Hate Crimes: Crimes of Motive, Character, or Group Terror?

Paul H. Robinson

University of Pennsylvania Law School, phr@law.upenn.edu

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HATE CRIMES: CRIMES OF MOTIVE, CHARACTER, OR GROUP TERROR?

PAUL H. ROBINSON

ABSTRACT

The primary objection of traditional criminal law theory to hate crimes is use of the actor’s “motive” in defining the offense or the penalty enhancement. Motive, it is said, ought not be, and generally is not held to be, relevant to criminal liability. Hate crimes violate this rule by taking account of the actor’s motive—his or her anti-race, anti-religion, anti-sexual-preference, or other anti-group motive.

I will argue that motive ought to be and commonly is, notwithstanding the claims to the contrary, an element in determining liability or grade of offense. What is objectionable, and what generally has been prohibited, is use of an actor’s character or general set of values as an element of liability or grading; but motive is not character. By keeping the law’s focus only upon the character attributes relevant to the conduct constituting the offense, motive in fact serves a useful role in reducing the temptation of liability inquiries to stray towards punishing general character.

While reliance upon motive may be consistent with traditional criminal law theory, it does not follow that motive is necessarily the best criterion for defining the harms and evils that hate crimes seek to punish. Using an actor’s bigoted motivation as a defining characteristic creates special difficulties in implementation and application, as well as dangers of infringing constitutionally protected speech or expressive conduct. One might conclude that, while traditional notions of criminal law theory would permit its use, hate motivation is best avoided as an offense or grading element, in favor of more objective factors present in such offenses. A promising alternative is the criminalization of conduct that is intended to cause (or risk) intimidation or terror of an identifiable group. That alternative avoids the possibility of First Amendment problems and is consistent with mainstream criminal law theory by punishing an actor according to the extent of the harm caused, risked, or intended.
INTRODUCTION

In an effort to condemn and deter crimes motivated by hatred and bigotry, many states have enacted new crimes or sentencing enhancements that punish such crimes. Hate motivation for committing the crime may not always be an explicit element; the most common formulation, following the Anti-Defamation League ("ADL") model statute, punishes selection of a victim "by reason of the actual or perceived race, color, religion, national origin, or sexual orientation" of the victim.¹

Even in this form, however, the offense punishes or enhances punishment for the actor's motivation in selecting the victim—"by reason of. . . ." Both formulations raise the question of whether reliance upon an actor's motivation is appropriate in the definition of a criminal offense.

I

MOTIVATION AS AN ELEMENT OF LIABILITY OR GRADING

A common claim is that motive is not, and ought not be, relevant to criminal liability or grading.² The law cares about intention, not motive. But that does not seem consistent with existing criminal law. "Motive" has this dictionary definition: "something (as a need or desire) that causes a person to act."³ There is no reason to think that treatise writers or criminal code drafters would give it a different meaning. Yet criminal law is full of offenses that have as elements a particular reason for acting, a need or desire that causes the person to act. Publicly exposing one's genitals with the purpose of gratifying one's sexual desire is indecent exposure; breaking into a house with the purpose of committing a crime therein is burglary; killing another for payment frequently is an aggravated form of murder.⁴ Indeed, every time an offense definition contains the phrase "with the purpose to . . . ," the law takes

². See, e.g., George Fletcher, Rethinking Criminal Law 463 (1978); Jerome Hall, General Principles of Criminal Law 98-99 (2d ed. 1947).
³. Webster's Seventh New Collegiate Dictionary 553 (1965). Specialized literatures might give it a special meaning, of course.
⁴. Most jurisdictions treat this not as an offense element, but as a factor relevant to grading, as in the Model Penal Code's use of "for pecuniary gain" as an aggravating factor in considering imposition of the death penalty. Model Penal Code § 210.6(3)(g) (1985).
as an offense element the actor’s motive, the cause of his or her act.

It is the nature of human conduct that nearly every action is performed for a purpose. In nearly every instance there is “something that causes a person to act”: to steal the television in the house broken into, to gain sexual gratification by “flashing” another, or to earn the money offered for the killing. And these causes of action—these purposes, motives—often are relevant to determining how blameworthy an actor is for the action. I will leave it to the philosophers to develop a theory as to which motives ought to be relevant to criminal liability and which ought not, but I can give some examples. It commonly would be judged less blameworthy to break into a house for a place to sleep than to steal the television; less blameworthy to “flash” another in order to change one’s clothes conveniently than to gain sexual satisfaction; and less blameworthy to kill out of jealousy than for a fee.

Some motives can reduce an actor’s blameworthiness. If an actor breaks into a mountain cabin to steal food to save his family from starving until rescuers find them, the reason for acting undercuts the actor’s blameworthiness. Good motive frequently will give rise either to a justification defense or to an excuse defense for a mistake as to justification.

Not all motives are relevant to liability. Every intentional killing may have a motivational cause, and most are to be condemned. But some motives may not significantly increase or decrease an actor’s blameworthiness from that for the typical intentional killing. Killing out of jealousy, revenge, or anger might all be equally condemnable, but none are likely to be as condemnable as killing for a fee.

An actor’s motive, such as wanting to steal the television, may tell us that the actor desires to cause harm beyond that already caused, adding a ground for added inchoate liability. The motivation may make the act itself seem particularly more offensive to us, as in killing for a fee, perhaps because it reveals the act to be more calculated than we might otherwise have thought.

The actor’s motive also may tell us something about the actor’s general character. The motive to steal may suggest greed; the killing for a fee may suggest an extreme indifference to the value of human life. It is not that the law punishes an actor for his or her greed or indifference but, when such aspects of character are exercised in performance of the offense conduct, they may alter our assessment of the blameworthiness of the actor for that conduct.
To summarize, motive—the cause of an action—frequently is an element of liability and grading, and no apparent reason exists why it should not be that way. It should alter liability if and only if it alters an actor’s blameworthiness for the prohibited act. Some motives alter our judgments of blameworthiness, others do not; distinguishing between the two is the challenge put to criminal code drafters.

Some people might argue that use of motive is unobjectionable if the motive is to cause an external result. This kind of motive might even be called an intention. The purpose or motive (or intention) of the actor’s conduct is to bring about an external consequence: to obtain the television or to obtain the fee for the killing. More problematic, they might argue, is motive that satisfies an internal emotion. I kill my neighbor not because it will bring about a desirable external consequence—for instance, he will stop attracting my spouse’s attention—but because it will bring some purely internal satisfaction: revenge for the role he played in causing my spouse to leave me long ago. Should the criminal law be more suspicious of using such internal-satisfaction motives than external-consequence motives?

This is a question of some importance in the matter of hate crimes because some actors may commit such offenses not for the harm that they cause to the hated group—e.g., intimidating others who identify with the victim—but rather for the internal satisfaction that it brings, the satisfaction of their hatred.

However, the distinction between internal and external goals seems tenuous. When the flasher exposes himself, his motive is, as the offense details, to satisfy his sexual desire—an internal satisfaction, not an external consequence. His motive is key to defining the offense, for it excludes from liability the person who “flashes” another not to gain sexual satisfaction but simply because they are late to a meeting that requires a change of clothes. There seems little reason to claim that because the motive is an internal one, sexual satisfaction, it is an inappropriate element of liability. One may wish to dispute whether one internal motive or another increases (or decreases) an actor’s blameworthiness; some will while others will not. It would be odd, though, to insist that the criminal law can never take account of an internal motive.

Even where the immediate motive is to cause an external consequence, the desire for that external consequence may stem

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5. For a discussion of the distinction, see Glanville Williams, Criminal Law: The General Part 48 (2d ed. 1961).
from the wish to satisfy an internal desire. The killer for a fee may want the money not to provide worldly comforts (he never spends it); rather, earning the fee in this way gives him a sense of self-importance and power. Does it matter to us that his motive is such internal satisfaction rather than to acquire external comforts? Killing for a fee is particularly repugnant no matter which motivation, internal or external, is dominant. Indeed, most of the cause-and-effect chains of motive and action ultimately lead to satisfaction of an internal desire. The person who breaks into the cabin to feed his family has their safety as his immediate concern, but why? Perhaps because it makes him feel good to protect his loved ones. Should this internal satisfaction disqualify his motive as worthy of a mitigation or defense?

II
MOTIVE AS A SUBSTITUTE FOR CHARACTER

Rather than leading the criminal law into questionable territory, motive can be a useful device in keeping the criminal law from expanding into such territory, as in imposing liability because of an actor's character. (By character, I mean an actor's personal predisposition toward certain kinds of conduct or beliefs: honesty, dishonesty, bigotry, tolerance, generosity, stinginess. Each says something about a person's internal decision-making and suggests how the person is predisposed to act in the future.)

One could conceive of a world where greed or indifference to the value of human life, or other traits of bad character, were themselves grounds for criminal liability and punishment. These are traits to be condemned. Bad character shows both a moral shortcoming in itself and a predisposition toward future antisocial conduct. Why wait until the bad character expresses itself in a burglary or killing? Why not allow proof of bad character itself to be adequate to bring to bear the law's power to punish the "offender" and protect the public?

It may be that some of this kind of thinking lies behind the current popularity of hate crimes. Racial, religious, or sexual bigotry shows bad character that deserves punishment. Such character is a form of moral depravity in itself and calls for condemnation by the criminal law. If we can identify the hate-mongers in our society, we can punish them and, in the process, publicly reaffirm society's commitment to the virtues of tolerance.

But this is where traditional criminal law theory would have some difficulty. We do not criminalize or punish bad character, of
course; the criminal law is reserved for condemning past antisocial conduct for which the actor is to blame. A person's character may be an adequate ground for heaven-and-hell judgments by religion, but the criminal law restricts itself to punishing at most expressions of character through action.

Sometimes thought of as the act requirement, this basic principle has several justifications. First, the legal process has a limited ability to know character except through action. A greedy and indifferent person may successfully hide behind lawful acts his or her entire life. Second, all except the determinists believe that a person has the power to choose how he or she will act at any given moment, no matter what his or her character may be. A greedy or indifferent person may successfully bring himself to overcome that predisposition and to lead a lawful life. And, finally, few people have a character that is all good or all bad. Even the leader of the Ku Klux Klan might contribute his kidney to save his daughter. How is the law to punish a person who is good in some respects and bad in others? How could the law hope to balance a person's good traits against the bad?

By waiting for action, the criminal law hopes that in each of life's decisions an actor may choose to do something different than that toward which bad character predisposes. By waiting for action, the law justifies punishment upon the actor's choice not to act differently than his or her bad character predisposes. That is, the criminal law waits to see how, and if, a person's bad character will be exercised in bad conduct.

The conduct may tell us something about the actor and the choice that he or she has made. To the extent that the circumstances tell us something relevant to blameworthiness, we take account of that in assessing liability and grade. The motives for breaking and entering (to steal the television), or for killing (to earn a fee), or for flashing (to get sexual satisfaction), do tell us something relevant. By taking account of these motives, the law takes account of character in the only way that it properly can if it is to maintain its focus upon action.

This suggests that taking account of motive is consistent with the criminal law's requirement that liability wait for conduct. But my claim is something more: that the use of motive is an important mechanism for keeping criminal law within the boundary of action and out of the zone of liability for bad character. Imagine a world where motive for conduct could not be considered by the criminal law, where only the action itself could be used as grounds for liability. (Assume the actor's state of mind as to that
present action could be taken into account, whether his action was intentional or accidental.) This would, I predict, be seen as a sterile creation that was blind to much of what ought to be relevant to liability and punishment. And, with diminishing credibility in making accurate blameworthiness judgments, such a system would be discarded in favor of something that did take account of more relevant facts. If motive were not allowed, then the danger arises that bad character itself would be used.

We see this tendency today, as the criminal law substitutes predictions of future dangerousness (a claim about the defendant’s character) in place of facts that assess the actor’s degree of blameworthiness for past conduct. Dangerousness is the rationale and the criterion for special extended terms of incarceration for habitual offenders. Under such provisions, an offender may be sentenced to life imprisonment for obtaining $120.75 by false pretenses—for example, upon a showing that he committed two previous felonies related to credit card and check fraud. Some jurisdictions use dangerousness as the primary criterion for deciding whether consecutive sentences should be imposed for multiple offenses. A consecutive sentence should be imposed “after a finding by the trial judge that confinement for such a term is necessary in order to protect the public from further criminal conduct by the defendant.” Dangerousness similarly is the rationale and the criterion for extended terms for several classes of offenders, such as those determined to be “sexually dangerous persons.” Under one of these statutes, for example, a sex offender


7. Such sentencing was upheld as constitutional in Rummel v. Estelle, 445 U.S. 263 (1980).

8. Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976) (citing Sentencing Alternatives and Procedures, § 3.4(b)(IV), American Bar Association Project on Standards for Criminal Justice (1968)).

is committed to an indeterminate term, from one day to life imprisonment, upon a finding that he "constitutes a threat of bodily harm to members of the public."\(^\text{10}\) The release decision for such offenders similarly is keyed to the dangerousness of the offender.\(^\text{11}\) Indeed, some jurisdictions allow extended terms for nearly any serious felony where the offender is found to be dangerous.\(^\text{12}\) And many jurisdictions have their parole commissions make release decisions for all offenses by assessing *inter alia* the dangerousness of the offender. Typically, an offender may be released only if such action "will not increase the likelihood of harm to the public."\(^\text{13}\)

The virtue of taking account of motive is that it helps focus the inquiry on the actor's past conduct. It allows the law to consider character-related issues as they concern the actor's blameworthiness for his or her action—Was this act committed out of greed? Does this conduct reflect an indifference to the value of human life?—without allowing the law to slide into an explicit inquiry into the actor's character, apart from what is reflected in his or her act (such as his potential for future crimes).\(^\text{14}\) Note that the instances of dangerousness affecting punishment listed above

\(^\text{11}\) The Board is authorized to release a person, "if the board deems it in the best interests of that person and the public and that the person, if at large, would not constitute a threat of bodily harm to members of the public." Colo. Rev. Stat. § 16-13-216(5) (1992).
\(^\text{13}\) Tex. Crim. Proc. Code Ann., art. 42.18, § 8(a) (West 1993). See also Alaska Stat. § 33.16.100 (1986); Ark. Code Ann. § 16-93-701 (Michie 1987) (release when there is a reasonable probability that the prisoner can be released without detriment to the community); Colo. Rev. Stat. § 17-22.5-404 (1992) (the board shall first consider the risk of violence to the public in every release decision it makes); Del. Code Ann. tit. 11, § 4347 (1987) (a parole shall be ordered only in the best interest of society); Fla. Stat. Ann. § 947.18 (West 1985) (no person shall be placed on parole until and unless the commission finds that there is a reasonable probability that, if he is placed on parole, his release will be compatible with his own welfare and the welfare of society); Ky. Rev. Stat. Ann. § 439.340 (Michie/Bobbs-Merrill 1985) (a parole shall be ordered only for the best interest of society); Mo. Ann. Stat. § 217-690 (Verno 1983) (when, in the board's opinion, there is a reasonable probability that an offender can be released without detriment to the community, the board may in its discretion release or parole such person); Mont. Code Ann. § 46-23-201(1) (1992) ("reasonable probability that the prisoner can be released without detriment to...the community").
\(^\text{14}\) It is not my view that dangerous persons ought to be free from incapacitation. On the contrary, any viable society must protect itself from dangerous persons in some way. My view is, rather, that dangerousness of future criminality ought to be dealt with through civil rather than criminal commitment. See
typically exist in the less public aspects of the criminal justice system, sentencing and parole. Few, if any, offenses are defined to make future dangerousness an element.

III

PROBLEMS IN IMPLEMENTING HATE-MOTIVATION OffENSES AND THE ALTERNATIVE APPROACH OF CRIMES OF GROUP TERROR

While use of motive jibes with traditional criminal law theory, it does not follow that hate-motive is the best means of defining crimes of this sort. Some writers have pointed out the potential dangers of infringing protected speech in violation of the First Amendment.\(^\text{15}\) Even if one concludes that some hate-motivation formulations might not violate the First Amendment, it is hard to feel good about coming so close to the line.

Other scholars have suggested serious problems in the drafting and application of hate-motivation offenses.\(^\text{16}\) How can we tell when an offense was in fact motivated by hatred? Even if we can show hate motivation, how can we tell whether the hatred is for the group or for this person in particular, or some combination of the two? (Presumably, the hatred must be for a characteristic of the victim that the victim shares with a group.) If some combination of hatred for the group and the individual is requisite, what proportion of the hate motivation must be hate for the group rather than the individual? Which characteristics—that is, which groups—are to be covered by the offense? How are these groups to be defined? (What is a “religion” for the purposes of

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an offense motivated by hate of the victim's religion? Are some sexual offenses necessarily hate crimes against women?) Would it be less objectionable to commit a crime against a member of one group than against the member of another group, if both crimes were motivated by a hatred for the respective groups? On what grounds could we punish hate motivation against some groups but not others? Is there liability if the offense is motivated by a hatred for conservatives? Oil executives? Abortionists? Americans? The subjectivity of the judgment, the difficulty of proof, and the complexity in identifying the victim groups to be recognized, make laws regarding hate-motivation offenses difficult to draft and apply.

A different approach to criminalizing much of the conduct now sought to be covered by hate-motivation crimes is to focus upon the greater harm caused and intended by such conduct, than would occur in an analogous offense without the hate-motivation. Spray-painting a swastika on a synagogue simply is not the same as spray-painting a gang's name on vacant buildings on its turf. Both are forms of visual pollution and property damage that may offend us, but the former also can hurt and intimidate, in a very real way, all of the members of that synagogue and, less directly, all Jews who see or hear about it. A greater harm to a greater number of people can result, and frequently is intended, where the conduct seeks to intimidate or emotionally injure an identifiable group, than in instances where the same conduct does not target a particular group.

The cross-burning on an African-American family's front yard is more harmful and therefore deserves greater punishment than a similar size fire in a different context without the hate message. All crime, especially public crime, can hurt and intimidate each of us; however, the other African-American families in the neighborhood and, to a lesser extent, other blacks who hear of the incident can be hurt and intimidated by the burning more than they or we are hurt or intimidated by a non-hate-message burning. This, of course, is frequently exactly what the offender hopes and desires. He or she seeks to send a message of hate and an implicit threat to both the immediate victims and to others of the same group. By focusing on the additional harms as the basis for greater liability, we avoid the hate-motivation application problems as well as the potential First Amendment issues.

Taking account of such secondary harms in criminalizing and grading conduct is not new. Provisions like Model Penal Code section 250.9, for example, criminalize the desecration of vener-
ated objects precisely because of the potential for greater harm that such conduct brings. (Consistent with this, the Code classes the offense as one against public order and decency rather than as an offense against property.)

The challenge is to draft a statute that will encompass the variety of things that people can do to intimidate and emotionally injure a group by victimizing one person on the present occasion. Perhaps something along the following lines would be a starting point:

_Causing or Risking Group Intimidation or Terror._ Any person who commits an offense and, by such conduct, purposely or recklessly causes or hopes to cause intimidation or terror in a group of persons who identify with the victim [through race, religion, gender, or sexual preference], shall be liable for an offense under this section. If the person purposely causes or hopes to cause such intimidation or terror, the offense is a [fourth degree felony]. If the person recklessly causes such intimidation or terror, the offense is a [second degree misdemeanor].

Note that liability could be available under this section even if the group were not in fact intimidated or terrorized. Because the provision is drafted as a separate offense, an actor can be held liable for an unsuccessful attempt to commit the offense.

There remains the question of how broadly to define the groups whose intimidation may trigger the offense. Given the soundness of the underlying theory—greater harm deserves greater liability—one could have the offense apply to any crime that intimidates any larger group, as the draft statute does. In practice, the offense would still be used primarily against those who seek to intimidate or terrorize the groups that historically have been victimized in this way. In this form, however, the offense also could be used to give added punishment for efforts to intimidate or terrorize any group. For example, it could be used against persons who assault attendees at a pro-choice (or pro-life) convention in an effort to intimidate or terrorize others at the convention. On the other hand, if the point of the legislation is to

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17. Offense grades are included not to propose the particular grades; different statutory grades have different meanings in different jurisdictions. The point, rather, is to show that purpose and recklessness as to causing intimidation or terror in the group might be graded differently.

18. There may be disagreement over whether the reckless form of the offense can be punished under an attempt statute. See Paul H. Robinson, A Functional Analysis of Criminal Law, 88 Nw. U. L. Rev. — (forthcoming 1994).
make a special, symbolic statement in favor of tolerance for diversity along particular lines—race, religion, sexual preference, to name a few—then more limited application may be preferred. Nevertheless, this may still raise the choice-of-group problems inherent in the application of hate-motivation statutes noted above.