Submission of the Edmund Burke Institute to the Public Consultation on the review of the Prohibition of Incitement to Hatred Act 1989


Edmund Burke Institute
Hiems Transit

Table of Contents

Introduction

The EBI has long taken the position that free speech is a fundamental human right, a core component of a functioning democracy, and a driver of innovation, in relation to both political and economic affairs.

Sadly it has now become fashionable to believe that free speech does not include hate speech, the definition of which is generally left rather malleable. The problem, of course, is that what constitutes hate is a personal affair and what one person will view as an act or a statement driven by malice or racism another may view as simply careless or inelegantly phrased; or vice versa.

We would point towards the recent situation in which Kevin Myers, a long-term friend of the Jewish community in Ireland, was accused of anti-Semitism as an example of this, and the many people saying that the Labour party in Britain is not an anti-Semitic party, as they are investigated for institutional anti-Semitism by the Equality and Human Rights Commission, as another example.

The EBI has asked two independent experts in the field to contribute pieces to this document, and so this document consists primarily of pieces from Professor Gerard Casey, emeritus of UCD, and Dr Conor Hanly, currently lecturing in law at N.U.I. Galway. These pieces together offer a comprehensive and cohesive overview of the area and present a compelling argument against the adoption of broader hate crime and hate speech legislation.

Whilst those pieces make a compelling argument on their own we would like to add five short points to this document that we believe are the primary arguments against an expansion of the 1989 Act.

1 – Hate speech laws are fundamentally undemocratic as they undermine the ideal that citizens are equal before the law.

2 – Removing the requirement to prove intent or likelihood from the 1989 Act would create a scenario in which the law could be used, by mischievous or malevolent parties, as a weapon against those they dislike, those they wish to hurt, or those expressing political opinions which, whilst legitimately not racist or otherwise unacceptable, are offensive to a member of a particular group.

3 – Hate speech laws are fundamentally racist as they 'other' and infantilise the groups they aim to protect.

4 – Accepting the idea that the state should be capable of controlling public, and therefore political, speech will cause the state to gain an unconscionable degree of control over the lives of its citizens and that power will be open to misuse and corruption.

5 – The organisations currently collecting statistics on hate crimes in Ireland are mostly activist organisations who support the adoption of stricter laws on speech and, as such, the statistics that they produce should not be seen as a proof of the level of hate crimes in Ireland. The state has been negligent in not collecting exhaustive information on this subject itself before considering movement on the Act and, as such, a broadening of the Act now cannot claim to be based upon evidence of a sufficient quality to justify the potential harm to what is nearly universally recognised as a fundamental right of the human person.

To close, it has been said that the only ways in which men are actually equal is before God and before the courts. God is probably outside the jurisdiction of the state, and so we can set that part aside, but the proposed expansion of the 1989 Act would give lie to the idea that all men are equal before the courts and instead tell us that all men are equal, but some men are more equal than others.

Regards,
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Author Biography

Gerard Casey

Gerard Casey is Emeritus Professor of Philosophy at UCD. He holds a PhD from Notre Dame in the United States and has been awarded Dlitt by the NUI. He is graduate in law from the University of London and holds a masters in Laws from UCD. Amongst other positions he is an Associated Scholar at the Ludwig Von Mises Institute and a member of the Royal Institute of Philosophy. One of Ireland's most prominent philosophers and political theorists he is widely published and on the editorial boards of many scholarly journals. In 2017 he published Freedom's Progress; A history of Political Philosophy and in 2019 he published ZAP: Free Speech and Tolerance in the light of the Zero Aggression Principle.

Conor Hanly

Dr. Conor Hanly is a lecturer in the School of Law at NUI Galway, where he specialises in the area of criminal law. He is the author of a leading textbook on the subject, An Introduction

to Irish Criminal Law (3rd ed., 2015). He was the principal investigator and lead author in the ground-breaking study, Rape and Justice in Ireland (2009). He is also an award-winning legal historian, with a particular interest in the institution of the jury.

Dr. Conor Hanly on the review of the Prohibition of Incitement to Hatred Act 1989

The Prohibition of Incitement to Hatred Act 1989 was enacted to prohibit the use of words or behaviour to display hostility towards specified groups. No one disputes that such hostility

occurs in our society, or the hurt, upset and exclusion that can arise as a result. Nor is there much dispute that society is justified in taking action to reduce the occurrence of such incidents. The issue is the use of a criminal statute for this purpose, a statute constitutionality has been questioned (see Kelly et al, The Irish Constitution, 5th ed. (2018)).

The right of free of speech is universally acknowledged as a fundamental basis for a free society and is protected in virtually every human rights instrument in existence. The right is designed to allow for the expression of opinions, especially on matters of public policy – broadly, matters of law, regulation, courses of action by State bodies and the use of public funds. It is especially essential that individuals be free to offer unpopular opinions, and the right to free speech exists to protect this freedom – a right to free speech is hardly necessary when expressing popular or mainstream views. Issues such as the availability of abortion or gay marriage, immigration policy, minorities and affirmative action policies, etc., can be highly charged and emotive. That some might find a particular viewpoint on such issues to be offensive cannot be a basis for prohibiting the articulation of that viewpoint.

The right to free speech is not absolute, of course – even in the United States, which takes almost an absolutist stance, infringements of the right to free speech are permitted. The Irish Constitution expressly makes this right subject to public order and morality. Accordingly, in Irish criminal law, prosecutions may legitimately be brought in respect of speech that contravenes the law of incitement, breach of the peace, threats to kill or cause serious harm, and harassment. The Constitution itself prohibits sedition and indecency. Further, the Defamation Act 2009 protects the right to a good name, which is constitutionally protected. Nevertheless, the general principle is that an individual should be as free as possible to speak his or her mind; any infringement of this principle should be narrowly construed and should go no further than is necessary. Furthermore, an infringement of the right must be precisely defined, and this raises one of main problems with the 1989 Act – the principle of legality.

The principle of legality requires that the criminal rulebook be known in advance in order to protect individual liberty. Individuals should be in a position to know what the law proscribes, thereby allowing them to take steps to stay within the law. For this to happen, criminal

offences must be defined with a high degree of precision. There are multiple examples of the Irish courts striking down statutory provisions that infringe this requirement (see, e.g., King v. Attorney General (1981) IR 233, Dokie v. DPP (2011) 1 IR 805; Douglas v. DPP [2013] IEHC 343). This latter case concerned a charge under section 18 of the Criminal Law Amendment Act 1935, as amended, which made it an offence to cause scandal and injure public morals. Hogan J. found that the relevant terms were "highly subjective in [their] application and meaning". Later he ruled

[T]he offences … are hopelessly vague and subjective in character and they intrinsically lend themselves to arbitrary and inconsistent application. No clear standard of the conduct which is prohibited by law is articulated thereby and s.18 does not contain any clear principles and policies.

Accordingly, the terms in question were "manifestly unconstitutional".

Most of the infringements of the right to free speech noted above are capable of objective definition (except for indecency, but as this term is used by the Constitution itself, no constitutional issue arises). Such objectivity is not possible with the core terms employed by the 1989 Act. The Act makes it an offence to use threatening, abusive or insulting words/conduct intended or likely to stir up hatred for a group of persons on account of certain characteristics. Words or actions that create feelings that fall short of this requirement (i.e., ridicule) will not in principle come within the ambit of the Act. Threats are easily defined and form the basis of the offence in section 5 of the Non-Fatal Offences against the Person Act 1997 – no real issue there. Insulting or abusive conduct, on the other hand, can be defined widely or narrowly depending upon the views of the victim, the Gardaí or the court. The difficulty lies in identifying where, say, contempt or ridicule end and insult or abuse begin. Accordingly, these terms are "highly subjective in their application and meaning". But the major difficulty lies with the concept of hate, which constitutes the primary ingredient of the offence. The inherent ambiguity of this word is demonstrated by the fact that the Act itself offers no definition of what is the central ingredient of the offence. Thus, an individual cannot know in advance whether his or her comments or actions have crossed the legal line.

There is a second difficulty with ambiguity: the Act becomes malleable and can be deployed against the expression of opinions that another person finds offensive (i.e., the Act lends itself to "arbitrary and inconsistent application"). Even supporters of the 1989 Act acknowledge these difficulties (see Schweppe and Walsh, Combating Racism and Xenophobia through the Criminal Law (2008)). There have been examples of such overreach in the history of the 1989 Act. A complaint was reportedly made against the Bishop of Raphoe in 2012 for a homily in which he complained of a "Godless culture that attacked the Church" (Irish Independent, 29 January 2012). The complainant suggested that the homily incited hatred towards dissidents, outsiders and secularists. It is noteworthy that even the President of the National Secular Society condemned this complaint (Huffington Post, 7 February 2012). A second example concerns a Garda investigation, reportedly launched at least in part under the 1989 Act, in respect of the display of nude portraits of Brian Cowen. The Fine Gael justice spokesman for justice, Charlie Flanagan, decried the investigation (Irish Times, 26 March 2009). These examples did not lead to prosecutions under the 1989 Act, but even the threat of a complaint can have a chilling effect on the expression of minority or controversial views. Given the ambiguity of the central terms used by the 1989 Act, and these examples of the Act being invoked, it is hardly a stretch to imagine the Act, especially if extended as suggested, being capable of being used against certain political opinions such as those advanced by prolife organisations. Indeed, there are examples of prolife views being censured or subjected to "no-platforming" by student bodies on university campuses in the US and the UK on hate-speech grounds (e.g., see UK Parliament Joint Committee on Human Rights, Freedom of Speech in UK Universities (2018)).

It follows that, in my opinion, the 1989 Act should, at the very least, not be extended. The alternative formulations suggested ("hostility" and "prejudice") suffer from the same difficulties as "hate" (see Schweppe and Walsh), and therefore offer no relief against ambiguity. An ambiguous definition is tantamount to no definition. That the 1989 Act has been relatively ineffective does not mean that the law is powerless against racist and offensive speech. As noted above, there are numerous laws that can be used, and aspects of the civil law such as employment laws might also be deployed in some circumstances. In the well-known case brought against the Dublin Bus driver, for example, the complaint centred upon

the defendant's abuse of a Gambian man who was attempting to bring food on to the bus. While ultimately acquitted of a charge brought under the 1989 Act, could the defendant not have been dealt with according to Dublin Bus' disciplinary procedures? Abusing a customer of one's employer surely constitutes a dismissible action.

I accept that the existing laws will not cover every instance of offensive conduct. I agree entirely that civility in this country is regrettably lacking and needs to be encouraged, and society should deploy resources to accomplish this task. But society may do so only within our constitutional framework, and this framework is designed to limit the reach of the punitive and coercive powers of the State. No doubt this will leave some offensive incidents without a legal remedy: using racial epithets, for example, or the well-known Facebook case in which an individual created a Facebook page containing highly offensive comments about Travellers. Sometimes this behaviour will be beyond the law's reach. This is unfortunate but the only way to capture such behaviour (short of an itemised list of prohibited words) is to employ ambiguous phraseology in the definition of offences. As noted above, such terminology carries the real risk of the law being used to shut down views deemed by some to be offensive. It follows that attempts to extend the 1989 Act as suggested inevitably extends that risk too far.

Another change to the 1989 Act that is apparently under consideration is a reversal of the burden of proof. At present, the State bears the burden of proving every element of the offences contained in the Act, and must do so beyond a reasonable doubt. Echoes of this principle can be found in Bracton's work, Laws and Customs of England written around 1250 – "it is presumed that every man is good until the contrary is proved" (see Stumer, The Presumption of Innocence, 2010:2). Thus, the presumption has long been a cornerstone of the common law criminal justice system; in Woolmington v. DPP [1935] All ER Rep 1, Viscount Sankey famously described the presumption as a "golden thread" running through "the web of the English criminal law". It has constitutional status in Ireland and is also reflected in the European Convention on Human Rights (Article 6(2)). The presumption reflects the principal concern of a liberal state, namely the liberty of the individual. The state should ensure the maximum liberty for the individual, and if the state wishes to interfere with that liberty it must

first prove that it has good reason to do so. The principle also reflects the fact that proving a positive is easier than proving a negative. Accordingly, the presumption goes some way to compensating for the gross inequality in power between the state and the individual defendant. It follows that reversing the burden of proof in any criminal statute is a matter of the gravest concern.

It is not clear exactly how reversing the burden in the 1989 Act would operate, but presumably it would relate to the issue of hate – i.e., the defendant would bear some burden in establishing that his speech was not intended or likely to stir up hatred. The Irish courts have expressed considerable scepticism about such reversals (see People (DPP) v. Smyth and Smyth [2010] 3 IR 688; DPP v. Tuma [2015[3 IR 360; People (DPP) v. Forsey [2018] IESC 55). In particular, the courts are rightly concerned at the prospect of a person being convicted without his being shown to be guilty. The current practice of the courts is that a reversed burden will be constitutionally permissible if it can be discharged by the defendant showing a reasonable doubt as to the element that falls on his shoulders (see the Forsey case). In doing so, the courts have shown themselves willing to "read down" the wording of statutes that suggest a stronger burden on defendants. Even with this understanding, I urge that the temptation to reverse any part of the legal burden of proof in prosecutions brought under the 1989 Act be resisted. If a person is to be branded and sanctioned as a racist, and is to suffer punishment as a result, it is imperative that the State has positively proven the central element of the allegation. It follows that the State must bear the full burden of proving the issue of hate. This may result in a low conviction rate, but this is also a price of a free society. The State should not interfere with individual liberty without having shown good cause according to rules published in advance, and this is even more important when dealing with an offence whose definition is inherently ambiguous. Furthermore, if reversing the burden under the 1989 Act is deemed appropriate, then why not extend this reversal to other offences that experience low conviction rates such as rape? Pretty soon, the presumption of innocence would be more honoured in the breach than in the observance.

For these reasons, I urge the government and the Oireachtas to defend our free society and the right of citizens to freely express opinions that underlies that society. The Prohibition of Incitement to Hatred Act 1989 should not be extended.

Professor Gerard Casey on the review of the Prohibition of Incitement to Hatred Act 1989

Part 1: Hate Speech

Before responding to the questions raised concerning the preliminary issues for discussion, here are some general considerations on the very idea of hate speech.

Incitement as a crime

The common law distinguishes three inchoate crimes—incitement, conspiracy and attempt. Attempt is clearly criminal; Conspiracy may be criminal if it is correctly judged to be the beginnings of a concerted action. On the other hand, it might be nothing more than reprehensible idle talk Incitement, however, is not substantively criminal at all, unless one's suggestions somehow have the magical quality of overbearing the autonomy of other human agents and forcing them to do things they wouldn't otherwise do.

Incitement is a 'go on' activity rather than a 'come on'. If I post a piece on Facebook saying, 'I think it would be a good idea to burn down Leinster House and others go ahead and burn it down, I'm not responsible for what they've done. I'm not a Svengali with the power to

overrule other people's wills. On the other hand, if my Facebook post reads: 'OK gang, let's go and burn down Leinster House. Meet outside Buswell's at 3.00 p.m. next Saturday. Bring torches and a plentiful supply of petrol. Bottles to make Molotov Cocktails will be provided,' this begins to look like a conspiracy shading over into the beginnings of attempt. There is no mechanical way to determine when such speech passes over into criminal action. The presumption should be that speech is not criminal unless the circumstances, as evaluated by the judgement of normal people, determine otherwise.

Whatever about the criminalisation of incitement to an action that is itself clearly criminal, such as arson or theft, the idea of making incitement to hatred a criminal offence is nonsensical. Hatred is an emotion or a psychological attitude and in neither case is it particularly attractive. Hatred is, and should be, the object of moral and spiritual evaluation and its expression controlled by social norms, but hate just by itself has never been and should not be a matter for the law. If I sit in my study hating all sort of people and objects and groups and actions with an all-encompassing and virulent hatred, I may thereby cause some moral or spiritual damage to myself but as long as I sit in my room and do not act on my hatreds no one else is harmed. Hate which expresses itself in speech or writing or by electronic means also does no harm to others unless it is a credible threat to their persons or property as it would be in the case of conspiracy or attempt.

A right not to be offended?

But it might be objected that we have the right not to be gratuitously offended. No, we don't! There is no such right. Who, after all, is to determine objectively what is and what isn't offensive? In a cohesive society, social conventions, manners and etiquette will generally do a reasonably good job in setting limits to the extent of offensive speech. In a society in the process of disintegration, law is dragged into the fray and the giving and taking of offence becomes a matter for determination by legislators who have no obvious qualifications for such determination.

It might be argued that people shouldn't make offensive comments and so it doesn't much matter if we have laws outlawing such comments! The shouldn't in 'people shouldn't make offensive comments' is moral but the outlawing is legal. I shouldn't swear or commit adultery

or drink to excess either but do we really want to make swearing or adultery or excessive drinking or whatever our current normative environment considers morally reprehensible to be punishable by law? Some people in some countries that are located in a galaxy not all that far, far away do in fact do this or want to do this but societies based on Western principles have to date been able to resist, at least partially, that siren call. In rejecting the idea that we have a right not to be offended, I do not deny that words can hurt. Who likes to be called by rude names? But however hurtful words may be, there is still a difference in kind, not just in degree, between hurtful words and a hurtful punch in the face.

What of free speech that isn't merely offensive but which is downright hateful? Shouldn't that be prohibited? No! Legal prohibition is not in order here either. Even if it is shown that certain forms of speech causes harm, that is not sufficient to justify prohibiting them. It all depends upon what you mean by harm. Some harm is entirely defensible, for example, taking the last cucumber sandwich (à la The Importance of Being Earnest) or getting a job which means that all the other candidates are harmed by your so doing (that is, they didn't get the job). On the other hand, some harms are not defensible, such as stabbing a rival football supporter to death because he disrespected your football team.

Counter-productivity of speech laws

The argument that speech laws can actually be counter-productive is made by Nadine Strossen who points out in her book Hate, Why We Should Resist It with Free Speech, not Censorship that hate-speech laws can end up targeting the very minority groups such laws purport to protect. 'In 2010,' she writes, 'Amnesty International and Reporters Without Borders complained that in Kyrgyzstan a prominent journalist who is a member of the Uzbek minority, and the Uzbek newspaper he edited, were baselessly charged with "inciting ethnic hatred" due to their reporting on conflicts between Uzbeks and the Majority Kyrgyz.' (Strossen 2018, 86) A knife will cut the hand of the guilty and the innocent alike.

One problem with criminalising hate speech is that in contemporary society what constitutes hatred is a moveable feast. What's hate speech to you may be someone else's genuine moral conviction. In April 2019, the Australian rugby player, Israel Folau, said in a social media post that gay people would go to hell if they didn't repent. Australia's opposition leader remarked.

'There is no freedom to perpetuate hateful speech,' and New Zealand's prime minister commented, somewhat more vaguely, '[Folau is] a person in a position of influence and I think that with that comes responsibility … I'm particularly mindful of young people who are members of our rainbow community, there is a lot of vulnerability there.' If Folau had posted that adulterers or drunkards would go to hell if they didn't repent, I wonder if Australia's opposition leader would have been moved to condemn this as hate speech, or New Zealand's prime minister to worry about vulnerable young members of the adulterers' or drunkards' community. Wait a minute! Folau did include adulterers and drunkards, as well as thieves, atheists, idolaters and liars in his list of those who are destined for hell unless they repent.

Here's what he wrote: "Warning. Drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists, idolaters. Hell awaits you. Repent! Only Jesus saves." I am waiting with bated breath to see a media backlash or the Twitter mob describing him as an adulterophobe or a drunkardophobe!

Why should it be assumed that what Folau wrote was, in fact, an example of hate speech? Perhaps it could better be taken as an example of love speech, a friendly and charitable warning addressed to those in moral or spiritual danger, much as one might warn those with a propensity for walking on cliff edges of the perils to life and limb that such an activity entails. One commentator remarked that there is, in fact, nothing necessarily hateful about Folau's tweet, remarking that 'Folau—however misguided—had the interests of homosexuals and atheists and others at heart. In his Christian world, he was trying to help them avoid the horrors of the eternal hellfire.'

If you can't express your biases or your hatreds or what others perceive as your biases or hatreds, then you've been pre-emptively gagged. You are at the mercy of those who get to determine what is and what isn't hate speech, where hate speech is simply whatever those who are given to censorship and have the power to censor find hateful! But speech which is merely offensive to certain individual groups should not be censored by legal means, and the very existence of hate-speech laws implicitly denies that there are ways, non-legal but effective ways, of regulating speech, insinuating that, without legal prohibition, there would

be no constraints on what can and cannot be said. But societies have always regulated speech, informally through social sanctions.

Free speech, if it is to be genuinely free, cannot just for the virtuous and the well-intentioned and the polite.

Response to the 4 questions:

1. Should the list of protected characteristics should be changed?

Yes: it should be restricted and eventually eliminated! In the UK, the Metropolitan Police these us that verbal abuse 'can be a common and extremely unpleasant experience for minority groups'. That is no doubt true, but would it not be an unpleasant experience for any group, even a non-minority group? What if you're white, male and heterosexual and someone, such as a radical feminist, abuses you verbally or calls you names because you are a white, male, heterosexual? Isn't that problematic at all? If not, why not? There is no principled reason to exclude any group that can be identified in any way. And when every possible identifiable group is included, such laws lose their point.

2. Should the use of the term 'hatred' be changed?

'Hatred' is already sufficiently nebulous but its replacement by 'hostility' or 'prejudice' would be even more substantially restrictive of free speech. Who is to say what is and what isn't hostility or prejudice?

3. Should changes be made to the legislation to take account of online communications?

No.

4. Is requiring intent too high a threshold to meet?

No. Any move in the direction of lessening the requirement of intention would be seriously retrograde.

Hate speech laws, however well-intentioned, are patronising and infantilising. They are essentially unfit for purpose in any society which purports to be liberal and to value free speech.

Part 2: Hate Crime

The invitation to make submissions on the topic of hate speech permits the inclusion of material relating to the conceptually distinct but related topic of hate crime.

What is hate crime?

Hate crime is an offence that would be an offence even without the hate—assault or vandalism, for example—but where the motivation for the offence is the hatred of a specific category of victim.

Why do we have hate crime laws?

Why did the category of hate crime spring into existence? Was it because there were large gaps in the criminal law that needed to be filled or was it that some of our more awful criminals couldn't otherwise be adequately punished? It must be conceded, I believe, that the notion of 'hate crime' is largely symbolic and is intended to send a message of support to the members of certain groups which, it is believed, are especially at risk from criminals. Reporting on CNN in October 2018, Eric Levenson asks why hate crimes matter and his answer to his own question is that 'The idea is to show the targeted community—people of that race, religion, disability, ethnicity, gender, sexual orientation or gender identity—that their lives and identities matter.' A hate crime is a crime committed against Tom, Dick or Harriet not in their capacities as individual human beings but as members or representatives of certain groups conceived to be specially-at-risk. Hate crime laws, then, in punishing the thoughts of criminals does so insofar as those thoughts are directed negatively (by means of hatred or prejudice) against certain identifiable groups and so such laws are a particularly insidious manifestation of identity politics.

In their excellent Criminal Law and Identity Politics (1998), James Jacobs and Kimberly Potter, having characterised hate crimes as an attempt to eliminate prejudice in society by the use of the criminal law, raise some significant points that must be seriously considered. First, how do we define the prejudices that the hate crime laws are intended to eliminate? Second, why these prejudices and not others? Why racism, for example, but not ageism or disabledism? Why not attempt to stamp out prejudice against people who speak with a Birmingham accent or people who have red hair or people who are politically conservative?
Since hate-crimes laws are directed at those who, by definition, are or are likely to be criminals, what reason have we, ask Jacobs & Potter, to think that they will be moved to become equal opportunity offenders by such laws? 'It would take some heroic assumptions,' they write, ' to believe that bigoted and anti-social criminals and potential criminals, if they are listening at all, will be any more responsive to this message than they have been to all the other threats and condemnations contained in criminal laws that they regularly ignore.' (Jacobs & Potter, 68)

Hate crimes, then, in addition to involving the criminalisation of thought, are essentially political in origin and in effect. They are demanded by a variety of victim groups for symbolic reasons (recognition of their special victim status and the pre-emptive repression of criticism) and for material reasons (allocation of funding and legal resources) and they are provided by politicians for, as one would expect, political reasons, not least among which is the attractive and cost-free benefit (cost-free to the politician if not to society at large) of signalling one's superior virtues.

The passing of hate crime laws tells the lobbyists for the various victim groups, that politicians are on their side. Jacobs and Potter go so far as to say the '...the primary purpose of hate crime laws is to bolster the morale and strategic position of certain identity groups, not to impose heavier sanctions on prejudiced offenders.' (Jacobs & Potter, 73-4) Just as the policy of affirmative action and gender-quotas paradoxically institutionalise and reinforce the very divisions in society that they are allegedly intended to eliminate, so too, hate crime laws implant considerations of race and sex and sexual orientation and religion firmly into the heart of public policy-making and law-making. That being so, it's not obvious that delineating

sections of the population as permanent victims who had a claim to special consideration and treatment will promote the idea that justice is and ought to be blind.

Jacobs and Potter conclude, 'The concepts of prejudice and bigotry are political to the core. Hate crime laws explicitly seek to punish people for having bigoted beliefs … It would appear that the only additional purpose in punishing more severely those who commit a bias crime is to provide extra punishment based on the offender's politically incorrect opinions and viewpoints.' (Jacobs & Potter, 127-8)

Do we need hate crime laws to prevent unique harms?

Perhaps it might be argued that the category of hate crime is justified because its object is not just the protection of the particular victim of a particular crime but the entire group of which the victim is somehow taken to be a representative. Expressing this point, the Oregon Supreme Court held that hate crime 'creates a harm to society distinct from and greater than the harm caused by the assault alone. Such crimes—because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a member—invite imitation, retaliation, and insecurity on the part of persons in the group to which the victim was perceived by the assailants to belong.' (cited in Jacobs & Potter, 86)

As should be immediately obvious, hate crimes are not unique in this respect. Burglaries in a given neighbourhood, for example, have been known to heighten fears among the adjacent non-burgled property owners that they may be in line for attack. To generalise the argument, it seems to depend upon the idea that hate crimes warrant more severe sentences than non-hate crimes because third-parties will be disturbed by them in some special way. But then the question arises: is the possibility the third parties will be disturbed by such crimes a justification for allocating stiffer sentences to them? Jacobs and Potter ask us to consider a case where a judge might enhance 'the punishment of a black defendant who robbed a white victim on the ground that fear of black robbers was creating deep anxiety and terror in the white community, leading to white flight from the city, and to the deterioration of the city's

tax base?' If you would not be prepared to countenance such a judicial sentencing practice in this case, on what grounds would you justify it were the races to be reversed?

In 2001, a bill was introduced in Portland, Oregon that called for an additional five years in prison for miscreants whose crime was motivated by hatred of people who subscribe to beliefs that support capitalism or those whose crime consisted of violently supporting the downgrading of the needs of human beings to protect the unspoiled nature of the environment. According to the local press, the target of the (admittedly) novel legislation were eco-terrorists and critics of capitalism. Senator Gary George who sponsored the bill may have had his tongue firmly in his cheek but his point is a serious one; why is a crime that is motivated by hatred of one set of aspects of human life to be punished with additional severity but not crimes that are motivated by hatred of other aspects of human life?

A basic question re motive and crime

Is a criminal's motive relevant to the determination of whether or not a crime has been committed? If it is not relevant to the determination of the crime, why should it relevant when it comes to the allocation of punishment? If I were to steal the Crown Jewels, my intention in so doing is to assume the rights of an owner with respect to that set of sparklers. My motive might be my own enrichment or it might be the endowment of a hospital in Africa for those suffering from some dreadful but curable disease. Similarly, Robin Hood's motive might have been the lightening of the burdens of the Nottinghamshire poor but his intention was to remove what he stole from the control of the Sheriff of Nottingham and assume control of it himself.

To those who argue that taking motivation into account is, or should be, irrelevant to determining the nature of a crime it might be responded—'well, mental elements are already relevant in, for example, homicide, to determine the difference between murder and manslaughter. To be convicted or murder, the accused must have intended to kill or cause serious harm to the victim. So there can't be any principled objection to including mental elements as part of a crime.' There is a significant difference, however. In murder, the relevant

mental element is the intention to kill or cause serious bodily harm. The motivation for that intention, also a mental element, whether hatred or greed or callousness, is irrelevant to the determination of the character of the crime. It may be relevant in helping to discover the criminal but that's a different matter. In hate crime, so-called, the intention is to cause harm of some kind to the victim. The motivation is for the harm inflicted on the victim is perceived to be hatred and, unlike the case of murder, is taken to be partially constitutive of the crime itself.

So, the pertinent mental element in crime should be the intention of the criminal, not his motive. If John Boyne Crippen killed Cora Crippen and intended to kill her or to cause her serious bodily harm, he is guilty of murder. If he did this out of hate or any other negative emotion, while that affects the moral dimension of his act, it doesn't affect its legal quality. It doesn't make it a 'hate crime', any more than if he did it from motives of greed, he would have committed a 'greed crime'.

	Hate Crime	Murder
Intention	to cause harm of some kind	to kill or cause serious bodily harm
Motivation	hatred—partially constitutive of the nature of the crime. Here, the *why* of the crime has become part of the *what* of the crime.	Hatred, greed—perhaps relevant to discovering the identity of the killer but irrelevant to determination of nature of the crime. What is relevant is *what* the killer intended to do, not *why* he intended to do it.

Motive may be understood as the psychological element that provides the explanatory context for the intention that is constitutive of the criminal act. Consider the following two cases. Suppose I want to be rich so that I can live a lavish lifestyle but, unfortunately, I have a rooted aversion to work and I chose the wrong parents (parents with no money). But there is

lots of money in my local bank so I carry out a robbery to get the money I want. On the other hand, suppose I am appalled by the ravages caused by disease in Africa, much of which could be alleviated by money. I have no money so I rob a bank to get the money to send to Africa. In both cases, the intention is to convert the assets of the bank to my own purposes, assuming the rights of an owner towards them. In both cases, I have engaged in an act of theft. But the motives of the two cases differ significantly and while this affects the moral character of the acts, it doesn't affect their legal character.

Part 3: Conclusion

Hateful thoughts are not crimes. Neither is hate speech. Hate action may be a crime but only if the action, whether accompanied by hate or not, is already a crime. Why a crime is committed may be relevant to its investigation and detection but it is irrelevant to whether or not a crime has been committed. If someone bashes me in the face because that's what he likes to do, that's a crime. If he does it because he hates his life, that's a crime. If he does it because he hates white people, that's a crime. It's not more or less a crime in one case than in the others. In every case, the crime consists of violating my bodily integrity—end of story, Similarly, if someone steals my mobile phone, that's theft. What difference does it make what the motivation of the thief was? What's relevant is that my mobile phone has been stolen. Or suppose that one man assaults a woman and another man assaults another woman and that the physical damage, duration of assault and so on in both cases are as nearly identical as makes no difference. But in one case, the assault is motivated by the assailant's desire to appropriate the woman's purse while in the other case, it's motivated by the assailant's misogynistic belief that women are inherently inferior being. To punish the second assailant more severely than the first is to punish him for his misogyny which, however much we might disapprove of it morally, is not in itself a criminal offence—at least, not yet.

Hate crime is thought crime.

Whatever fancy footsteps one dances around the legal issues raised by so-called hate crimes, it should be readily apparent that punishing <crime X + hate> by factor delta more severely than <crime X simpliciter> makes the hate in <crime X + hate> punishable by factor delta and, since hate is a psychological emotion or attitude, what the law is punishing by the extra weighting are the thoughts of the criminal. Hate crime is thought crime.


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