greater punishment. A motive of greed or sadism is highly culpable, yet legislatures have not created or enacted general provisions that aggravate punishment for "greed crimes" or for "sadism crimes."

This concern has merit. It would indeed be desirable if legislatures more thoroughly and comprehensively addressed the question of the relevance of aggravated motives for crimes (Hessick 2006). On the other hand, the practical political constraints faced by those who would reform criminal legislation in a principled way are a serious impediment to systematic treatment of this sort. Legislators and other legal actors involved in criminal law reform have strong incentives to attend only to the issues that are most salient to voters. Thus, it is unrealistic to expect adoption of bias crime legislation to be accompanied by much broader consideration of the relevance of especially culpable motives

throughout the criminal law. Under these circumstances, a conscientious legislator might defensibly focus on obtaining half a loaf or less, in the form of bias crimes legislation, rather than give up altogether on the effort to enhance punishment for aggravated motives.

The second concern is that we as agents lack sufficient control over our motives; thus, extra punishment for a bias motive is inconsistent with just deserts. The strongest rejoinder to this argument is that we have at least as much control of our motives as we do over our mens rea, yet it is widely accepted that differences in mens rea properly affect the level of punishment that we deserve. I might strike another in anger, with the purpose to harm him; or with knowledge that the object I throw in his direction will harm him; or with recklessness or negligence. In each case, it might be difficult to control my angry response. Yet I am responsible for purposely, knowingly, recklessly, or negligently harming him. Similarly, I can decide whether or not to act on a bias motive (or a motive of greed or sadism).[7]

Another version of the second concern is that bias "motives" often are not further purposes of the actor; rather, they are dispositions. Perhaps it is justifiable to impose extra punishment on a hired killer whose motive (in the sense of further purpose) is to obtain money for succeeding in murdering a victim. And perhaps it is justifiable to punish more severely the person who not only breaks into a building but also does so with the intent to steal or batter. But bias "motives" often are not higher-level purposes. When A punches B because of B's race or religion, it often is not the case that A had the purpose, not just to injure B, but to achieve some other goal, such as sending a message that B's group is less worthy of respect.[8]

I agree that bias motives often are not properly characterized as higher-level purposes. There often is no further end that the biased offender is trying to bring about; he acts because of bias, not necessarily "in order to" bring about a state of affairs in which members of the target group are denigrated or excluded.[9] Yet it does not follow that bias is therefore not sufficiently within the actor's control that the actor deserves punishment. Suppose B utters a slightly insulting remark to A and A responds with a punch, and suppose that if A had been of the same race or religion as B, A would not have become so insulted, angry, and violent. A nevertheless has sufficient control for moral and legal responsibility: absent extraordinary circumstances such as a brain tumor causing A's responses, A is responsible for his prejudiced attitude, and A is also responsible for permitting his prejudiced attitude to result in violence against B.[10]

A third concern is that enhanced punishment for a bias motive surreptitiously punishes for character, not for the defendant's actual acts. This concern is addressed below in the section "Do Bias Crime Laws Improperly Punish for Thoughts or Character?", in the discussion of the "improper punishment for thoughts" objection.

Expressive Wrong

Perhaps the strongest justification for bias crime laws is an expressive rationale: crimes motivated by bias express profound disrespect or disdain for the group of which the victim is a member, and the criminal law should counteract the offender's message by sending its own message expressing condemnation of such conduct.[11] Like other expressive accounts of legal rules, this rationale has intuitive power but also raises difficult questions.[12] Is the justification based on (a) what the actor expresses in committing the bias-motivated crime or (b) what the government expresses through heightened punishment? Or is it based on both (a) and (b)?

With respect to (a), is it necessary that the actor actually intended to express disrespect for the victim or the victim's group? Is it sufficient that the actor knew that others will so interpret his or her conduct? That the actor *should* have known this? On the other hand, perhaps such knowledge is not necessary. If that is so, if the actor's intention, knowledge, or other state of mind is not critical, then what facts are necessary or sufficient? Should we focus on the meaning that an average observer, or a reasonable observer, or many observers, would attribute to the conduct? Are the reactions of members of the target group significant or even decisive? In some cases, to be sure, these factors converge and there is no need to choose among them. If A paints a swastika on a synagogue or if B chains an African-American person to his truck and drags him through the streets of a city while screaming racist slurs, it is not difficult to conclude that A intends to communicate hatred of Jews and that B intends to communicate hatred of African-Americans; and almost all observers will perceive their conduct as so intended. But in many other cases, the precise criteria of "social meaning" will make a difference to how the facts are interpreted. (Note that even case A would raise interpretive difficulties if A had no idea what a swastika means but painted the symbol at the insistence of his friends.)

With respect to (b), expressive theories of punishment are controversial. A significant worry is the absence of a close fit between what punishment does to an offender and what punishment expresses by way of condemnation or denunciation. Does a 20-year term of imprisonment really express twice as much condemnation as a 10-year term? Twenty times as much as a one-year term? It seems that the more severe punishment in such examples is more persuasively justified by conventional purposes of punishment such as deterrence, incapacitation, and retribution, under which longer prison terms are justified by the greater suffering that they cause the offender or by the greater extent to which the offender is deprived of various liberties. This worry is especially significant in the context of bias crime laws, which often authorize enormous increases in punishment relative to the punishment for the parallel crime. If consequentialist or retributive principles do not otherwise justify this increase, the expressive value of punishment must be enormously weighty in order to warrant this degree of enhancement.[13]

In a recent essay, Duff and Marshall endorse a "communicative" version of the expressive rationale (Duff and Marshall 2018). In their view, the wrong addressed by hate crime prohibitions is "civic hatred," a radical denial of civic fellowship, a wrong against both the target group and the entire polity. One intriguing aspect of their analysis is the argument that punishment enhancements for bias crimes are justifiable, not because such crimes might cause especially serious harms, nor because the agents of such crimes are especially culpable, but because these crimes constitute distinct wrongs. Robbery, they plausibly argue, is not merely theft aggravated by the use or threat to use force; rather, robbery is "a distinctive kind of wrong—distinct both from ordinary theft and from ordinary assault" (ibid., p. 134).[14] Similarly, a bias crime is not just an aggravated version (either because of "greater harm" or because of "greater culpability") of the parallel crime. Rather, the civic character of the wrong makes bias crimes distinctive, for "they concern the offender's unwillingness to recognize their victim's standing as a citizen" (ibid., p. 134). The criminal law thus has a distinctive reason to mark such conduct as criminal.

Duff and Marshall's claim that a bias crime is a distinct type of wrong that is not necessarily "worse" or deserving of "greater" punishment than other types of wrong is provocative and plausible. But I wonder how far it takes us. In the abstract, it helps defuse the objection (discussed later) that bias crimes punish for thoughts or character alone. But concretely, it is not clear that the argument undermines the conclusion that a bias crime should ordinarily be punished more seriously than an otherwise identical parallel crime. On the other hand, the argument does suggest that it is justifiable for government officials to publicly condemn the offender's conduct or engage in other expressive acts that do not themselves constitute punishment. And perhaps the argument warrants a distinct *type* of punishment, different in kind from the punishments that the state otherwise authorizes. For example, it might support the imposition of a shaming punishment on the bias criminal. Still, even if such a sanction is otherwise an appropriate and proportional punishment, it does seem that the punishment for the parallel crime should be treated as a floor, and that the presence of bias necessarily enhances the otherwise permitted punishment.

Greater Vulnerability of Victims

Another justification for bias crime punishment enhancement sounds in distributive justice. According to Harel and Parchomovsky, the state has the duty to distribute fairly the good of protection from crime; thus, it must make special efforts to reduce crime against those who are especially vulnerable because of immutable personal characteristics such as race or ethnicity (Harel and Parchomovsky 1999). Greater enforcement of the criminal law is one way to discharge this duty, but another is harsher sanctions. And bias crime penalty enhancement, they argue, can be justified by this egalitarian duty.

This argument has some merit. The criminal law does occasionally enhance punishment based directly on a group's vulnerability to crime—for example, when the victim is elderly or a child.[15] Moreover, the authors are correct that their approach helps explain why some bias crime laws do not require animus or hostility but extend to actors who select victims on the basis of a prohibited group characteristic. When the basis of selection is opportunistic, in the special sense of preying on vulnerable victims, then their approach helps explains why the criminal law might wish to impose a higher sanction.

But the authors' approach also poses several problems (*see* Simons 2000; Woods 2008). First, it does not plausibly explain actual bias crime legislation. There exist many categories of highly vulnerable victims for which punishment enhancement is not routinely imposed—for example, crimes against persons with an intellectual disability or against prison inmates. Conversely, legislation imposing heightened punishment for bias crimes is not best explained by the extra vulnerability of the victims of such crimes. When an African-American is assaulted because of his race, a Catholic is targeted because of her religion, or a gay person is attacked because of his sexual orientation, voters and legislators believe that additional moral condemnation and punishment is warranted; but they do not believe that the quantum of additional condemnation or punishment that is deserved is a direct function of the protected group's unusual vulnerability to crime. Race, religion, and sexual orientation are personal traits with enormous social significance. Criminal actors who select victims on these bases do not act in a historical and social vacuum: the moral and social significance of their acts is reinforced by centuries of official and private acts of discrimination that have disadvantaged groups along these lines. When bias crimes occur, they reinforce the memories and effects of that discrimination and threaten social division. Heightened vulnerability to crime is only part of the story.

Second, when special vulnerability (e.g., of a child or elderly person) is indeed a legitimate consideration in the criminal law, the actor need not act out of a motive of animus toward the vulnerable, nor need he or she select the person because of their vulnerability. It is sufficient that the actor knowingly victimizes a child or an elderly person. Yet bias crime liability for a person who merely knows that the victim is of a different race or religion, but who neither is motivated by this status nor selects the victim because of this status, seems clearly unjustifiable. Why the difference? Because the justification for punishing crimes against the vulnerable is quite distinct from the justification for punishing bias crimes: in the latter case, only acts that are based on a bias motive or discriminatory selection are likely either to bring about the relevant harm (such as exacerbating racial division) or to express disrespect for the targeted group.

Do Bias Crime Laws Improperly Punish for Thoughts or Character?

One prominent objection to bias crime laws is that they impermissibly (and perhaps unconstitutionally) punish for thoughts or beliefs, contrary to liberal values including the right of free speech.[16] I only address this objection briefly, since it has been amply discussed in the literature. The most persuasive responses to the objection are as follows:

1. It is incorrect to characterize these laws as punishing for thoughts alone, since the laws always require conduct. Indeed, they invariably require that the defendant's chosen conduct, absent a bias motive or selection criterion, must itself constitute a crime (including the usual actus reus and mens rea requirements of that crime) (*see* section "Must a Parallel Crime Already Exist?" below).
2. Punishment enhancement does increase punishment based on a bias motive or discriminatory selection criterion, but it does not follow that the portion of punishment that is thereby enhanced is itself based on thoughts (or character) *alone*. Rather, the "thoughts" or "character flaw" must motivate or be expressed in the actor's conduct. If D steals from V while harboring negative feelings or antipathy toward the group of which the victim is a member, D is not necessarily eligible for an enhanced sentence. In doctrinal terms, D's attitude must at least satisfy criminal law's concurrence requirement. Consider a straightforward example that does not satisfy that requirement: D steals from V in the dark and has no idea of V's race, ethnicity, or religion. The next day, when D discovers that V was African-American or Catholic, D publicly boasts that he is delighted that he succeeded in victimizing a person from this racial or religious group.

   However, the concurrence requirement by itself is insufficient to ensure that bias crimes are consistent with principles of just deserts and of respect for mental autonomy.[17] That requirement would be satisfied, for example, if a white, heterosexual D knew, while committing a crime against V, that V is African-American or gay. Just as knowingly receiving stolen property or acquiring illegal drugs satisfies the concurrence requirement, so does assaulting a person when the actor knows that the person is within a category protected by bias crime laws. But such knowledge (as opposed to motive or discriminatory selection) is properly considered insufficient for bias crime enhancement. Contrast crimes that punish actors who prey upon specified categories of especially vulnerable victims, such as children or the elderly. For these crimes, knowledge that the victim is in the relevant class suffices to satisfy criminal law principles; the actor need not act with the *motive* of taking advantage of a child or elderly person.

3. A related objection emphasizes the supposed selectivity or lack of neutrality of bias crime laws in picking out as objects of enhanced punishment only certain heinous or hateful motives—viz. those based on an ideology that the government classifies as offensive. Assaulting or injuring someone in order to send a message of disapproval of the victim's race or sexual orientation is punished more, but engaging in the same act from a motive of sadism or greed is not.[18] As a criticism of criminal law's ad hoc consideration of culpable motives that aggravate punishment, this objection has merit, for reasons discussed earlier. But insofar as the argument purports to demonstrate that bias crime laws are problematic because of improper *ideological* selectivity, the argument is not fully convincing. The claim that the criminal law should (or even can) be ideologically "neutral" is implausible, for the familiar reason that any justification of criminal law rules must rely on underlying consequentialist or nonconsequentialist rationales that will inevitably be controversial.

Scope Problems

A number of difficult questions of scope arise if a jurisdiction decides to enhance punishment for hate or bias crimes. The answers to these questions clearly depend on which justifications for bias crime laws one finds most compelling.

Bias Against Which Groups?

Bias crime laws today typically apply to bias or animus on the basis of race, ethnicity, religion, disability, gender, or sexual orientation.[19] Some laws also extend to the group characteristics of gender identity or age. Only a small number of jurisdictions extend protection to groups defined by other categories such as homelessness, personal appearance, or political beliefs.

This variation in coverage is justifiable insofar as it reflects the contemporary reality that different groups are targeted by bias in different communities. And as a matter of principle, in determining which groups to protect, it is highly relevant whether some groups have suffered especially serious disadvantage over time, including government-imposed disadvantage. However, the actual variation between jurisdictions that we see in current bias crime laws is undoubtedly also due to jurisdictional differences in values held by legislators and voters (such as different views among constituents about the expressive value of denouncing homophobic crime) and in the political influence exercised by different religious and civil rights interest groups (Jenness and Grattet 2001).

Two additional questions are important here. First, should protection extend not only to disadvantaged minority groups but also to majority groups? Legislation invariably prohibits bias or selection according to group status (such as race or religion), not according to *minority* group status. In *Wisconsin*

v. Mitchell, for example, defendant was an African-American youth who specifically encouraged others to beat up a white victim, which they did. Defendant was convicted not only of aggravated battery but also of intentionally selecting the victim because of the victim's race, resulting in a substantial sentencing enhancement. The Supreme Court upheld the conviction even though the victim was white. In principle, the argument for heightened punishment in this type of case seems weaker, if the most persuasive justifications of bias crime laws are that they cause a greater harm or constitute an expressive wrong and if the most defensible characterization of such a harm or wrong is the causation or existence of social division *because the group has suffered social disadvantage*.[20] On the other hand, egalitarian principles, and perhaps expressive wrong principles, might justify ignoring whether a group is relatively disadvantaged. Perhaps it is important that legislative rules not send the message that blacks should receive greater "protection" from such rules than whites, or that Muslims, Jews, or Catholics should receive greater protection than Protestants.

The second question is whether *intragroup* bias should be the basis of punishment enhancement. In a recent case, members of an Amish sect were prosecuted under the federal hate crime law for violently attacking members of another sect, including shearing their hair and cutting off their beards. The court concluded that intragroup bias is indeed covered by the law.[21] Once again, this broad extension of scope seems much less justifiable than the paradigm case in which a dominant religious group preys upon a widely despised, smaller religious group. On this broader view, for example, the internecine strife between factions of the Nation of Islam that led to the murder of Malcolm X would render that murder a bias crime. Struggles within religious groups over power and disagreements within such groups about dogma seem rather remote from the central concerns of bias crime laws.

Animus or Discriminatory Selection?

Bias crime statutes are often ambiguous about whether animus is required or whether selection on the basis of a group status is sufficient. The statutes often simply state that the actor must have committed a specified crime "because of" race, religion, or another listed group characteristic. But it remains useful to discuss these two distinct models as ideal types and to consider which model is more justifiable.[22]

The animus model insists on proof that the actor was motivated by hatred of members of the victim's group or by a similar disrespectful attitude toward the group. The discriminatory selection model requires only that the victim was selected because of membership in the relevant group.

The discriminatory selection model is normally significantly broader in scope.[23] Accordingly, that model prompts significant concerns about proportionality and fair notice. For example, this model would seem to justify punishment for *opportunistic* bias, a kind of bias that is arguably less culpable

than paradigm instances of animus-motivated crime.[24] If an offender deliberately selects transgender or Muslim victims to attack, not because of animus, but because the offender believes that such victims are less likely to report the crime, perhaps his conduct does not express fundamental disrespect in the way that paradigm animus-motivated crimes do. Similarly, if an offender preys upon the elderly or the disabled only because she believes that they are less likely to resist the attack successfully, the conduct again seems less culpable or wrongful. On the other hand, if the group that is opportunistically selected is a group that is quite frequently the subject of animus-motivated attacks, such as transgender or Muslim victims, the fact that a particular offender merely had an opportunistic motive might not be a decisive argument against enhanced punishment.[25]

Even under the narrower animus model, significant questions of scope can arise. Must the actor be *personally* motivated by bias, or is it sufficient that her motivation is to curry favor with a gang or other group that she knows is motivated by bias? The latter seems sufficient: the harm or wrong caused or expressed when *reflected* prejudice or bias motivates a crime is not appreciably less than in a paradigm bias crime.

Should animus be understood to include culpable indifference—a disposition to care less when one's conduct will harm a member of a protected group? If culpable indifference is interpreted broadly, then such an extension would be very problematic. Compare animus in the sense of hatred or antipathy: in such cases, there will often be supporting evidence that an offender uttered racial epithets just before, during, or immediately after the crime, or that the offender planned to target a member of the protected group. But in the case of culpable indifference, supporting evidence will be much more difficult to gather. Only in the rarest case will the offender admit that he victimized X because he simply didn't care whether X suffered harm or because he cared less than if X were a member of the offender's racial or religious group. Moreover, the concurrence requirement properly insists that it is not sufficient that an actor merely possessed an indifferent attitude or disposition while engaging in the relevant conduct. To be sure, it is also true that merely possessing a standing attitude of dislike or hostility toward another group—that is, animus in the narrow sense—is also not sufficient for enhanced punishment if that attitude merely accompanies criminal conduct and does not motivate it. But it is even more difficult in the case of culpable indifference to define and prove the requisite connection between the agent's attitude and his resulting conduct (Simons 2002).

For similar reasons, it would not be defensible to include, within the definition of animus, cases in which the agent's animus or hostility was *unconscious*. Here, the concern about criminal punishment turning on factors that are not sufficiently within the actor's control is indeed powerful and should be decisive against enhanced punishment.

Bias Must Be a Cause, but What Kind of Cause?

Even if bias motive (or targeting a victim because she is a member of a protected group) can be a proper basis for punishment enhancement, the question remains: what causal connection is required between the bias motive or selection criterion and the defendant's action? The most difficult question here is how to resolve mixed motive cases (Verstein 2018). Consider the following perspectives and possible approaches.

1. *Bias as sole or primary motive.* Suppose A has no plan to commit a crime, but happens upon V1, and because of animosity toward V1's group, A assaults V1. Here, we might conclude that bias is the sole or primary motive for the crime. Bias would be a primary motive but not the sole motive if A had another, less compelling reason for engaging in the assault—for example, to prove to himself that he could successfully assault someone without suffering injury himself.
2. *Distinguishing motive for crime from motive for selection.* Suppose B plans to steal a wallet from someone. After patrolling the neighborhood for a few minutes, he decides to victimize V2, in part because V2 is Muslim, and B hates Muslims. B could just as easily have victimized many others. Here, we might conclude that bias is the but for cause of B committing the crime of stealing from V2. But it would not be correct to characterize bias as the sole motive: obtaining financial profit from the crime was plainly another potent motive. Indeed, that was B's initial reason for committing a theft. Perhaps we should say that B's sole motive for committing a theft was financial profit, while B's sole or primary motive for selecting V2 as the victim of the contemplated theft was V2's religion. These characterizations seem more precise and helpful than trying to answer the undifferentiated question, "What reasons motivated B to commit the crime that he committed?" And for similar reasons, it is unhelpful to frame the question as whether it is true that "B intentionally stole from a Muslim."[26]

   Conversely, suppose C decides to victimize V3 because V3 is Muslim, but C initially gives no thought to what crime to commit against V3. When C is in V3's presence, C decides to steal V3's bicycle because he would benefit from owning it. Here, too, it seems most precise to differentiate two questions: What reason did C have to target V3? And what reason did C have to commit the crime of theft?

   Another variation is this: C2 settles upon the crime of stealing V3's bicycle because he knows how much V3 relies upon the bicycle and how difficult it will be for V3 to replace it, and C2 wishes thereby to make life more difficult for V3 as a Muslim. In this variation, unlike the previous two examples, C2 acts out of animus both in selecting a person as a victim and in deciding what crime to commit against the person. This appears to be the somewhat rare case in which an actor's sole motive or

reason, along both dimensions, is animus against members of a protected group. (Defacing the home of a member of a group out of animus toward the group is another such case.[27])

3. *Bias as a necessary or but for cause*. Many courts adopt the necessary or "but for" cause (or "straw that breaks the camel's back") approach to mixed motives in bias crime cases.[28] This approach has the advantages of simplicity and also of realism: it is exceedingly rare that an offender engages in a particular form of criminal conduct, victimizing V for the *sole* reason that V is a member of a protected group.[29] However, the approach is highly problematic in overdetermination cases, that is, cases in which the actor has another sufficient motive for the conduct, as in the example in the next paragraph.
4. *Bias as a sufficient but not necessary reason or cause*. Suppose D, who is white, is angry with V4 because D's girlfriend just broke up with him in order to be with V4. And suppose D also dislikes V4 because V4 is African-American, a group toward which D has general antipathy. The next time D sees V4, D gives V4 a shove while uttering a racial slur. Here, the fact finder might conclude that bias was a sufficient but not a necessary (or but for) reason for D's committing the crime of assaulting V4 and might draw the same conclusion about jealousy. If bias and jealousy are each independently sufficient causes of D's conduct, a bias crime enhancement might be warranted. Why should D be treated more favorably by the criminal law just because he happens to be moved both by jealousy (which does not trigger greater punishment) and by bias (which does)?

   Notice, too, that a strict "necessary cause" requirement would have the absurd result of precluding a sentence enhancement if the actor is motivated by two sufficient (but not necessary) reasons, *each* of which is an impermissible bias motivation. Suppose E, who is white and able-bodied, attacks V5 both because V5 is African-American and because V5 is disabled, and suppose that race and disability are each a sufficient reason for E's crime. It would surely be unacceptable to strictly apply a necessary cause test here: because neither reason taken alone was a necessary cause, the result would be no penalty enhancement. (However, a supporter of a necessary cause requirement might respond that the requirement should apply in all cases except for this specific subcategory of overdetermination cases in which two different prohibited reasons are each sufficient but not necessary.)
5. *Bias as a "substantial" or "significant" motivating factor*. Some jurisdictions employ this test.[30] Unfortunately, it borders on incoherence.[31] How much motivating weight is necessary or sufficient under the test? Employing this test amounts to an admission that justifiable causal criteria cannot be identified in advance and that the fact finder should simply

muddle through. Moreover, if the threshold of substantiality or significance is too low, this approach creates problems of proportionality and, perhaps, of punishment for mere thought or bad character.[32] This would be the case, for example, if a reason were considered "significant" simply because it was a reason that the actor consciously considered before acting, even if it played absolutely no role in his decision—that is, even if it did not increase by one iota the probability that the actor would victimize a member of a protected group.

6. *Bias as a primary motive*. If we were to require that bias was the "primary" or "predominant" motive of the actor's conduct, what would this mean? On Andrew Verstein's recent illuminating account,[33] it would mean that bias was a stronger reason for the conduct than any other reason motivating the actor. A primary motive requirement is distinct from either a but for or sufficient cause requirement: The primary motive might have greater motivational force than the secondary motive even if both motives are but for causes and even if each motive is independently sufficient to bring about the actor's conduct.
7. *Characterizing the object of the actor's motive or reason*. Another complication in analyzing mixed motive cases is how to characterize the object of the motive. In an earlier example, I supposed that D would have shoved V4 (a) even if V4 had not been black but also (b) even if D's girlfriend had not left D for V4. In that sense, each motive is a sufficient cause, and neither is a necessary cause. But suppose that D inflicted a *harder* shove on V4 because of the combination of motives than D would have inflicted if only one of these motives had been operative. Should we still say that "the shove" or "the crime of assault" was overdetermined? It seems more precise to say that each motive is a necessary cause of *the extra force of the shove*. In many cases, this extra precision will not make a legal difference. But in other cases, it will. Suppose that the extra force caused V4 to die, while the force that V4 would have used if only one motive had been operative would have caused V4 to suffer injury but not death. On this supposition, both motives are but for causes of the more serious crime of homicide (rather than assault), a fact that might well make a difference to whether we conclude that a bias motive caused that crime.
8. *Bias as a cause but not a motive*. Finally, bias could have a causal effect on the actor's conduct without being a reason or motive for that conduct at all. Suppose a racist individual F, arguing with V5 of a different race, impulsively strikes V5; and suppose it is clear that F would not have struck V5 if V5 had been of the same race as F. So long as it is still within the control of such an actor not to act in response to such a cause, criminal responsibility is at least an open question. Perhaps F harbors unconscious bias toward V5's race. Or perhaps F is simply indifferent to whether members of V5's race suffer harm.

However, authorizing a greater penalty in this category of cases is extremely problematic. I am doubtful that it is feasible for the criminal law to clearly define and consistently apply this criterion. Also, it will often be the case that the practical capacity of an agent to avoid acting out of unconscious bias or indifference is highly diminished, at least as compared to his or her capacity to avoid acting because of a bias motive or reason. These concerns militate strongly against enhanced punishment in this category of cases.

9. *Suggested resolution*. The most defensible causal approach, I believe, is the primary motive test because it is a practical test widely employed in the law and because the strongest justifications for bias crime laws (that bias crimes cause group-specific harm and are expressive wrongs) provide greater support to this test than to the alternatives. If, for example, bias has much greater motivational force than jealousy in inducing an offender to commit a crime, these justifications plausibly support punishment enhancement. And framing the question in terms of "greater or lesser" motivational power is, although somewhat arbitrary, a familiar and accepted doctrinal technique. At the same time, the necessary cause test (if accompanied by an exception for certain overdetermination cases) is also a workable and defensible test. And insofar as the latter test makes conviction more difficult than the primary motive test, it should be appealing to those who are apprehensive about the potential breadth and harshness of bias crime laws.[34]

Must a Parallel Crime Already Exist?

It is widely assumed that bias crimes should merely enhance punishment for conduct that is already criminalized. But is this assumption justifiable? Why, exactly, must a parallel crime already exist?[35] In principle, shouldn't the state be permitted to criminalize conduct that is otherwise not quite serious enough to deserve criminalization, if the conduct is accompanied by a bias motive? In other contexts, the criminal law sometimes recognizes that inculpatory motives may convert noncriminal into criminal conduct. For example, simple possession of burglary tools might not be a crime, but if the actor possesses these items with the intention to break into a dwelling or vehicle, the conduct might become a crime (*see* Hessick 2006, p. 96). Moreover, given the realities of criminal law enforcement, police and prosecutors might not find it worthwhile to fully investigate or pursue a parallel crime (especially if it is a minor crime such as a misdemeanor), yet they would pursue the crime if it was accompanied by a bias motive that could result in a more significant punishment.

In practice, to be sure, there are reasons to require the existence of a parallel crime. It is much simpler, in revising criminal codes, to add a sentencing or crime-level enhancement than to create an entirely new crime. Moreover, punishing for

bias-motivated conduct that is not otherwise criminal fosters the appearance that the state is punishing only for bad character or biased thoughts.

Yet the question remains: is this merely appearance? After all, eliminating a parallel crime requirement is entirely consistent with retaining the requirement that the actor's bias motive must bear an appropriate causal connection to the actor's conduct. Suppose, for example, that defacement of the personal property of another is considered too trivial an interference with the person's proprietary and dignitary interests to warrant criminalization. Writing "you suck" in magic marker on a classmate's backpack is annoying behavior but arguably insufficient to justify a criminal record. But now suppose that the defendant writes a racial or religious slur on the backpack, for the purpose of upsetting the backpack's owner and insulting the group to which the owner belongs. I see no principled reason not to permit criminalization of this conduct. At the same time, a bias motive should not permit criminalization unless the underlying conduct was otherwise *eligible* for criminalization—for example, because that conduct could legitimately be criminalized absent countervailing values or pragmatic concerns, or because the conduct does not quite satisfy justifiable principles of criminalization but comes very close to doing so.

Proportionality Problems

Bias crime laws often permit a dramatic increase in punishment relative to the punishment for the parallel crime. Thus, it is common to elevate a misdemeanor to a felony (resulting not only in a lengthier term of incarceration but also in the lifelong collateral consequences of a felony conviction) or to increase the authorized sentence for a parallel felony quite substantially. For example, the Wisconsin hate crime statute upheld in Wisconsin v. Mitchell increased the maximum punishment for aggravated battery from two years to seven years.[36]

Even if some enhancement in punishment for a bias motivation is justifiable, the question remains whether current statutory schemes are too harsh and violate principles of proportionality. Unfortunately, there is nothing close to a scholarly or judicial consensus about what those principles require, on either a consequentialist or retributivist account of the justifications for punishment. Consider, for example, that in some criminal law areas such as theft and sexual assault, the differentiation and grading of different subcategories is largely accomplished by variations in actus reus, whereas in other areas, most notably homicide, variations in mens rea make all or almost all of the difference. No obvious explanation exists for why mens rea has greater significance for some crimes than for others. It is similarly difficult to explain why motive is irrelevant to punishment for some crimes, modestly relevant for others, and highly relevant for yet others. Absent such explanations, the task of developing defensible proportionality rules for aggravating motives is extremely difficult.

One suggestion, offered by Al-Hakim and Dimock, is that proportionality principles permit no more than a doubling of the penalty when group hatred is an aggravating factor. Their rationale is as follows:

> The primary target of our penalty must be the underlying crime, which must be a public wrong worthy of criminal condemnation independently of the motivation(s) that might lead to its commission. That is permissible on liberal grounds. But if we enhance the punishment that the underlying crime deserves by more than 100 percent, … the primary target of our condemnation is the hatred, rather than the public wrong. (Al-Hakim and Dimock 2012, p. 610)

Such an enhancement, they conclude, would be illiberal and unjustifiable.

This proposal and rationale will not satisfy skeptics who believe that any substantial enhancement, or indeed any enhancement, of punishment because of bias or hatred is inconsistent with liberal principles. Nor will the rationale satisfy others who worry that the offender's actus reus and mens rea should matter much more than his motive. If a violent attack on a stranger deserves 10 years in prison, or arson of a large building deserves 20 years, does an additional bias motivation really warrant a punishment that is almost double that amount (almost 20 years for the attack, almost 40 years for the arson)?

One obvious general approach to proportionality is as follows: calibrate the severity of punishment to the principles that justify the punishment in question. Thus, suppose that, as a matter of just deserts, an actor who purposely harms a victim is much more culpable, or characteristically causes additional harm, or commits a graver intrinsic wrong, relative to an actor who harms a victim knowingly or recklessly. Then those mens rea distinctions should result in proportional differences in punishment severity. Alas, this approach only identifies the requisite ordinal differences; it does not take us very far toward identifying the permissible or required cardinal differences.[37]

Another possible response to the proportionality objection is the "distinctive wrong" argument noted earlier: the wrong that bias crimes target is incommensurate with other criminal wrongs. Just as it might be incorrect or misleading to characterize a minor sexual assault as either more or less grave than a nonsexual physical assault threatening bodily harm, it might be incorrect to characterize the bias "portion" of a bias-motivated crime as more or less grave than the parallel crime. In principle, we might punish the parallel crime (such as the theft or assault) with one type of punishment (such as incarceration for a specified term) but punish the additional bias "portion" of the crime with a different type (such as temporary loss of specified voting or other civil rights). A distinctive wrong arguably deserves a distinctive form of punishment. Whether such a solution is practically realizable in our current criminal justice system is an open question, however.

My own tentative views about proportionality in the present context are as follows. Punishment for the most serious crimes—such as murder or rape—should

only be enhanced modestly, perhaps 10%, if motivated by bias against a historically disfavored group. Greater enhancement would implicitly express the false message that bias matters almost as much to the actor's just deserts as the highly condemnable serious crime itself. But at the lowest end, punishment may appropriately be enhanced significantly and in some cases more than 100%—for example, for defacing a building. Nevertheless, in the absence of a comprehensive approach to aggravated motives, I would err on the side of parsimony. Perhaps the existence of a terroristic motive or purpose warrants a large enhancement in the punishment for any crime, while a bias motivation should be treated more like a motive of pecuniary gain, only modestly enhancing punishment, especially for parallel crimes that are already punished severely.

Conclusion

This chapter has tried to identify the strongest justifications for bias crime laws and the most potent and troubling challenges. However, such laws are by no means the only or best solution to the serious social problem of bias-motivated violence. Nationalist leaders throughout the world increasingly inflame passions against immigrants, refugees, and racial and ethnic minorities. There is also evidence that the incidence of bias crimes in the United States has increased significantly in recent years.[38]

Bias crime laws may or may not be an effective means of reducing the incidence of bias crimes. They may or may not diminish racial, ethnic, religious, and other social divisions. They may or may not express appropriate condemnation of bias and prejudice. They may or may not impose the punishment that offenders justly deserve. But at the very least, they target a genuine problem, a problem that demands serious attention. I hope we can agree that the principles of equality, tolerance, and mutual understanding that these laws aim to further and uphold are fundamental values, values that demand a fervent defense.[39]

Notes

1. To be sure, a small number of mitigated murders also do qualify as "hate crimes" in the sense of crimes motivated by bias. See State v. Castagna.
2. See Murphy (1988) (discussing "retributive hatred"); Hampton (1988) (discussing "moral hatred"); and further discussion in Moore (2010).
3. A similar range of examples can be found in Tribe (1993).
4. A similar notion of selective sympathy or indifference has been endorsed as justifying strict scrutiny for equal protection purposes (Brest 1976, pp. 7–8). But compare Baron (2016, p. 506) (concluding that it would not be a hate crime for a thief to intentionally choose Jews as victims of burglaries, not because he hates Jews, but because he likes them less than the others whom he could victimize).
5. At the same time, many racists and homophobes might sincerely claim to "care" a great deal about African-Americans and gays, based on outrageous stereotypes

that assume the intellectual incompetence or moral failings of these groups. Some supporters of slavery asserted benevolent motivations for the practice. To be sure, the credibility of such a claim is dubious if the actor has engaged in an act of violence against a member of the group. How does punching someone in the face demonstrate genuine concern for his welfare? But suppose the actor engaged in a different type of criminal wrong, such as locking the victim in a workplace until the end of the workday out of a misguided, paternalistic belief that the victim is a member of a group that cannot be trusted to return to work after a lunch break. In such a case, the actor's claim that he acted out of a paternalistic and benevolent motive might occasionally be credible. Needless to say, the sincerity of such a motive or belief does not make it justifiable.

6. To be sure, victim impact statements about the effect of a bias crime on the victim's group are one way to provide more individualized case-specific evidence (cf. Hurd and Moore 2004, p. 1091). But such statements create serious problems of their own, such as inconsistency, undue weight accorded to especially articulate victims, and undue favoritism toward more wealthy defendants. These problems are less likely to plague group-based criteria for sentencing enhancement.
7. See Brax (2016, p. 240): "We can choose whether or not to treat a reason *as a reason*."

   The lack of control argument might, however, provide some support for the argument that bias "motive" should be required and that culpable indifference should be insufficient. See discussion infra. The argument also might be relevant to which causal test of motive should be adopted.
8. See Hurd and Moore (2004, pp. 1122–1123), arguing that hatred "motivates" action only in the limited sense that the action is a product of that emotion, and bias "motivates" action only in the limited sense that bias is a standing disposition to draw false beliefs about members of a group.
9. Similarly, most of those who act out of anger do not act for the purpose of expressing their anger. Contrast the (unusual!) actor who makes a deliberate decision to react in anger, heeding his therapist's advice that expressing anger will benefit his mental health (*see* Simons 2002, pp. 244–245).

   An analogous issue arises with mitigating motives. As a doctrinal matter, self-defense requires that the actor's forcible response to a threat was (at least partially) for the purpose of defending herself. But in many self-defense cases that should result in acquittal, such a purpose is lacking. If D lashes out in fear in response to an unjustified attack, but not with a conscious purpose to prevent further harm to herself, and if D's conduct satisfies the objective necessity and proportionality requirements of self-defense, the absence of a defensive purpose should not be, and probably is not, fatal to her self-defense claim (*see* Simons 2008).
10. But see Garvey (2008), Hurd and Moore (2004).
11. See Kahan (1996), Lawrence (1999), Duff and Marshall (2018) (endorsing a "communicative" rationale). For a general account of expressive theories of law, see Anderson and Pildes 2000. Expressive theories of punishment are discussed in Duff and Hoskins (2017).
12. For a general critique of expressive theories of law (including punishment), see Adler (2000). For a critique of expressive theories as justifications for hate crime laws, see Hurd and Moore (2004).

13. See Hurd and Moore (2004, pp. 1114–1115), arguing that the mere enactment of bias crime laws may send a strong message, while the imposition of actual punishment on actors who do not get the message "is rank injustice" if the punishment exceeds their just deserts.
14. For a similar analysis of felony murder, see Simons (2012).
15. See U.S. Sentencing Guidelines Manual § 3A1.1 (b)(1) & cmt. n. 2 (2016) (authorizing increased punishment by two levels if defendant knew or should have known that a victim of the offense was a vulnerable victim, defined as "a person … who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct").
16. Addressing the constitutional question, the U.S. Supreme Court invalidated a cross-burning statute in *R.A.V. v. City of St. Paul* as a violation of the First Amendment because the law selectively silenced speech based on its content, but in *Wisconsin v. Mitchell*, the Court upheld a very broad bias crime statute that enhanced defendant's punishment based on his discriminatory selection of a victim on the basis of race. In *Virginia v. Black*, the Court upheld a cross-burning statute that, unlike the law in *R.A.V.*, applied to all cross burnings that are intended to intimidate, without regard to the race or ethnicity of the victim.
17. Gabriel Mendlow identifies an additional, implicit criminal law requirement, beyond concurrence of actus reus and mens rea, that he believes bias crime laws might not satisfy—the requirement that the state may not treat a person's thoughts as objects of punishment, even if those thoughts are realized in his conduct (*see* Mendlow 2019).
18. More precisely, bias crime laws permit enhancement of punishment by a specified amount, while factors such as sadism or greed are more likely to be discretionary, aggravating factors that a judge may or may not consider when sentencing the defendant within the range otherwise specified for the crime.
19. These are the most common "protected" categories that trigger potential punishment for a hate crime. See https://www.adl.org/adl-hate-crime-map. The District of Columbia includes a broad list of categories: "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation." D.C. Code § 22-3701(1) (2018). Belgium's list of protected categories is also extensive:

    > race, color of skin, descent, national or ethnic origin, nationality, sex, sexual orientation, marital status, birth, age, wealth, belief or philosophy of life, current and future state of health, disability, language, political conviction, or physical or genetic characteristic or social origin.

    (Articles 33–42 of Belgium's Law of 10 May 2007, from OSCE Report, p. 35)
20. See Baron (2016, p. 521), expressing concern about extending bias crime laws to groups that are not especially vulnerable to oppression.
21. *U.S. v. Miller*; *U.S. v. Mullet*. An analogous issue arises when one Latino prison gang targets a different Latino gang.
22. See Lawrence (1994, 1999); Grattet and Jenness (2001) (describing different phraseology in hate crime laws, including (a) requirement of animus or hatred; (b) requirement that actor had intent to harass and intimidate victim on the

basis of a specified group status; and (c) requirement merely that actor committed offense because of a specified group status).

23. "Normally," but perhaps not always, depending on what other criteria are part of each model. Suppose the discriminatory selection model requires that the selection criterion was a necessary cause of the actor's criminal conduct, while the animus model only requires that animus was a sufficient cause. Then it would sometimes be easier to establish animus than to establish discriminatory selection.
24. See Ginsberg (2011), Lawrence (1999). For arguments in favor of enhancement for opportunistic bias, see Wang (2000), Woods (2008).
25. For a similar view, see Duff and Marshall (2018, p. 145), arguing that the key question is not whether the offender was motivated by bias, but whether the perpetrator demonstrated and "enacted" group hatred "in the very commission of the offense." In their view:

> I can enact hatred of another group in an attack on one of its members, even if what motivates me is just a desire to earn the money I have been promised, or to curry favor with a group to which I want to belong, and I feel uncomfortable about what I "have to" do. To criminalize enactments of hatred is to criminalize actions that carry a certain meaning, not to criminalize thoughts, feelings, or motives that lie behind the action. (Duff and Marshall 2018, p. 139)

26. On one (referentially *transparent*) description, the quoted proposition is true even if B did not know that the victim was Muslim, so long as he intended to steal from a person he identified on some other basis and it turns out that the person was a Muslim. On another (referentially *opaque*) description, the proposition is true only if V2's status as a Muslim was part of the reason that B victimized him. See Schwitzgebel 2015); Ferzan (2008) (rejecting the view that the characterization of an intention is just a matter of what is motivationally significant to the actor).
27. Defacing a house of worship is a similar case except that the persons harmed are not individualized.
28. See *U.S. v. Miller* (concluding that a faith-inspired manner of assault does not necessarily prove a faith-inspired motive for assault). One of the court's examples is highly instructive:

> [I]magine that a child tells his parents he is gay. As a result of their faith, the parents ask the child to undergo reparative therapy. The child resists, the parents dig in, all three fight verbally about everything from faith to family obligations. At some point, the child snaps. He assaults the parents and does so in a faith-offensive way—by physically forcing them to eat non-kosher food, by tattooing 666 on their arms or by taking some other action that deeply offends their faith. No doubt faith entered the mix from both sides of the assault, but there *is* doubt about whether the parents' faith broke the camel's back in terms of why the child committed the assault. That the means of assault involved religious symbolism confirms only that he knew how best to hurt his parents. It does not seal the deal that his parents' faith, as opposed to their lack of support for him, was a but-for motive of the assault. (ibid., p. 596)

29. See *State v. Hennings* (upholding bias crime charge against a defendant whose motive for running over an African-American boy with his truck might have included not only the victim's race but also anger that the victim was standing in the road rather than on the sidewalk).
30. Some state statutes require only that the victim be chosen "in whole or in substantial part" because of the group characteristic. See N.Y. Penal L. § 485.05(1)(a), (b) (2016).
31. The analogous "substantial factor" test in tort law employed by many courts was firmly rejected in the Restatement of Torts, Third. See Restatement Third of Torts: Liability for Physical and Emotional Harm § 26, comment j (2010). Interestingly enough, a recent empirical survey found that the "substantial factor" test did a better job than the "but for" test and other legal tests in capturing survey participants' views about the meaning of legal causation (especially in overdetermination cases involving independent sufficient causes) (*see* Macleod 2019). However, the survey did not examine whether a test that explicitly imposed liability on sufficient but not necessary causes would perform even better.
32. See *U.S. v. Miller* (p. 592).
33. See Kaiserman (2018), Verstein (2018, pp. 1134–1136) (pointing out that a primary motive requirement is employed in a wide range of legal contexts).
34. One recent article explores ordinary understandings of legal causation standards (including causation in the context of bias crimes). The author's conclusions are broadly consistent with my suggested resolution:

    > [T]he "substantial factor" standard for causation comes much closer to tracking common sense and statutory causality attribution than does the "but-for" test, the "contributing factor" test, or the "sole factor" test, and the *sufficiency* of the relevant "cause" is far more predictive of causality attribution (and blameworthiness assessments) than the Court's "but-for" standard. (Macleod 2019, p. 962)

35. Federal hate crime laws do create federal crimes out of conduct that would not be a federal crime but for a prohibited bias motive (*see* https://www.justice.gov/crt/hate-crime-laws).
36. For other examples of the degree of punishment enhancement that bias crime laws permit or require, see Simons (2000, p. 266 n. 67). For example, Alabama increases the punishment for a Class B felony from a minimum of two years to a minimum of ten years if the crime is motivated by bias. AL Code § 13A-5-6, § 13A-5-13 (c)(1)(b) (2016).
37. See Walen (2016, § 4.4) (discussing ordinal and cardinal proportionality).
38. The Federal Bureau of Investigation announced a 17% increase in reported hate crimes in 2017 as compared to 2016 (Hohmann 2018). Moreover, "[a]ccording to the Center for the Study of Hate and Extremism, there were a total of 1,038 hate crimes recorded in the 10 largest American cities last year, an increase of 12 percent from 2016 and the highest figure in more than a decade" (Fausset 2018).
39. I thank Kim Ferzan, Jeff Helmreich, Val Jenness, Jamie Macleod, Gabe Mendlow, and participants in the Law, Reason, and Value Colloquium of the Center for Legal Philosophy, UC Irvine, for helpful comments.

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