

WHY SHOULD THERE BE HATE CRIME LAWS

Abstract

Last few decades are characterized by a dramatic increase in awareness of states and international forums for the hate crimes and the need for a legal response. However, these developments are accompanied by fierce debates - in the legal academic circles and the public at large - whether hate crime laws are justified and necessary. This paper starts from the fact that hate crime laws are clearly justified, or that it is justified to punish hate and prejudice and focuses on the question whether it is necessary to do so. Or in the words of Frederick Lawrence, a state may do so - but should it? This paper will offer some new perspectives of arguments in favour of the hate crime legislation that allow us to say that the hate crime laws are not only justified but also essential. The methods used are mainly descriptive and interpretative method.

Key words: hate crimes, theory of punishment, expressive function of punishment

When considering the question of whether it is really worth of having hate crime laws, there are usually several different arguments that although deserve to be considered, ultimately fail to truly answer the question.

One of them is the argument that if hate crimes are not established as a separate category, they will not be treated accordingly. In addition to this statement, the usual passivity of the police and the rest of the criminal justice system in dealing with incidents motivated by bias are being highlighted.¹ According to this argument, the lack of prosecution and punishment of such cases is manifested in different ways. It is even possible the fact victim belongs to a stigmatized group (for example, the group is stereotyped as a group that is involved in crime) to affect the investigation so that the victim is perceived as in some way guilty for the crime.² The argument continues by analyzing the consequences that entails inaction of the authorities, particularly the poor investigation or the lack of it, the prosecution and the punishment of such incidents. Namely, it is pointed out that it requires a small number of such cases for affected communities to become disillusioned with the response of the officials carrying out the law.

They have been led to believe that their experience is not fully recognized by the state. In turn, this could encourage a belief among members of affected communities that hate crimes will go unpunished. It could shake confidence in the criminal justice system and thereby increase the social cracks.³ In contrast, the adoption and implementation of hate crimes legislation can significantly improve the criminal justice responses to these crimes. And the benefits are really great. Improved criminal justice responses increase the confidence of affected communities. This leads to sharing information and cooperation from the communities who are normally extremely

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¹ For a more detailed analysis of the passiveness of the police and the rest of the justice system in relation to such incidents in the UK see Paul Iganski *"Hate Crime" and the City* The Polity Press University of Bristol, Great Britain, 2008, pp 88-92

² *Hate Crime Laws: A Practical Guide*, OSCE Published by ODIHR Warsaw Poland 2009 p. 21.

³ Ibid, pp. 21-22.

suspicious towards the police. That, in turn, allows more investigations to be resolved, improves the relations between the police and the affected community, etc.

Although we can fully agree with the positive impact of hate crime laws described above, this argument still fails to respond to our question: Is it really worth of having hate crime laws? What makes this argument inadequate or wrong in this context?

The conclusion of the argument previously highlighted is that crimes motivated by prejudice should be treated by the criminal justice system as all other crimes, and not that these crimes should be treated separately as hate crimes. The justification for the adoption of special laws (and therefore higher penalties) for hate crimes because they are not sufficiently vigorously prosecuted or punished by the state authorities is constantly reminding us of the discharged option for proper handling of these crimes (even only as parallel crimes). More specifically, if these cases are carefully investigated and vigorously prosecuted like any other crime, then our concern would be satisfied without the need of adopting special hate crime laws. Indeed, if our argument for special legislation (and higher penalties) for hate crimes is based on the fact that these crimes are not sufficiently prosecuted, what will our excuse be in the case when they are?

One could argue that the adoption of special laws or regulations for hate crimes is perhaps the best or only way to improve the response or the reaction of the criminal justice system to these crimes. And Frederick Lawrence admits that this is a strong and clearly evident justification. However, the question "is it really worth" of having hate crime laws will have to start from the assumption that the criminal justice system (anyway) functions or it can be enabled to function.⁴

Another challenging answer to our question is that hate crime laws are valuable in order to get increased penalties for racially motivated violence. According to this argument, the investigation and the prosecution of hate crimes are not the only targets. Hate crimes demand not only punishment but also harsher punishment than the parallel crimes. However, as in the previous case, it is also possible here to achieve the goal without the need to adopt specific hate crime laws. Namely, the laws of the countries usually provide in the case of racial, ethnic or religious motivated violence, the officials to consider the motivation of the perpetrator in deciding whether to act on the case, and likewise the court to consider the motivation in determining the appropriate penalty. Accordingly, increased penalties for hate crimes exist, at least in theory, without the need for special hate crime laws.

Sometimes in response to the question whether it is worth having separate hate crime laws, the positive impact of the law making process is being noted. Specifically the impact the adoption of these laws can have on increasing awareness of the population on racial, ethnic or religious prejudice and hatred. This argument relies on the fact that ideally, legislation is being adopted after discussions by the legislature, the authorities enforcing the law and the society at large. This serves to focus attention and increase awareness of the breadth and nature of the offenses. Accordingly, the process of adoption of this legislation can improve awareness, and thus responses to cases of hate crimes.⁵

Again, as in previous cases, we will emphasize that this goal can be achieved without adopting special hate crime laws. There are many ways other than legal, which may and usually raise the awareness of the population to certain issues of social interest. And further, the raised awareness usually leads to a request for an appropriate legal answer, not vice versa. Sometimes,

⁴ Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, Cambridge, Massachusetts, 1999, p. 162.

⁵ *Hate Crime Laws: A Practical Guide*, OSCE, Published by ODIHR, Warsaw, Poland, 2009, p. 22.

in cases of raising the awareness of the population by the adoption of specific legislation, can prevail a wrong public impression that the legislation is adopted under pressure (international, of the current government, etc.) or as a part of the harmonization of the society with “the modern world trends”, and not because of the necessity of such legislation. Such impression, associated with the prevailing prejudices, could further reduce the population awareness on the evils of racial or ethnic prejudice and hatred. Although this can be counter-refuted, we just want to emphasize that the previous argument can be a double-edged sword. However, this brings us back to the question: Is it worth adopting hate crime laws?

In order to see whether, more exactly, why it really worth to have laws that clearly/deliberately punish racially motivated violence, we must go back to the general justification of punishment and to expand that discussion by reviewing the expressive value of the punishment. The expressive value of punishment is one that allows us to say that hate crime laws are not only justified but also essential.⁶

I. EXPRESSIVE FUNCTION OR VALUE OF THE PUNISHMENT

It is in the nature of criminal punishment to stigmatize. Criminal punishment carries with it social disapproval, anger and indignation. Number of authors writes about the expressive value of punishment. According to Henry Hart, the expressive value of punishment is the key to the distinction between the criminal and the civil: “What distinguishes a criminal from a civil sanction, and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition.”⁷ In “The Expressive Function of Punishment”, Joel Feinberg argues that a satisfactory definition of punishment must justify its expressive function.

He writes that punishment is a usual means of expressing the views of anger and indignation and the views of disapproval and condemnation of the authority who punishes or of those on whose behalf he punishes.⁸ Gary Melton and Michael Saks emphasize the symbolic value of the law, noting that it does not simply act as a “carrot or stick”.⁹ In addition, the law “teaches us the moral and social norms of the community and, in a sense publishes, repeats, and truly ritualizes the motives and themes of the culture”.¹⁰ According to Nigel Walker, the punishment of a crime actually announces that in a particular society such an act is not tolerated.¹¹ Through the expression of such condemnation, the punishment can in fact correct the cracks in the social fabric caused by the offender's act.

⁶ Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, Cambridge, Massachusetts, 1999, p. 163.

⁷ Henry M. Hart, Jr., “The Aims of the Criminal Law”, 23 *Journal of Law and Contemporary Problems*, 1958, p. 404, quoted in Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, Cambridge, Massachusetts, 1999, p. 163.

⁸ Joel Feinberg, “The Expressive Function of Punishment”, in: *Doing and Deserving: Essays in the Theory of Responsibility*, Princeton University Press, Princeton, New Jersey, 1970.

⁹ Gary B. Melton and Michael J. Saks, The Law as an Instrument of Socialization and Social Structure, in: Gary B. Melton (Ed.), *Nebraska Symposium on Motivation: Vol. 33. The Law as a Behavioral Instrument*, University of Nebraska, Lincoln, p. 235.

¹⁰ *Ibid.*, p. 251.

¹¹ Nigel Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice*, Rowman & Littlefield, Lanham, Maryland, 1980, p. 28.

Inspired by the expressive function of criminal law, which allows the society to express and strengthen its values; some authors go further and assume that the generally justifying goal of punishment is to give society its official statements on how the citizens should behave. These authors are representatives of the so-called *expressive* or *condemning theory of punishment*.

The expressive or condemning punishment theory draws its roots from the views of the great French sociologist Emille Durkheim. He is one of the first scientists to focus on the role of social condemnation in punishment. According to Durkheim, punishment is a social condemnation of certain behaviour and social cohesion emerges from the act of punishment. He emphasizes the positive role that punishment of crimes plays for the society. By condemning the offense and the perpetrator, the population strengthens its commitment to the fundamental values and norms of society. Thus, in his work "Division of Labor in Society", Durkheim rejects the utilitarian (conventionalist) justifications for punishment, noting that punishment does not serve to correct the perpetrator or frighten future perpetrators. According to Durkheim, the real function of the punishment is to maintain the cohesion of society unharmed by maintaining common consciousness. The criminal law is the expression of the "common consciousness" of the community. In fact, when a crime is committed, the shared expression of values in a society is violated. Accordingly, the punishment of the perpetrator is inevitable to point out that the general awareness of the community is unaltered and shared beliefs and values remain absolute. Without punishment, collective moral awareness cannot be sustained.¹²

Durkheim's expressive or condemning theory is subject to two basic lines of criticism: one based in sociology, the other in the theory of punishment.

The sociological critique of an expressive or condemning theory is focused on the link between the law and moral consensus. If we keep in mind that the criminal law, as well as the law in general, arises through social conflict, and not through the expression of universal social norms, then the condemnation theory loses much of its weight. The issue of the social value consensus is further complicated in modern multicultural societies. Increased diversity is inclined to make social cohesion more permeable. For example, contemporary debates about universalism of human rights and cultural relativism clearly depict such a complicated situation.

Although this criticism raises interesting and important questions, we will still have to insist that there is some universally shared morality, or rather an important social consensus that rests on criminal law. As Frederick Lawrence elaborates, this consensus becomes even greater if we seek the moral view of the community not in the support of specific crimes, or even in support of the principle of criminal law more widely, but in the belief in the rule of law in general.¹³

The second line of criticism focuses on understanding the punishment of the perpetrator exclusively as condemning the violation of social norms. The effect of condemnation, according to this criticism, can be achieved in many other ways. For example, an official announcement by the higher state officials in the country, public reading on the Main Square, etc., could also successfully fulfil this function. Consequently, the expression of judgment cannot itself be a

¹² Emille Durkheim, *Division of Labor in Society*, Free Press, New York, 1964. See also Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, Cambridge, Massachusetts, 1999, pp. 163-164.

¹³ Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, Cambridge, Massachusetts, 1999, p.165.

punishment theory. Such a theory ultimately always relies on some other justification of its validity, a justification which condemnation alone does not confer.¹⁴

Lawrence in this context refers to Nigel Walker's remark for whom the advocates of expressive or condemnatory theory are at the base either quasi-retributivists or crypto-consequentialists.¹⁵ They are quasi-retributivists because the convention of punishment as the means to denounce makes sense only when the defendant deserves to be punished. Punishment without desert would leave the denunciation meaningless. They are, on the other hand, crypto-consequentialists because they justify punishment by the social utility that it produces. Maybe in this case the utility comes in the form of social cohesion and not in the "classic" shape of crime reduction. But it is a utility calculus nonetheless.¹⁶

This critique seeks to show that the expressive punishment theory is not an independent theory or theory that can offer an independent justification of the punishment. Strong opponents of expressive theory remind us that even Joel Feinberg, whose writing about the expressive function of punishment is often quoted by contemporary expressivists, never accepted the expressive function as a justification for the punishment. Namely, he always considered that the expression of condemnation was at most, incidental function of punishment, and not part of what could be appropriately labelled as a punishment theory or theory justifying this institution.¹⁷

However, as Frederick Lawrence observes, "so long as expressive theory is not merely redundant with retributive or consequential arguments, it legitimately takes its place among these eclectic approaches".¹⁸ In other words, expressive punishment takes us beyond classic statements of the retributive and utilitarian theories of punishment. It builds on these theories and extends our understanding of punishment.

For example, the expressive punishment, the same as the retributive one, does require individual culpability and retributive desert. But, contrary to retributive theory that focuses only on the wrongdoer and either the debt that he owes to society or the punishment that society owes him, expressive theory goes further and looks to the societal aspects of this punishment.

Lawrence explains this through Kant's famous example of "the last execution of the people of the island". This example is typically taken as the paradigmatic expression of Kantian retributivism. What is this all about? On the last day before the island community "separate and scatter . . . throughout the world," it should execute its last imprisoned murderers. The conclusion to which this example should bring us is that punishment is necessary even in this case, when all the consequences become irrelevant. Kant justifies such a punishment "in order that everyone may realize the desert of [the murderers'] deeds."¹⁹ Further on, if members of the island community do not punish their killers, according to Kant, they can all be considered as participants in the killing as a public injury to justice. Joel Feinberg finds expressive aspects in

¹⁴ Ibid., p. 164.

¹⁵ Nigel Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice*, Rowman & Littlefield, Lanham, Maryland, 1980, p. vii. Quoted by Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, Cambridge, Massachusetts, 1999, p. 164.

¹⁶ Ibid., p. 165.

¹⁷ Heidi M. Hurd and Michael S. Moore, "Punishing Hatred and Prejudice", *Illinois Public Law and Legal Theory Research Papers Series*, Research Paper No. 03-17, November 18, 2003, p. 82.

¹⁸ Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, Cambridge, Massachusetts, 1999, p. 166.

¹⁹ Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Rights* (1796), Trans. William Hastie, Clark, Edinburgh, 1887, p. 198. Quoted in Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, Cambridge, Massachusetts, 1999, p. 166.

this formulation and sees the punishment here as more symbolic and expressive than retributive.²⁰

Expressive theory also has a consequentialist aspect. It understands the punishment as expressing an attitude about social values. Such annunciation of social values may look far from the classical utilitarian consequences that are reflected in the reduction of crime through disabling, intimidating or rehabilitating of the perpetrators and potential perpetrators.²¹ However, utilitarian considerations can be much wider. Utilitarian can assume that, for example, punishment will release vengeful emotions in a way that prevents some members of society from taking the law in their own hands; that it will educate the population on the principles of morality that protect the people from being hurt by others, etc. Thus, maintaining the sense of social cohesion through the continuous provision of the core of shared values is entirely in line with the utilitarian considerations of punishment.

It is important to emphasize that we do not see the expressive theory as self-assuring full justification of punishment, but rather as an opportunity to understand the full impact of punishment. In the following section expressive theory will help us understand why hate crime laws are necessary.

II. THE EXPRESSIVE VALUE OF PUNISHING HATE CRIMES

The expressive argument offered in support of the hate crime legislation is double. First, we see the crime as an expression of a message - the degradation of the victim and the group to which it belongs. As Dan Kahan writes: On expressive grounds, serious crimes strike us as such – that is, as *crimes* and as *serious* – not just because they impair another's interests but because they convey that the wrongdoer doesn't respect the true value of things."²² In this sense, hate crimes are symbolic. The messages of the swastika or the burning cross are clear: "You are not desired here. You are not valuable human beings. We are powerful and you need to be afraid. Do not show yourself or you will be hurt".²³ Second, we are to view criminal punishment as expressing another message, namely, a message disapproving and denouncing the message sent by the criminal. Or, as Kahan explains: "To express condemnation, then, society must respond with a form of punishment that unequivocally evinces the community's repudiation of the wrongdoer's valuations".²⁴ Hate crime laws provide such a counter-narrative. Thus, according to the expressive theory, both crime and punishment are seen as communicative exercises. The perpetrator opens the conversation with his crime, declaring that he does not value the victim and those like her - as persons. Society, by penalizing him, answers back that not valuating such persons is wrong.²⁵

²⁰ Joel Feinberg, The expressive function of punishment, in: *Doing and Deserving: Essays in the Theory of Responsibility*, Princeton University Press, Princeton, New Jersey, 1970, pp. 103-104.

²¹ Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, Cambridge, Massachusetts, 1999, p. 166.

²² Dan M. Kahan, "The Anatomy of Disgust in Criminal Law", *Mich. Law Review* 96, 1998, p. 1621, 1641.

²³ Phyllis B. Gerstenfeld, *Hate Crimes: Causes, Controls, and Controversies*, 2nd edition, Sage, Thousand Oaks, California, 2011, p. 26.

²⁴ Dan M. Kahan, "The Anatomy of Disgust in Criminal Law", *Mich. Law Review* 96, 1998, p. 1621, 1641.

²⁵ Heidi M. Hurd and Michael S. Moore, "Punishing Hatred and Prejudice", Illinois Public Law and Legal Theory Research Papers Series, Research Paper No. 03-17, November 18, 2003, p. 49.

So, the expressive value of the law is used to show the society's refusal of hate crimes. Hate crime laws in this sense are seen as a powerful expression of the condemnation of society of these crimes as crimes that deserve a particular reproach.

Many authors have noted the expressive value of hate crimes legislation. Weisburd and Levin write about the powerful signalling effect contained in the hate crimes legislation. According to them, the existence of hate crimes laws sends a clear message that discriminatory motivation for a crime is an evil that society will not tolerate.²⁶ Sarah Sun Beale also writes about the strong social condemnation of hate crimes that hate crimes legislation expresses. Such condemnation, Beale continues, imposes a general affirmation of the social value of the target groups and recognition of their legitimate place in society. In this way, hate crimes legislation leads to strengthening the commitment of community to the equality among all citizens.²⁷ The declaratory or expressive role of hate crimes laws is neatly articulated by Derek McGhee, according to whom this legislation plays a symbolic role in its attempt to modify or correct unwanted behaviour in society, both in the name of greater protection of target groups, and in the name of protecting the wider society from the negative impacts of hate incidents.²⁸ By highlighting the expressive value of such laws, McGhee points out to the higher penalties they impose on perpetrators of hate crimes as also an important way of denoting society's condemnation of such acts.

Thus, bearing in mind the expressive value of punishing hate crimes, let's try to sum up what actually happens when the law on hate crimes is passed.

This act of a law creation is a social condemnation of racism, religious and ethnic intolerance, and all those other forms of intolerance that the law encompasses. Additionally, this act of condemnation is at the same time an act that expresses value. Namely, punishment not only shows the boundary between the permitted and the banned, but at the same time announces what is being condemned and what is being embraced. Values that are in this respect widely accepted in hate crimes laws are equality and respect for cultural differences. Hate crimes laws send a message that equality and respect for cultural differences are among the highest values in modern societies. Or, conversely, because ethnic tolerance and equality are so highly valued, the crimes that violate these values should be punished and must be punished separately as hate crimes. Also, hate crimes must be punished more severely than otherwise similar acts that do not harm these values.

As the adoption of special hate crimes laws (by which these acts are penalized more severely) expresses a certain attitude of the society, the same is being done by the non-adoption of such legislation. In the former case a message from the legislation is also being expressed. It is the message that equality and respect for diversity are not among the highest values in the society. As Lawrence explains, it is impossible for the choices of punishment or impunity made by society not to express social values. "There is no neutral position, no neutral ground."²⁹ Every choice gives a statement with certain value content. The legislation adopting hate crime law condemns racial hatred, and the legislation not doing so gives the racists comfort. By the fact that the hate crime is punished identically with the parallel crime, the motivation of prejudice is made

²⁶ Bennett Weisburd and Brian Levin, "On the Basis of Sex: Recognizing Gender-Based Bias Crime", *Stanford Law & Policy Review* 5, 1994, p. 27.

²⁷ Sara Sun Beale, "Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?", *Boston University Law Review*, 80, 2000, p. 1254.

²⁸ Derek McGhee, *Intolerant Britain?: Hate, Citizenship and Difference*, Open University Press, Maidenhead, 2005, p. 29.

²⁹ *Ibid.*, p. 168.

irrelevant. It is not part of what is condemned. Thus, the individual victim, the target community and the society as a whole suffer from double: "Not only did the hate crime appear, but the hatred that lies under such crime is invisible to the eyes of the justice system".³⁰

And the underlying sentiments are not at all benign. In this sense hate crimes illuminate a semi-collective sentiment. The specific prejudices involved in hate crimes are related to a genuine, prolonged history of oppression and inequality, resulting in gross injustices over the groups to which the victims belong. And these injustices and all their consequences persist in many different ways, in our case through the crimes of hatred.

Hence, the punishment of hate crimes is necessary for the full expression of the commitment of society to equality as its supreme value - equal care and respect for all people, which also implies respect for their (ethnic, racial, cultural) diversity.

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Violence motivated by ethnic hatred or prejudice is different from other forms of violence. The acts of hatred, compared to the parallel crimes, appear to be worse. "They are worse in a way that is relevant to setting a framework for criminal punishment".³¹ The unique harm, caused by hate crimes, not only justifies but also demands their increased punishment.

It is clear that punishing hate crimes will not end impatience in society.³² This big goal requires activity both of the criminal justice system and of all aspects of civil life, both public and private. But our inability to solve the whole problem (if at all possible) should not deter us from the intention to deal with parts of the problem. Criminal punishment is a really rough tool and a cruel instrument. But again, we are settling a time and a world that continues to suffer from prejudice and intolerance towards cultural diversity. In addition to the historically drawn lines of division, the "added multiculturalism" of contemporary societies has repeatedly triggered new cultural divisions and prejudices. The close placement of cultures in contemporary plural societies is constantly tempting citizens' tolerance and puts society at a constant risk of more or less violent eruptions of prejudices (hate crimes). The laws envisioning hate crimes are in this regard only one way of action and perhaps the most severe way, but "they constitute a critical element in defending the right to be equal or different".³³

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³⁰ Ibid., p. 169.

³¹ Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, Cambridge, Massachusetts, 1999, p. 175.

³² In this sense, hate crimes laws are often attacked as ineffective dealing with the problem. It is pointed out that these laws can replace the true "institutional building" in the field of community relations. Politicians can get rid of responsibility more easily. Throwing laws over the problem does not cost money and does not require genuine political energy. James B. Jacobs and Kimberly Potter, *Hate Crimes, Criminal Law & Identity Politics*, Oxford University Press, Oxford, 1998, p. 91.

³³ See also Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, Cambridge, Massachusetts, 1999, p. 175.

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