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CONDEMNING THE RACIST PERSONALITY: WHY THE CRITICS OF HATE CRIMES LEGISLATION ARE WRONG

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INTRODUCTION

Hate crimes legislation enhances the punishment for an ordinary crime, or creates a new substantive crime, if the offender is motivated by certain prejudices, such as racism or anti-Semitism.[1] For example,

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[1] *See* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 6, 29, 33 (1998). Examples of punishment-enhancement statutes include Montana and Alabama. In Montana, a person found guilty of *any* offense committed because of the victim's race, creed, religion, color, or similar enumerated motivations may be sentenced to between two and ten years imprisonment *in addition* to the punishment provided for the commission of the underlying offense. *See* MONT. CODE ANN. § 45-5-222 (1997). Alabama, by contrast, creates a mandatory minimum sentence for violent crimes stemming from designated biases. *See* ALA. CODE § 13A-5-13 (1998). The Anti-Defamation League ("ADL") model "intimidation" and "institutional vandalism" statutes are the paradigm examples of the new substantive offense approach to hate crimes. JACOBS & POTTER, *supra*, at 33. "Intimidation" is defined as committing trepass, criminal mischief, harassment, menancing, assault, or other "appropriate statutorily proscribed criminal conduct" (to be specified by the individual state) if done by reason of the actual or perceived race, color, religion, national origin, or sexual orientation of another individual or group of individuals. *Id.* Intimidation is defined to be one degree more serious a crime than the underlying offense. The crime of "institutional vandalism" is committed by knowingly vandalizing any church, synagogue, cemetary, school, or similar listed structures or adjacent grounds belonging to religious groups. *Id.* at 34–35. Montana actually uses both approaches—an ADL-modeled intimidation statute and punishment-enhancement for all other bias crimes. *See* MONT. CODE ANN. § 45-4-221.

The term "hate crime" is a shorthand for a criminal offense motivated by antipathy toward a racial or ethnic group or an individual because of his membership in that group. *See* FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 9 (1999). There are two broad categories of hate crimes legislation: the "discriminatory selection model" and the "racial animus model." *Id.* at 29–30. Under the discriminatory selection model, what matters is that an offender selected his victim based on the victim's race, gender, or ethnic group. *Id.* at 30. *Why* he chose this method of selection is irrelevant. *Id.* Under the racial animus model, by contrast, the offender's negative opinion toward the victim's group must be a central motivator for the crime. *See id.* at 30, 35.

the maximum sentence imposed on an assailant motivated by hatred for African Americans would be greater than one motivated by a nasty temper. Despite its enactment in numerous jurisdictions,[2] hate crimes legislation has recently come under attack.[3]

Among the bases of attack, four are of particular interest to me. First, critics of hate crimes legislation argue that hate crimes are no more morally reprehensible than similar crimes motivated by greed, power, lust, spite or pure sadism:

> A con artist may defraud widows out of their life savings in order to lead a life of luxury. An ideologue may assassinate a political leader in order to dramatize his cause or to coerce decision makers into changing national policy. Are these criminals less morally reprehensible than a gay basher or a black rioter who beats an Asian store owner? Of course not. As the legal philosopher Jeffrie Murphy has commented:

The racial animus model presents the clearest case for strong condemnation. For example, a purse snatcher who selects women victims because he thinks it easier to snatch their purses than to pick men's wallets from male pockets acts without anti-woman motivation. Greed, not gender-antipathy, explains why he selects his particular victims. *See id.* at 73–75. But an offender who assaults women because he hates them as a class acts from a particularly reprehensible misogyny. *See id.* Discriminatory victim selection is often strong evidence of group animus, but it is the presence of the animus itself that most clearly merits special punishment. *See id.* at 79. At the very least, group animus motivated crime does more serious harm than group selection based crimes and should thus be punished more severely. *See id.* The arguments in this Article made in defense of hate crimes legislation are thus strongest when applied to the racial animus legislative model.

Federal legislation passed shortly after the Civil War can reach hate crimes but is not expressly directed against them, focusing on criminalizing conspiracies to violate federally guarenteed rights (see 18 U.S.C. § 241 (1994)) and deprivations of federal rights by government officials (*not* by private actors) based on race, color, or alienage (see 18 U.S.C. § 242). *See also* JACOBS & POTTER, *supra*, at 37 (explaining scope of these statutes). Part of the Civil Rights Act of 1968, 18 U.S.C. § 245, only reaches hate crimes in an ambigious way that makes it hard to classify whether the Act fits the discriminatory selection or group animus models discussed here. Additionally, the Act applies only if certain specified federally protected rights or state and local activities are involved. *See* JACOBS & POTTER, *supra*, at 38 (analyzing 18 U.S.C. § 245); LAWRENCE, *supra*, at 35–39 (explaining the ambiguities in federal law). The Hate Crimes Sentencing Enhancement Act of 1994 mandated revision of the United States Sentencing Guidelines "to provide sentencing enhancements of not less than three offense levels for offenses that are hate crimes," Pub. Law No. 103–322, 108 Stat. 1796 (Sept. 13, 1994), but this enhancement applies only to offenses that are otherwise federal crimes. *See* NATIONAL GAY AND LESBIAN TASK FORCE, THE IMPORTANCE OF HATE CRIMES LAWS 1 (Dec. 1997); *see also* JACOBS & POTTER, *supra*, at 76–77 (summarizing Enhancement Act's provisions). Proposed federal legislation would expand the scope of federal hate crimes by eliminating the requirement that certain specified federal rights or state and local activities be involved and by expanding the number of protected groups. *See* H.R. 77, 106th Cong. (1999).

[2] *See* JACOBS & POTTER, *supra* note 1, at 29–44.

[3] *See id.*

> "[p]erhaps all assaults, whether racial or not, involve motives of humiliation and are thus evil to the same degree."[4]

Critics further note that these offenders cannot be held fully culpable for their prejudices. A hate criminal might have been brought up to believe that homosexuals, women, and blacks are inferior, immoral and evil. According to this account, his prejudice was imposed, not chosen, and should render him a candidate for a lesser punishment, not a greater one.[5]

Second, critics of hate crimes legislation argue that the harm to victims of hate crimes is no greater than that of other comparable crimes. The injury to a victim whose legs are broken by an assailant armed with a baseball bat is not affected by the offender's motivation.[6] Indeed, at least one social science study found that the psychological pain of a hate crime is less than an ordinary crime, for the "ability of some hate violence victims to maintain their self-esteem may be associated with their attribution of responsibility for their attacks to the prejudice and racism of others."[7]

Third, critics contend that hate crimes are not the only crimes that can have repercussions beyond the immediate victim. For example, a killing or rape at a university is likely, according to various social science studies, "to enhance feelings of vulnerability and fear" among fellow students, friends, co-workers, relatives and neighbors of the victim.[8] Therefore, that bias-motivated crimes frighten and humiliate minority group members does not warrant additional punishment of the offender. Even if those communities are more frightened by bias crimes than other crimes, that is an irrational fear that courts should not legitimate.[9]

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[4] *Id.* at 80 (quoting Jeffrie G. Murphy, *Bias Crimes: What Do Haters Deserve?*, 11 CRIM. J. ETHICS 23 (1992)).

[5] *See id.* at 81. *But see* Kent Greenawalt, *Reflections on Justifications for Defining Crimes by the Category of Victim*, 1992/1993 ANN. SURV. AM. L. 617, 627.

[6] *See* JACOBS & POTTER, *supra* note 1 at 811–82.

[7] Arnold Barnes & Paul H. Emphross, *The Impact of Hate Violence on Victims: Emotional and Behavioral Responses to Attack*, 39 SOC. WORK 247, 250 (1994); *see also* JACOBS & POTTER, *supra* note 1, at 82–84 (surveying what little empirical data is available).

[8] JACOBS & POTTER, *supra* note 1, at 87 (*quoting* AMERICAN PSYCHOLOGICAL ASSOC. TASK FORCE ON THE VICTIMS OF CRIME AND VIOLENCE, FINAL REPORT 36 (Nov. 30, 1984)); *see also* WESLEY G. SKOGAN & MICHAEL G. MAXFIELD, COPING WITH CRIME: INDIVIDUAL AND NEIGHBORHOOD REACTIONS (1981); KEVIN N. WRIGHT, THE GREAT AMERICAN CRIME MYTH 2–15, 70–79 (1985).

[9] Jacobs and Potter argue that for black communities to fear racially-motivated assaults by whites is no different from the white community experiencing greater terror because some robberies in that community have been committed by blacks. *See* JACOBS & POTTER, *supra* note 1, at 87–88. This comparison is misleading. It is indeed reprehensible for whites to worry more

Finally, critics reject the claim that punishing hate crimes will reduce group conflict. To the contrary, critics view hate crimes legislation as a manifestation of "identity politics"—individuals relating to each other as members of groups, based on such characteristics as race, gender, religion, and sexual orientation—to achieve the strategic benefits of being recognized as "disadvantaged and victimized."[10]

This Article attempts to refute these claims by arguing that critics of hate crimes legislation have ignored the important roles of the criminal law in condemning evil character and accommodating the tensions between individualized and group justice. The Article makes three core claims: (1) the psychological and moral need for individualized justice is undermined when victims are harmed because they are treated as members of a category rather than as unique beings; (2) in an especially dangerous way, hate crimes contribute to a racist culture that creates subordinate status for marginalized groups and raises the risk of physical harms, such as further assault; and (3) racist assaults rely on a despised theory of human worth that has been rejected by our modern constitutional culture. This last point draws on a salient historical example in which violent acts were routinely committed for reasons of racial animus, thereby creating a caste-based social system: American slavery. These three claims, once proven, set the stage for understanding how hate crimes legislation promotes inter-group harmony by relying on political and emotional themes that should be common to all American subcultures, rather than promoting a divisive identity politics. These three claims also recognize that hate crimes legislation promotes a vision of virtuous citizen character in a republic, a vision that requires us to condemn the racist personality.

This last point—the importance of condemning the racist personality—assumes a theory that I here outline but cannot defend in an Article of this length: that the criminal law should embrace character morality, rather than action morality. Action morality, the idea that freely chosen actions determine moral blame, currently dominates criminal law.[11] Hate crimes legislation, critics contend, violates action morality principles because hate crimes inquire into the offender's

about attacks on them by black than white assailants. The ordinary robber, however, is motivated by greed. His race is not relevant to what level of fear his victims have a right to experience. If, however, violent robberies are directed at blacks *because* they are black, or whites *because* they are white, rather than because they have money, that is a reason for either community to feel a special fright and humiliation. *See infra* Parts II, III and IV to understand why.

[10] *See* JACOBS & POTTER, *supra* note 1, at 5, 88–90.

[11] *See* Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape* [hereinafter Taslitz, *Two Concepts*] (draft manuscript) (copy on file with author).

motive. Motive—the reason why a criminal commits a crime—however, can only be assessed by, and indeed is an aspect of, character. To punish an offender for his motive is thus to penalize him for who he is rather than what he has done.[12]

Character morality, in contrast, holds that we should be punished for causing certain harms that stem from who we are, rather than merely for what we do.[13] Character moralities seek to condemn and deter evil character.[14] Character is an enduring disposition to behave in particular ways in particular situations.[15] Such an enduring disposition can be revealed only through an offender's actions. To the kind of character moralists whom I follow here, therefore, punishment is deserved to the extent that a defendant's actions reflect his evil nature.[16] "Evil" is a complex notion and comes in degrees.[17] At its most extreme, an evil character is someone who finds pleasure in causing another pain.[18] A less extreme form of evil involves indifference to how one's actions hurt others.[19] Character moralities have both retributive and utilitarian justifications. The retributivists seek to punish only to the degree that one freely chooses to do harm because of one's character.[20] The utilitarians endeavor to punish evil character because that approach most efficiently identifies those likely to inflict future harm.[21]

Character moralists are unimpressed by the claim that prejudiced individuals are less culpable because their upbringing precluded them from choosing their actions at the time of the crimes. Such people could, for example, have made efforts to change their racist personalities by socializing with those of other races.[22] Character moralists also more openly embrace the role of the emotions, including retributive emotions, in legal theory,[23] and they are unashamed to craft a secular

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[12] *See infra* notes 71–98 and accompanying text.

[13] *See* LAWRIE REZNEK, EVIL OR ILL? JUSTIFYING THE INSANITY DEFENCE 12–13, 41–60 (1997).

[14] *See id.*

[15] *See id.* at 12–13, 42; Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 6–14 (1993) [hereinafter Taslitz, *Myself Alone*]; *see also infra* notes 71–98 and accompanying text.

[16] *See infra* text accompanying notes 71–98.

[17] *See* Taslitz, *Two Concepts*, *supra* note 11, at 6.

[18] *See* COLIN MCGINN, ETHICS, EVIL, AND FICTION 62–63 (1997).

[19] *See id.* at 66–67; *cf.* REZNEK, *supra* note 13, at 13 ("I . . . define an evil person by his propensity to harm others in the pursuit of his own selfish interests.").

[20] *See* Taslitz, *Two Concepts*, *supra* note 11, at 6.

[21] *See id.* at 7.

[22] *See id.* at 10. Some character moralists argue on utilitarian grounds for punishing evil character even if we *never* have any control over who we are and what we do. *See generally* JOHN KEKES, FACING EVIL (1990).

[23] *See, e.g.*, Dan M. Kahan & Martha C. Nussbaum, *Two Concepts of Emotions in Criminal Law*,

definition of evil.[24] Moreover, because our character is partly constituted by the groups with which we identify, emphasizing character enables us to examine the important connection between harm to individuals and to the groups to which they belong.[25] For all these reasons, character morality offers a clearer vision of what makes hate crimes especially reprehensible.[26]

What, then, is a racist character? I define a racist personality as one that finds pleasure in inflicting pain on a person because of that person's race. A racist personality is therefore only one species of evil character.[27] My task is to explain why this kind of evil character is worse than, or at least importantly different from, other sorts of evil character. In particular, I argue that violent wrongdoers whose character-based group animus leads them to attack group members undermine their victims' need for individualized justice, harm their victim groups' status, raise the risk of further assaults, and damage values central to our modern republican government. In these ways, these criminals are more culpable, dangerous, and harmful than similarly situated offenders not motivated by group hatred. Although this Article's focus is limited to the paradigm case of racial violence, my analysis should ex-

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96 COLUM. L. REV. 269, 297 (1996); Taslitz, *Two Concepts*, *supra* note 11, at 11 (explaining why Kahan and Nussbaum's theory is a character morality).

[24] *See* KEKES, *supra* note 22.

[25] This is so because group identity is an essential part of character. *See infra* notes 64–70 and accompanying text.

[26] As noted earlier, see *supra* note 1, the ADL has played an important role in promoting hate crimes legislation and has authored an influential model statute. *See* JACOBS & POTTER, *supra* note 1, at 33–36. The ADL's effort likely reflects a character morality. The ADL was part of the intergroup relations movement, which by the 1950s had come to see prejudice as the result of a flawed, even diseased, personality. *See* STUART SVONKIN, JEWS AGAINST PREJUDICE: AMERICAN JEWS AND THE FIGHT FOR CIVIL LIBERTIES 1–78 (1997). Consequently, the movement shifted tactics from countering adult ignorance about minority groups to changing child rearing and education practices as a way to raise future generations free from the traits of racial and ethnic hatred. An allied law reform movement argued that legal change cannot await the spread of enlightened attitudes, for law reform can help to promote precisely such enlightenment. *See id.* at 79–112. Current social science research supports the idea that law can influence social norms, which in turn shape personalities. *See* CASS SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 32–69 (1997) (on social norms and law); SVONKIN, *supra*, at 84–86 (legal change is a prerequisite to changing bigotry). Therefore, law should have a role in reshaping racist character. The ADL's current anti-hate crimes program may represent precisely this fusion of insights from the 1950s manifestation of the intergroup relations educational movement with those of its allied law reform variant.

[27] *See supra* notes 17–21 and accompanying text (defining "evil"). I do not want to suggest that racial conflict and subordination are purely a matter of individual prejudice or isolated acts by deviant individuals. To the contrary, institutional and unconscious racism are two major modern causes of racial discrimination. *See generally* JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM (1997).

tend (with some qualifications) to violence motivated by other group-based animus (such as sexism or homophobia) and, perhaps with somewhat less force, to certain nonviolent crimes. Perhaps more importantly, the critics of hate crimes legislation enthusiastically extend *their* critique to racial violence. According to Professors Jacobs and Potter, "[i]t makes no sense to call a prejudice-motivated murder or rape 'worse' than an otherwise-motivated murder and rape."[28] It is this conclusion that I find most troubling, and demonstrating its error is my primary goal.

Part I defines individualized justice as recognizing the deep-seated human need, reflected in our criminal laws and procedures, to be judged based on our own unique thoughts, feelings, actions, character, and situation. Hate crimes stifle this need in two ways: by treating victims as mere representatives of a group; and by humiliating that part of our unique nature that is rooted in our particular nexus of intimate group connections. Part I argues that a central purpose of the criminal law is to address the resentment and indignation that society in general, and victims in particular, feel from the specific way in which an offender has degraded his prey. Hate crimes legislation is needed because it condemns the particular way in which the victims have been humiliated—the damage to their sense that they are judged for who they uniquely are. Part I further explains that the damage done stems from a racist personality, one particularly culpable for its misdeeds and particularly dangerous to further victims.

Part II argues that the messages sent in hate crimes contribute in a profound way to a racist culture. This racist culture damages the status of culturally salient groups, an injury in itself but also one that reduces that group's access to political and social power and to various material and social resources. Hate messages also raise the *risk* of additional physical harms, such as future assaults, and the mere existence of that heightened risk is morally relevant, even if such harm never occurs. Part II explains that the offender's culpability for group status harms and for a heightened risk of future individual assaults stems from his racist personality. It is the violent expression of the racist attitudes at the core of his being, not violence per se, that causes these harms.

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[28] JACOBS & POTTER *supra* note 1, at 149. I do not pretend to address every objection to hate crimes legislation that Jacobs and Potter raise in their book-length treatment of this subject. My three central points, however, are ones they do not raise, and which, I argue, outline interests that outweigh any even arguable countervailing considerations.

Part III examines the antebellum conflict between Southern pro-slavery and various Northern abolitionist, emancipationist, and anti-slavery ideologies. Part III concludes that, especially by the time of the Fourteenth Amendment's adoption, the conflicting Northern and Southern views on slavery reflected differing philosophies on the desirable character of free republican citizens. In particular, Northerners condemned what they perceived to be a cruel Southern character, ever ready to engage in racially-motivated violence. To Northerners, such a character was inconsistent with the operation of a free republican government. The Fourteenth Amendment, Part III argues, was designed in part to battle this danger to our polity, a danger that can be averted only by legislative, as opposed to judicial, action.

Part IV argues that for a multicultural society to remain coherent, it must not tolerate remnants of the master-slave relationship, and it must treat its citizens decently. Racial violence is the defining feature of slavery. "Decency" means that social institutions neither humiliate nor tolerate the humiliation of citizens by treating them, and the groups to which they belong, as unwelcome in the family of man. Hate crimes legislation challenges the racial violence at slavery's heart and sends the message that all citizens will be treated decently. In this way, hate crimes legislation promotes unity among racial and ethnic groups. Critics of hate crimes legislation are therefore wrong to contend that it promotes divisive identity politics.

I. Individualized Justice

Individualized justice is a deeply ingrained concept in our criminal jurisprudence.[29] It respects each person's particular character and circumstances.[30] It demands that each individual be "treated as unique, a 'universe of one.'"[31] Accordingly, individualized justice rejects clas-

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[29] *See, e.g.*, Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 Colum. L. Rev. 1093, 1114–18 (1996); Taslitz, *Myself Alone*, *supra* note 15, at 14–30.

[30] *See* Coleman, *supra* note 29, at 1114–15 & nn. 110–14 (collecting cases stressing a focus on particularized character and circumstances as at the heart of individualized justice); Taslitz, *Myself Alone*, *supra* note 15, at 20–24 (summarizing moral bases for the doctrine of individualized justice); *see also* Jeffrie G. Murphy & Jules L. Coleman, Philosophy of Law: An Introduction to Jurisprudence 128 (1990) ("Justice demands individuation . . . . And it seems elemental that there is a significant moral difference between a person who kills maliciously and one who kills accidentally . . . .").

[31] Taslitz, *Myself Alone*, *supra* note 15, at 4 (quoting Donald Schon, The Reflective Practitioner: How Professionals Think in Action 108 (1983)).

sification of others as a stereotype, a mere member of a category,[32] because this method of judging rejects the belief that each human life is of infinite, irreplaceable value.[33]

What makes each person unique includes his or her special thoughts, feelings, character, and situation.[34] A battered woman may experience fear of a quality and intensity others cannot understand without knowing her personality traits, economic pressures, and history of brutal treatment.[35] Similarly, it is not enough to know that someone grieves over the loss of a loved one. The pain of euthanizing one's elderly dog differs from that caused by the death of one's child.[36] Further, the pain of that child's death, for example, may differ based upon whether the child was an infant or an adult, close to you or long estranged.[37]

Courts' most explicit recognition of the need for individualized justice occurs at sentencing; indeed, the concept is elevated to a constitutional mandate in the death penalty context.[38] To a lesser extent,

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[32] *See* Taslitz, *Myself Alone*, *supra* note 15, at 18–20 (how typification in criminal adjudication undermines our cultural aspirations to individualized justice).

[33] *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 180 (1998) (individualized treatment is essential to human dignity); *see also* Michael J. Meyer, *Introduction*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 1, 7 (Michael J. Meyer and William A. Parent eds., 1992) ("[I]ndividuals have a unique worth and standing vis-à-vis the state, and, in addition, all individuals should enjoy equal public standings, at least insofar as they occupy the role of citizen.").

This concept is rooted in Judeo-Christian ethics. *See* JACOB NEUSNER, A SHORT HISTORY OF JUDAISM: THREE MEALS, THREE EPOCHS 11–12 (1992) (defining "Mishna"). The Mishna, a compilation of Jewish oral law, put it this way:

> If a human being stamps several coins with the same die, they all resemble one another, but the King of Kings of Kings, the Holy One, praised be he, stamps all human beings with the die of the first man [Adam]; and yet not one of them is identical with another.
>
> Therefore every individual is obliged to say, "for my sake was the world created."

MISHNA, *Sanhedrin* 4:5; *see also* RABBI JOSEPH TELUSHKIN, JEWISH WISDOM: ETHICAL, SPIRITUAL, AND HISTORICAL LESSONS FROM THE GREAT WORKS AND THINKERS 88–90 (1994) (reviewing various Jewish teachings on human uniqueness and value of each life). For one Christian view of individualized justice, see Thomas L. Shaffer, *Human Nature and Moral Responsibility in Lawyer-Client Relationships*, 40 AM. J. JURIS. 1, 2 (1995) ("Justice James Wilson . . . stated . . . his own Calvinist Christian ideal, when he said that, even if the state (the law) is the noblest work of humanity, the human person is 'the noblest work of God'—infinitely valuable, relentlessly unique, endlessly interesting.") (quoting in part Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 462–63 (1792)).

[34] *See* Taslitz, *Myself Alone*, *supra* note 15, at 6–34.

[35] *See* Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 44–46 (1998).

[36] *Cf. id.* at 19–20 & n.79 (on the nature of emotions); Taslitz, *Two Concepts*, *supra* note 11, at 9–12 (role of the emotions in criminal law).

[37] *See* Kahan & Nussbaum, *supra* note 23, at 285–300 (offering similar examples).

[38] *See* Coleman, *supra* note 29, at 1114–18 (summarizing law).

courts have also implicitly recognized the importance of individualized justice throughout the criminal trial process,[39] as the battered woman syndrome—used at trial, not only at sentencing—illustrates.[40]

The need for individualized justice has deep psychological roots and is felt by everyone in our culture. Philosopher William James explained that "any object that is infinitely important to us and awakens our devotion feels to us also as if it must be *sui generis* and unique."[41] In addition to the psychological research supporting the widespread need for each of us to be viewed as *sui generis*,[42] our constitutional and statutory law reflect a similar recognition of the importance of individualized justice to *all* persons, not only criminal defendants. Thus, the Fourth Amendment seeks to protect both the innocent and the guilty,[43] shielding "privacy [that] enable[s] the individual to constitute himself as the unique person he is,"[44] an aspect of the "fully realized life" and a "condition . . . for the realization of the common good."[45] The Victims' Rights Movement can also be viewed, in part, as an effort to extend the principle of individualized justice to crime victims in addition to criminal defendants.[46] That movement has sought to give victims a voice for their particularized pain.[47] Victims do not want

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[39] *See* Taslitz, *Myself Alone*, *supra* note 15, at 1–30.

[40] *See* 1 DAVID L. FAIGMAN, ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY §§ 8–1.0–.5, at 319–50 (1997) (summarizing uses of and state of the law concerning battered women's syndrome).

[41] WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 29–30 (1978). He continues: "Probably a crab would be filled with a sense of personal outrage if it could hear us class it without ado or apology as a crustacean and thus dispose of it. 'I am no such thing,' it would say; 'I am MYSELF, MYSELF *alone*.'" *Id.*

[42] *See* Taslitz, *Myself Alone*, *supra* note 15, at 14–17 (summarizing research); *see also* NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 286–92 (1995) (jurors' concerns with particularized, both temporally and geographically broad, inquiries into a criminal defendant's character and circumstances are "commonplace and widespread.")

[43] *See* ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 95–97, 150–56 (1997) (summarizing Fourth Amendment's purposes).

[44] Lloyd L. Weinreb, *The Fourth Amendment Today*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 184, 185–86 (Eugene W. Hickok, Jr. ed., 1991).

[45] *Id.*

[46] *See, e.g.*, DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE: A CASEBOOK 7–33 (1998); NATIONAL VICTIM CENTER, STATUTORY AND CONSTITUTIONAL PROTECTION OF VICTIMS' RIGHTS: IMPLEMENTATION AND IMPACT ON CRIME VICTIMS—SUB-REPORT: CRIME VICTIM RESPONSES REGARDING VICTIMS' RIGHTS (APR. 15, 1997); Laurence Tribe, *The Amendment Could Protect Basic Rights*, HARV. L. BULL., Summer 1997, at 19, 20 ("Pursuing and punishing criminals makes little sense unless society does so in a manner that fully respects the rights of their victims to be accorded dignity and respect . . . and . . . a meaningful opportunity to observe, and take part in, all . . . [relevant] proceedings.").

[47] *See, e.g.*, BELOOF, *supra* note 46, at 464 ("The victim's interests in participating in the plea bargaining process are many. The fact that they are consulted and listened to provides them with

judges to enact standard sentences that accompany, for example, a "typical" robbery. The victims want the judge to know their sleepless nights, restless fears, precise financial costs, and their children's worries.[48] Victim impact statements, victim interviews in pre-sentence reports, notification requirements about hearings and release dates, restitution orders, and the right to speak at sentencing are developments that enable victims to be treated as more than mere statistics or categories.[49]

Comprehending the underlying retributive emotions perhaps makes this clearer.[50] All retributive emotions protest against the criminal offender's despised theory of human worth.[51] We resent moral injuries to us because they are also messages saying that we count less

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respect and an acknowledgment that they are the harmed individual. This in turn may contribute to the psychological healing of the victim.")

[48] *Victims' Rights Amendment: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Paul G. Cassell, Professor of Law, University of Utah College of Law) ("Victims have found that making statements at sentencing brings a sense of healing and closure." One victim of a sex crime explained this concept "'[W]hen I read [the victim impact statement], it healed a part of me—to speak to [the defendant] and tell him how much he hurt me.'").

[49] *See, e.g., id.* at 1–35 (cataloging and justifying many of these proposed and existing victims' rights provisions); Karyn Ellen Polito, *The Rights of Crime Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?* 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241 (1990) (similar). I have argued elsewhere for the importance of the victim's voice and equality of treatment with the defense in the specific context of rape cases. *See* ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM (forthcoming 1999) [hereinafter RAPE AND THE COURTROOM]. That I endorse some aspects of the Victims' Rights Movement does not mean, however, that I endorse all its aspects—some of which gut important procedural protections for defendants—nor that I see a federal constitutional amendment as the wisest way to handle the problem. *See generally* Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997). On the other hand, existing statutes dealing with the protection of victims' rights are sometimes being employed in a discriminatory fashion—members of racial minorities in practice get less protection than other crime victims—highlighting the difficulty of subordinated group members to attain an adequate voice in the justice system. *See* NATIONAL VICTIM CENTER, STATUTORY AND CONSTITUTIONAL PROTECTION OF VICTIMS' RIGHTS: IMPLEMENTATION AND IMPACT ON CRIME VICTIMS—SUB-REPORT: COMPARISON OF WHITE AND NON-WHITE CRIME VICTIM RESPONSES REGARDING VICTIMS' RIGHTS (June 5, 1997).

[50] My analysis of the retributive emotions draws heavily on JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988), as seen through the lens of the theory of individualized justice articulated here. Murphy and Hampton structure their book as an exchange. While they disagree on a number of points, they agree on most central matters, and I treat their voices as one, except where otherwise indicated. Some of their disagreements are over terminology more than substance, and, where that is so, I have adopted Hampton's nomenclature. To the extent that readers see substantive differences between their two positions that are relevant here, I should be seen (unless otherwise noted) as siding with Hampton's side of the exchange. Murphy's later writings, however, largely support my position. *See infra* notes 78–81 and accompanying text. For a more detailed summary of this work for other purposes, see Taslitz, *Two Concepts*, *supra* note 11, at 10–11.

[51] *See* Taslitz, *Two Concepts*, *supra* note 11, at 68–74.

than the other; they insult and degrade us and therefore harm our self-respect.[52] Indeed, the fear that we are less than the other combines with our insistence that we are not to give resentment its special emotional flavor.[53] But there is another emotion—being "indignant," rather than resentful—that we feel when we lack fear that the offender is right to treat us as less worthy than he, but we protest against the degrading treatment nonetheless.[54] We can also be indignant about wrongs done to others, and it is therefore the term "indignant" that best describes society's reaction to crime.[55] We seek to reject the offender's message that his victim is of inferior value via the only effective punishment, the defeat of the offender by his victim or her symbolic agent.[56]

Indignation is also often accompanied by moral hatred, an "aversion to the insulter herself—her character, her habits, her disposition, or the whole of her" because she is taken "to be thoroughly identified with that cause."[57] That hatred must be expressed by society, because "how society reacts to one's victimization can be seen by one as an indication of *how valuable* society takes one to be, which in turn can be viewed as an indication of how valuable one really is."[58] Indeed, one hallmark of a racist society, I will argue, is its justice system's unwillingness to protest against the racially subordinating messages inherent in certain crimes.[59] Accordingly, satisfaction of our retributive emotions toward hate crimes requires the condemnation of the racist personality.

It is important to understand that defeat of the offender's *specific* cause is what matters.[60] It is not enough simply to punish an offender,

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[52] *See* MURPHY & HAMPTON, *supra* note 50, at 24–25.

[53] *See id.* at 50–60.

[54] *See id.* at 54–60.

[55] *See id.*

[56] *See id.* at 124–34.

[57] MURPHY & HAMPTON, *supra* note 50, at 80.

[58] *Id.* at 141.

[59] *See infra* notes 98–286 and accompanying text.

[60] Hampton put it this way:

> To inflict on a wrongdoer something comparable to what he inflicted on the victim is to master him *in the way that he mastered the victim.* The score is even. Whatever mastery he can claim, she can also claim. If her victimization is taken as evidence of her inferiority relative to the wrongdoer, then his defeat at her hands negates that evidence. Hence the *lex talionis* calls for a wrongdoer to be subjugated in a way that symbolizes his being the victim's equal. The punishment is a second act of mastery that denies the lordship asserted in the first act of mastery.

MURPHY & HAMPTON, *supra* note 50, at 128 (emphasis added). My argument here is that simply punishing the hate criminal is not subjugation "in a way that symbolizes his being the victim's *equal*." *Id.* Only punishment that expressly condemns his hateful racist message and the preju-

or even to punish him in some general sense for what he has done. Rather, we must punish him in a way that rejects the intolerable messages sent by his conduct.[61] Abner Louima, for example, was wrongfully arrested by New York City police officers who brutally sodomized him with a nightstick.[62] The conduct was revolting in itself, but it became a cause célèbre because both Louima and the black community viewed it as a racially-motivated crime.[63] While punishing the police officers for assault certainly addresses an aspect of the need for retri-

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diced character from which it sprang "master[s] him in the way that he mastered the victim." *Id.* Rejecting the racism in the offender is central to creating proportionality between the crime and its punishment.

[61] Jeffrie Murphy, in a later article specifically concerning hate crimes, expressed some uncertainty about whether they are indeed more deserving of retribution than other violent crimes. At the same time, however, he marshalled convincing arguments that hate crimes are indeed worse. *See* Murphy, *supra* note 4, at 20, 22. Murphy's article is discussed in more detail *infra* notes 75–77, 91–94 and accompanying text.

[62] *See, e.g.*, Tom Hays, *Indictment Charges Police with Bias in Torture Case—Mistaken Identity May Have Led to Assault*, RECORD, (Northern N.J. ed), Aug. 22, 1997, at A4 ("Volpe and Schwarz [two police officers] had already been indicted on charges of aggravated sexual abuse and first-degree assault based on evidence they allegedly sodomized Louima in the station house bathroom with a wooden plunger handle. The new indictment [on charges of second-degree assault] alleges that the sex attack also was based on race."). The Louima beating allegedly arose out of a melee at a Brooklyn night club in which Volpe mistook Louima for another man who had sucker-punched the officer during the chaos. *See id.* Louima told investigators that the four officers involved "repeatedly called him 'nigger' throughout his ordeal," resulting in the additional state second-degree aggravated harassment charge, a misdemeanor committed by striking or physical contact with another because of race, color, religion, or national origin. *Id.* The case "unleashed new accusations of police misconduct, and a federal investigation into a possible pattern of brutality in minority neighborhoods." *Id.* Various newspapers reported that indictments came down because of charges that the attack was motivated by racism. *See, e.g.*, Tom Hays, *Grand Jury Alleges Race Was Motive for Torture Attack by N.Y. Cops New Indictment Charges Officer Hit Immigrant Over and Over During the Drive to 70th Precinct*, STAR-LEDGER, (Newark, N.J.), Aug. 22, 1997, at 006. The State prosecution was ultimately dropped when the officers were indicted on Federal Civil Rights charges. *See Indictments in Louima Case*, NPR's Morning Edition, Feb. 27, 1998, Transcript #98022703-210. Louima has also filed a civil rights suit for tort damages. *See New York Brutality Victim Sues Police Department and Union*, LIABILITY WK. Aug. 10, 1998. The case spawned a tremendous outcry among anti-racism groups and the African-American community. *See, e.g.*, Ronald Powers, *Protestors Rally in Washington Against Police Brutality*, AP, Sept. 12, 1997 (describing a protest march outside the Justice Department in which Ron Daniels, director of the New York-based Center for Constitutional Rights said, "The case of Abner Louima is not some heinous aberration . . . It is systematic of a growing epidemic of police brutality and misconduct which is afflicting communities of color and poor communities across this nation."); *Fallen*, VILLAGE VOICE, Feb. 17, 1998, at 41 ("[T]he phrase 'Giuliani time'. . . . became a rallying cry for African American and Haitian community leaders as well as Giuliani's mayoral opponents, who blamed Giuliani for causing a deep racial rift, resulting in the brutalization of Louima."). The officers have not been tried yet, although, as of the date of this writing, jury selection has begun on the criminal charges. *See The Smoking Gun, The Abner Louima Torture Case* (visited Apr. 23, 1999) <http://www.the smokinggun.com/torture/torture.shtml>.

[63] *See supra* note 62 and accompanying text.

bution, complete societal satisfaction of the retributive need requires that the related convictions and punishment be viewed as at least partly done because Louima was targeted based on his race.

A racially-motivated assault breaches norms of individualized justice in important ways. Notably, the victim, such as Louima, is treated as merely a representative of a category. The officers judged and condemned Louima's entire being based upon the color of his skin. They ignored his character, hard work, and efforts to make a life for his family here—the qualities and experiences that made him a unique human being. He howled in protest against being treated as less than human, in general, and because his assault was motivated by racial hatred, in particular.[64]

Human uniqueness is partly a function of the intersection among the groups with whom we associate:

> [O]ur social identity—our sense of who we are and what we are is intimately bound up with our group memberships. Are we male or female? Black or white? Jewish or Christian? Republican or Democrat? Our attitudes, beliefs, and assumptions are thus in part shaped by the groups with which we identify.[65]

When Louima was anally raped with a police baton because he was viewed as a member of a less-than-fully-human group (i.e., black males), it was his blackness, in part, that police sought to subdue. Such denigration of blacks as a group humiliated a core part of Louima's identity. It matters not how his physical or emotional pain compared to someone similarly abused for non-racial reasons. His righteous indignation cannot be assuaged unless society loudly rejects the officers' evil cause—the message of their conduct: that Louima was unworthy *because* he was black. Similarly, society's retributive rage cannot, and certainly should not, be cooled without this recognition. Yet addressing legitimate retributive emotions, including moral hatred for those thoroughly identified with reprehensible causes, is necessary for social healing. Society can re-establish a relationship with these offenders, at least the relationship of civility between strangers, only after their sins have been expiated by suffering that has satisfactorily expunged their evil cause.[66]

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[64] *See supra* note 62 and accompanying text.

[65] Taslitz, *Feminist Approach*, *supra* note 35, at 23; *see also* Andrew E. Taslitz, *Abuse Excuses and the Logic and Politics of Expert Relevance*, 49 HASTINGS L.J. 1039 (1998) (extended analysis of a hypothetical illustrating how group affiliations are at the core of self-identity).

[66] *See* MURPHY & HAMPTON, *supra* note 50, at 36–37, 83–86. I recognize that the allegations

Such expiation necessarily involves rejecting not only the offender's cause but the offender himself. This point is made clearer by examining the nature of "motive." One common challenge to hate crimes laws is that they punish motives, and motives are said by many commentators to be irrelevant under Anglo-American law.[67] Our criminal laws traditionally inquire into the accused's mental state by asking, for example, "did the offender intend to hurt the victim in an assault case?" But, say these pundits, our laws do not generally inquire into motive by asking "*why* did the offender intend to hurt the victim—was it revenge for the victim's deception in a failed business deal, anger at a perceived slight, or racial hatred?"[68] Commentators who argue that motive should not play a role in criminal liability intimate that motive analysis borders on an inquiry into character because it requires detailed information about the actor and an in-depth examination of his psychological nature.[69] These commentators, in other words, claim we should punish people only for what they do, not who they are.[70]

As a descriptive matter, these critics are wrong. Motive often plays a role in criminal liability though it is not labeled as such. Common law burglary, for example, asks not only whether an offender meant to

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against at least one of the officers in the Louima case reflect the officer's belief that he was "sucker-punched" by Louima as a motivating factor in the assault, a matter distinct from any racial prejudice. The public perception, however, is that racial hatred was the primary motivation, "sucker-punching" being merely a potential trigger. *See supra* note 62 and accompanying text.

[67] *See, e.g.*, Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 333–34 (1991).

[68] *See* Murphy, *supra* note 4, at 20 (summarizing hate crimes critics' views on motive); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 107 (2d ed. 1995) (defining "motive" as "ulterior intention").

[69] *See* SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER 120–24 (1998) (conceding that motive requires a deeper inquiry into the background of the defendant's conduct and noting that motive critics see it as requiring deep psychological insight); Lawrence Crocker, *Hate Crimes Statutes: Just? Constitutional? Wise?*, 1992/1993 ANN. SURV. AM. L. 485, 490 ("The responsibility retributivist will say that the racial animus shows that one is a worse person, but not that what one does is worse.").

[70] *See* Crocker, *supra* note 69, at 490–94 (apparently conceding that hate crimes are "worse" than ordinary ones only if the *act* is worse than that of an ordinary assailant). Crocker argues that hate crimes acts are indeed worse because haters act with some awareness of our history of racism, thus ratifying that history. Here Crocker lapses into some ambiguity on his position on character, but his focus remains on the *act* as ratifying historical oppression: "The worse character is crystallized into an act that is itself morally worse." *Id.* at 493; *see also* DRESSLER, *supra* note 68, at 70 ("Criminal law should be limited to situations in which injury is seriously threatened, and not simply 'to purify thoughts and perfect character' . . . . [C]riminal law [should] be exercised only in response to conduct."). My embrace of a character morality here does not, however, require that the hater be aware of any history of racism. The hater's desire to harm another *because of* his race is enough to show him to be more culpable, harmful and dangerous than the ordinary assailant.

break into a house but *why* he did so—was it to get out of the cold (not a burglary) or to commit a felony therein (burglary)?[71] While the legal definition of the crime speaks of a *purpose* to commit a felony therein, the substance of the question asked is one of motive. Similarly, self-defense doctrine turns on motive, asking not only was there a purpose to kill, but *why* there was such a purpose—to prevent the offender's imminent death or serious bodily injury (self-defense) or some other reason (not self-defense)?[72] Indeed, motive plays a role in defining all specific intent crimes, as well as many defenses (such as insanity, duress, and necessity), and in sentencing.[73]

As a normative matter, the critics are also wrong. They are right to suggest that motive, in effect, makes criminal liability turn on character. But, character means more than a tendency toward evil thought: it means a willingness to act on that tendency—a willingness demonstrated only by our acts.[74] In a fit of anger, many of us have said to another, "I'm going to kill you," yet we do not commit the act. Professor Jeffrie G. Murphy explains, "[w]e look to motives not to punish them as thoughts alone but as evidence of the ultimate *character* of the person being punished."[75] He continues:

> Just because character is relevant to criminal liability, it does not follow that this is the same as punishing for *thoughts alone* or *character alone*. The law is interested in character-as-revealed-in-actions, not in those aspects of one's character that one manages to keep under control and never reveal in behavior. That the law will punish you for revealing your hateful disposition in hateful actions still allows you to stew in your own private hatreds all you want. I think this distinction is nicely respected in the common linguistic tendency to refer to general passions and dispositions of character as *motives* only when they enter into the explanation of behavior.[76]

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[71] *See* DRESSLER, *supra* note 68, at 351–52 (defining burglary); Murphy, *supra* note 4, at 21–22.

[72] *See* DRESSLER, *supra* note 68, at 107; PILLSBURY, *supra* note 69, at 120–21.

[73] *See* DRESSLER, *supra* note 68, at 107, PILLSBURY, *supra* note 69, at 120–21. And, of course, motive is central to distinguishing common law murder from manslaughter, for *why* an offender was provoked to kill the victim (for example, by a victim-spouse's adultery) determines whether to mitigate the homicide. *See* DRESSLER, *supra* note 68, at 490–98.

[74] *See* Taslitz, *Two Concepts*, *supra* note 11, at 6, 9–11.

[75] Murphy, *supra* note 4, at 22.

[76] *Id.* at 23 n.5.

When we punish a hate criminal, therefore, we do not adequately repudiate his conduct without also repudiating his character as here defined—his willingness, as revealed in his wrongly motivated actions, to harm others because of their group affiliation. In common parlance, we describe neo-Nazi terrorists as "racists"—a term registering disapproval of part of their core being—not as misguided fools making poor choices that send offensive messages. This common intuition is one that criminal law properly should reflect.

But, critics contend, character assessment is a poor basis upon which to impose criminal liability. Such is especially true concerning hate crimes where, for example, there is no evidence that racists are more culpable, inflict more harm, or are more dangerous than other similarly situated wrongdoers.[77] Again, the critics are wrong. Regarding culpability, they object that a racist's character is fixed by the time of his actions. He has no control over it, no choice, and is therefore not culpable for his actions.[78] As I noted in my introduction, this approach improperly freezes the action at one point in time: the time of the act. At an earlier point, however, the racist had the opportunity to change his character.[79] Contemporary society is filled with critiques of racism, so the offender must have been, and certainly easily could have been, aware of them. Moreover, he had the option of socializing with those of other races, joining a church teaching tolerance, or otherwise acting to counter his racist nature.[80]

These options aside, even if the offender had no such choice, he should still be held criminally liable. First, those with racist characters are by definition—because their willingness to inflict harm on those of other races is at the core of who they are—more dangerous than non-racists. It is thus the racists that are most in need of deterrence.[81] Second, as Samuel Pillsbury points out, even if determinism is right and there is no free will, criminal punishment can be justified.[82] Hu-

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[77] *See id.* at 22.

[78] *See* JACOBS & POTTER, *supra* note 1, at 81.

[79] *See supra* notes 13–26 and accompanying text.

[80] For a fuller development of the theoretical basis for this point, see Taslitz, *Two Concepts*, *supra* note 11, at 10.

[81] For a summary of the utilitarian argument that punishment is justifiable to prevent future harm even if the actor lacks free will, see Taslitz, *Two Concepts*, *supra* note 11, at 11. *See generally* KEKES, *supra* note 22 (explaining that character moralities do not necessarily turn on free choice). *See also* Murphy, *supra* note 4, at 23 n.6 (stating that mental states matter in criminal law partly because they demonstrate the offender's dangerousness, and it "is easier to believe that race haters are generally more dangerous than that they are generally more evil and blameworthy than the average assaulter").

[82] *See* PILLSBURY, *supra* note 69, at 19–33.

mans are fundamentally symbol-creating, symbol-interpreting creatures.[83] The values embodied in our conduct's messages are what give our lives meaning.[84] A central value that infuses meaning in modern Western cultures is that, in some sense, all humans have equal worth.[85] While there may be no free will in the sense of physical causation, we view actions as chosen when, at the time they happen, they are rational and uncoerced by immediately present outside forces.[86] Only this view allows the world to make sense to us, thereby giving meaning to our lives.[87] Accordingly, punishment is deserved according to the wrongdoer's choice to disregard another's value.[88] When victims are harmed because they are viewed as representatives of a category and not as unique individuals, their special value is disregarded, and a blow is struck against the core American ideal that all persons are created equal.[89] In this sense, a hate criminal is culpable because he is the kind of person whose rationally chosen actions contribute to robbing the meaning of both the victim's life and our collective lives as American citizens.[90]

The same thing that demonstrates his culpability—the messages his actions convey about himself and others—also shows the special nature of his harm. Because humans are symbol-using creatures, the

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[83] *See id.* at 23–31.

[84] *See id.* at 30–31.

[85] Pillsbury uses the word "autonomy," and later, in the hate crimes context, stresses the idea that all persons are "created equal." PILLSBURY, *supra* note 69, at 35, 114. These concepts seem to boil down to the notion of equal human worth. *See generally* THE CONSTITUTION OF RIGHTS, *supra* note 33.

[86] *See* PILLSBURY, *supra* note 69, at 18–31.

[87] *See id.*

[88] *See id.* at 33.

[89] *See id.* at 114.

[90] Professor Pillsbury adamantly maintains that his theory of criminal culpability is not a character morality. *See id.* at 73. He and I do not disagree, however, for he seems to be defining a character morality as one that broadly judges the whole person, including aspects of his character unconnected with his criminal acts. *See id.* Indeed, his moral theory inquires deeply into the wrongdoer's emotions, attitudes, motives, and predispositions to do harm *as revealed by his actions*. *See id.* at 26, 73, 110–24, 141–60. While he worries that current definitions of homicide are inconsistent with a focus on what the offender's actions reveal, he has no doubt that hate crimes meet this standard. *See id.* at 73, 114–15. His position is clearest in this paragraph:

> The line between an act-based and a character-based rule can be difficult to draw, however. Often it is a distinction more of degree than kind. After all, in order to assess the act we must pay considerable attention to the actor. We need to know whether a killer was crazy or sane, whether he killed deliberately or by accident. In assessing criminal conduct we necessarily assess a human actor, but only as revealed by the action.

Id. at 73. Thus, although we use different terminology, Pillsbury and I are saying the same thing.

messages crime victims receive from their offenders are necessarily part of the harm suffered.[91] Professor Murphy explained:

> When I am assaulted, part of what hurts me—part of what constitutes the hurt or injury itself—is in many cases the motive of contempt or hate or simple lack of respect that I see behind my attacker's conduct. I am hurt not simply because my body aches but also because I am degraded, insulted, and humiliated—concepts that cannot even make sense if severed from all ties with motives.[92]

Murphy is ambivalent, however, about whether the messages sent by hate crimes are worse than those stemming from equivalent crimes. On the one hand, he says, "I think, a message of contempt . . . is the core evil in racial discrimination . . . ."[93] On the other hand, he notes, "[I]f I wanted to attack hate crimes from the perspective of motives, . . . I would argue that perhaps almost all assaults, whether racial or not, involve motives of humiliation and are thus evil to the same degree."[94] Murphy's last speculation ignores, however, the deep human need to be judged as unique individuals rather than as stereotypes. This need is treated with particular contempt by the hate criminal. Furthermore, as Part II of this Article will demonstrate, hate crimes send messages that degrade entire groups, not only individuals, thus making them worse than non-hate assaults.[95] Additionally, as Part III will show, hate crimes send messages that reject the core of our post-Reconstruction era constitutional culture, thereby harming our political system as much as the groups and individuals that the hate criminal despises.[96]

Finally, hate criminals are more dangerous than ordinary offenders. It is hard to know the likelihood of any individual criminal recidivating. But if a hate criminal commits another criminal offense, it is likely that his new offense will again be motivated by racial hatred. That likelihood is high precisely because his racism is a central part of his character, his willingness to act because of race hatred. Yet his race-hatred-motivated assault will, for all the reasons noted in this Article, cause more harm than an assault stemming from other motives. In this

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[91] *See* Murphy, *supra* note 4, at 20, 22–23 & n.8.
[92] *Id.* at 22–23.
[93] *Id.* at 22.
[94] *Id.* at 23.
[95] *See infra* notes 98—152 and accompanying text.
[96] *See infra* notes 153—248 and accompanying text.

sense, therefore, of two similarly situated criminals, the hate criminal may be fairly described as the more dangerous.[97] Understanding the full scope of the danger requires us, however, to turn from the harm that he does to the individual to the damage he inflicts upon groups. That damage is done by contributing to a racist culture.

II. Racist Culture

By definition, hate crimes are assaults on both the individual *and* his group. The assailant defines the individual entirely by his group membership, and does so to hurl the insult, "I hate the group for which you stand."[98] The hate criminal's goal, therefore, is to denigrate the social status of both the individual and his or her group.

A group's status is a valuable good in itself and in its capacity to garner power.[99] Social "[s]tatus includes social approval, respect and admiration for one's style of life."[100] Respect is demonstrated through symbolic activity.[101] Yet this activity is not "merely symbolic." "[I]t is the very currency of having and maintaining higher and lower status,"[102] for status is a kind of social agreement about value.[103] Groups pursue status competition with amazing vehemence. They do so because dignity, honor, and moral approval are intrinsically important to most people and because status brings further advantages.[104] Status fosters a sense of solidarity as a class, enabling the group to achieve its political objectives more effectively.[105] Status reinforces political power, as did Jim Crow laws, largely by enforcing a system of daily group degradation.[106] Such degradation compelled black deference and helped Southern whites to retain their hegemony.[107] Status is also correlated

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[97] *Cf.* Crocker, *supra* note 69, at 491 ("An offender motivated by racial animus may well be of greater future dangerousness than other offenders. The generic character of the hatred suggests the strong probability of repetition.").

[98] George P. Fletcher, Basic Concepts of Criminal Law 124 (1998).

[99] *See, e.g.*, Kenneth L. Karst, Law's Promise, Law's Expression: Visions of Power in the Politics of Race, Gender, and Religion 8–15 (1993) [hereinafter Law's Promise].

[100] J.M. Balkin, *The Constitution of Status*, 106 Yale L.J. 2313, 2327 (1997).

[101] *See id.* at 2327.

[102] *Id.* at 2327–28.

[103] *See* Richard L. Abel, Speaking Respect, Respecting Speech 45–124 (1998) (theorizing and illustrating the struggle of many groups for social acceptance).

[104] Balkin, *supra* note 100, at 2328.

[105] *See* Abel, *supra* note 103, at 60.

[106] *See id.*

[107] *See also* Kenneth L. Karst, Belonging to America: Equal Citizenship and the Constitution 15–27 (1989) [hereinafter Belonging to America] (interpreting *Brown v. Board of Education*, 347 U.S. 483 (1954), as challenging the group stigma inherent in legal segregation); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* Mari

with greater ease in obtaining jobs, money, and other forms of economic empowerment.[108] The fostering of high group status is likewise seen as preserving morality or, at the very least, a particular way of life.[109]

Although status can inhere in both the individual and the group, the fate of both are linked.[110] Decades ago, in *Beauharnais v. Illinois*, the United States Supreme Court acknowledged that harm to a group's status harms its individual members.[111] There, Beauharnais, the President of the White Circle League, was convicted of violating a criminal statute prohibiting defaming groups. Beauharnais was alleged to be responsible for the distribution of a leaflet urging whites to unite against blacks. The leaflet stated, "[i]f persuasion and the need to prevent the White race from becoming mongrelized by the Negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."[112] Beauharnais argued that convicting him for arranging distribution of the leaflet violated his First Amendment rights to free speech. The Court disagreed:

> Long ago this Court recognized that the economic rights of an individual may depend for the effectiveness of their enforcement on rights in the group, even though not formally corporate, to which he belongs . . . . It is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community. It would, however, be arrant dogmatism, quite outside the scope of our authority in passing on the powers of a State, for us to deny that the Illinois Legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that

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J. MATSUDA, ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 59 (1993) ("*Brown* held that segregated schools were unconstitutional primarily because of the *message* segregation conveys—the message that Black children are an untouchable caste, unfit to be educated with white children.").

[108] *See, e.g.*, ABEL, *supra* note 103, at 60; Balkin, *supra* note 100, at 2328.

[109] *See* Balkin, *supra* note 100, at 2331.

[110] *See* ABEL, *supra* note 103, at 59–60.

[111] 343 U.S. 250 (1952). I have offered a similar analysis of *Beauharnais* in RAPE AND THE CULTURE OF THE COURTROOM, but for the very different purpose of exploring its implications for our evidentiary practices at rape trials. *See* TASLITZ, *supra* note 49.

[112] *Beauharnais*, 343 U.S. at 252.

> speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.[113]

Although *Beauharnais'* authority as First Amendment precedent has been challenged, the "claims of social scientists" to which the Court acceded are beyond serious dispute: if a group's status is devalued, the individual members of that group suffer as well.[114]

The chain of causation works the other way too: harm to the individual harms the group. Groups are defined both by their members' self-concepts and by how others define the group.[115] In particular, a subordinate group's identity can inhere in the eyes of an oppressor group.[116] When an individual member of a subordinate group is seen as behaving in a fashion meriting low status, his misbehavior is seen as "typical" of the group, and his degradation adds to that directed towards the group as a whole.[117] As the next Part of this Article will discuss, toleration of racial violence directed at individuals because of their group membership is among our culture's most powerful badges of inferior status. Correspondingly, legislative action condemning group-directed violence serves a powerful symbolic function in asserting the subordinated group's equal status with the dominant group. "Because the state imprimatur constitutes a public, official affirmation of norms and values, 'seemingly ceremonial or ritual acts are often of great importance' and 'the legislative victory, whatever its factual consequence, confers respect and approval.'"[118] But legislative victory alone is not enough. Each criminal prosecution of a violent hate crime serves a particularly important function in furthering minority groups' social position in light of the criminal justice system's

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[113] *Id.* at 262–63.

[114] *Id.*, *see, e.g.*, RUPERT BROWN, PREJUDICE: ITS SOCIAL PSYCHOLOGY 147–49, 176–85, 242–45 (1995); LARRY MAY, THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS 2–4, 112–20, 135–44 (1987) [hereinafter MORALITY OF GROUPS] (philosophers' argument, drawing on social science data); *see also* KARST, LAW'S PROMISE, *supra* note 99, at 1–30, 67–11 (similar argument, drawing on history and political theory).

[115] *See* MAY, MORALITY OF GROUPS, *supra* note 114, at 2–30, 73–81, 112–49; LARRY MAY, THE SOCIALLY RESPONSIVE SELF: SOCIAL THEORY AND PROFESSIONAL ETHICS 33–37 (1996).

[116] *See supra* note 115 and accompanying text.

[117] *See, e.g.*, DEBORAH TANNEN, TALKING FROM 9 TO 5: HOW WOMEN'S AND MEN'S CONVERSATIONAL STYLES AFFECT WHO GETS HEARD, WHO GETS CREDIT AND WHAT GETS DONE AT WORK (1994) (explaining how language, demeanor, and gender-related stylistic differences affect female advancement in the workplace).

[118] ABEL, *supra* note 103, at 61 (quoting in part JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 11, 23 (1963)).

unique role as moral educator. Professor Richard Abel put it this way: "By officially proclaiming transgression of our weightiest norms, criminal accusations and convictions can profoundly influence racial status."[119]

Hate crimes legislation thus helps to dismantle group-based status hierarchies that are inconsistent with the egalitarian spirit of our modern constitutional culture.[120] A similar objection has long been made by feminists who challenge our "rape culture."[121] According to Emilie Buchwald, a rape culture "is a complex of beliefs that encourage male sexual aggression and supports violence against women. It is a society where violence is seen as sexy and sexuality as violent."[122] A significant number of surveys reveal that nearly one-half of all men admit they would commit rape if they thought they could get away with it.[123] Moreover, the most common motivation for date rape is the prestige young men achieve among their peers for frequent sex, whether consensual or not.[124] Other rapists confess their desire to assert dominance or control over, or revenge upon, women.[125] Rapists' motives thus

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[119] *Id.* at 97.

[120] *See infra* Part III. Professor Balkin powerfully makes a similar point:

> But the Constitution does more than simply provide fair ground rules for cultural struggle. It also actively intervenes in some status hierarchies and requires that they be dismantled, or at the very least, that the support of law be withdrawn from them. The Constitution has an egalitarian demand, a demand which is more than a demand for equality of civil rights, and more than a demand for equality of political rights. It is a demand for equality of social status . . . . This egalitarian demand is what connects the Constitution to our founding document, the Declaration of Independence. It is the deep meaning of the American political experience. It is the soul of our Constitution.

Balkin, *supra* note 100, at 2343–44.

[121] Emilie Buchwald, et al., *Preamble*, *in* TRANSFORMING A RAPE CULTURE vii (Emilie Buchwald, et al., eds., 1993).

[122] *Id.*

[123] *See, e.g.*, James V.P. Check & Neil M. Malamuth, *Sex Role Stereotyping and Reactions to Depictions of Stranger Versus Acquaintance Rape*, 45 J. PERS. & SOC. PSYCHOL. 344–56 (1983); Neil Malamuth & James V.P. Check, *Sexual Arousal to Rape and Consenting Depictions: The Importance of the Woman's Arousal*, 89 J. ABNORMAL PSYCHOL. 763–66 (1980); Neil Malamuth, Maggie Heim & Seymour Feshbach, *Sexual Responsiveness of College Students to Rape Depictions: Inhibitory and Disinhibitory Effects*, 38 J. PERS. & SOC. PSYCHOL. 399–408 (1980); Todd Tieger, *Self-Rated Likelihood of Raping and the Social Perception of Rape*, 15 J. RES. PERSONALITY 147–58 (1981). Even in one study that found only a small percentage of the men admitting to a willingness to rape if there were no chance of being caught, over half the men said women mean "yes" when they say "no." *See* Crystal S. Mills & Barbara J. Granoff, *Date and Acquaintance Rape Among a Sample of College Students*, 37 SOC. WORK 504, 506 (1992). This last observation shows a striking male willingness to redefine male sexual aggression as non-rape.

[124] *See* Katharine K. Baker, *Sex, Rape and Shame* 1–30 (draft manuscript, on file with author) (summarizing research).

[125] *See, e.g.*, Diane Scully & Joseph Marolla, *"Riding the Bull at Gilley's": Convicted Rapists*

reflect widespread, common views among many men that sexual aggression, to the point of emotional terrorism or even violence, is a mark of masculinity.[126]

Moreover, the fear of rape leads many women to dress modestly, avoid public spaces at night without the company of a man, and generally seek male protection.[127] This limits women's freedom of movement and expression, inducing them to comply with patriarchal standards for proper behavior.[128] But, "[w]henever one group is made to feel dependent on another group, and this dependency is not reciprocal, then there is a strong comparative benefit to the group that is not in the dependent position."[129] A dependent group is seen as weaker and, therefore, of less value.[130] Because a rape culture makes women dependent on men for protection, but not vice-versa, women come to be seen as weaker and less worthy than men. "Rape culture" thus consists of a climate, a freely expressed set of attitudes that fosters subordinate female social status.

Philosopher Larry May has explained how holding and expressing such group-subordinating attitudes itself imposes some measure of moral responsibility on the offending speakers. A man who discusses women as "Other" promotes more prevalent, more deeply entrenched views of women as lesser beings.[131] Similarly, the expression of racist attitudes creates a sense of solidarity with those of similar mind.[132] As feelings of another group's lower value become more shared and more intense, the greater becomes the risk that others sharing those attitudes will act on them to cause harm.[133] Accordingly, sexist and racist speech further promote stereotypes that help to justify such harm.[134]

Describe the Rewards of Rape, *in* RAPE AND SOCIETY, READINGS ON THE PROBLEM OF SEXUAL ASSAULT 58–72 (Patricia Searles & Ronald J. Berger, eds., 1995).

[126] *See, e.g.*, Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 448–53 (1996).

[127] *See id.* at 394–400.

[128] *See id.* at 394–433.

[129] LARRY MAY, MASCULINITY & MORALITY 94 (1998).

[130] *See id.* at 63–74. This idea has deep roots in American culture. *See id.*

[131] *See id.* at 63–74, 92–94. May also notes "[i]t is the prevalent perception of women as 'other' by men in our culture which fuels the prevalence of rape in American society." *Id.* at 93. Furthermore, "[b]oth the 'climate' that encourages rape and the 'socialization' patterns that instill negative attitudes about women are difficult to understand or assess when one focuses on the isolated individual rapist. There are significant social dimensions to rape which are best understood as group oriented." *Id.* at 83.

[132] *See* LARRY MAY, SHARING RESPONSIBILITY 46–54, 79–94, 150–61 (1992).

[133] *See id.* at 1–54; MAY, MASCULINITY AND MORALITY, *supra* note 129, 63–74.

[134] *See* MAY, SHARING RESPONSIBILITY, *supra* note 132, at 64–68 (stereotyped beliefs retard the development of sensitivity, a highly valued character trait).

It is this heightened *risk* of harm that matters to May; it is irrelevant that the harm does not come about.[135] Just as a man who shoots into a crowd to see people scream is lucky if no one is hurt, so is it, for May, a matter of moral chance if sexist or racist speech does not result in rape, lynching, or lesser harms.[136] The sexist or racist speaker is thus morally culpable for the expression of his offending attitudes, even if he intends no concrete harm.[137] Of course, says May, the speaker is far less culpable than one who intentionally and directly inflicts harm.[138] The speaker may merit only shame or guilt, as opposed to the full moral blame that justifies criminal punishment.[139] But the harm that the speaker's message imposes—its contribution to a sexist or racist culture, or "climate"[140]—helps us to understand better the unique harms done by those, like hate criminals, who combine gender or racially subordinating messages with the direct, intentional infliction of concrete harm.[141]

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[135] *See id.* at 42–50.

[136] *See id.* at 49. May notes:

> [T]hey demonstrate . . . moral recklessness . . . . [T]he person with racist attitudes is like someone who aims a gun at another person and pulls the trigger but, unbeknownst to him, there is no bullet in the chamber. The fact that the gun does not go off in his hands, but it does go off in the hands of the next person to pull the trigger, does not eliminate his share in the responsibility for the harm. Both people who act recklessly share responsibility not just for the risk but for the actual harm.

Id.

[137] *See id.* at 42–50.

[138] *See id.* at 16, 46–47, 49–50.

[139] *See* MAY, SHARING RESPONSIBILITY, *supra* note 132, at 16.

[140] MAY, MASCULINITY AND MORALITY, *supra* note 129, at 89, 92.

[141] *See* MAY, SHARING RESPONSIBILITY, *supra* note 132, at 16; *see also* Taslitz, *Myself Alone*, *supra* note 15, at 1–30 (intentional infliction of harm is most deserving of full moral blame and criminal punishment). While the mere expression of racist views does not, therefore, merit criminal punishment, the intentional infliction of bodily harm motivated by, and involving the expression of, racial prejudice does. Racially-motivated assaults thus deserve criminal blame for the damage done by their message, separate and apart from the injury done by the physical actions of assault alone. The United States Supreme Court seems implicitly to have adopted this view, albeit not in precisely the terms discussed here, in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), where the Court upheld a hate crimes statute against First Amendment challenge. Among the Court's justifications for permitting the "singling out" of bias-inspired conduct, apart from other beliefs or biases, was that such conduct was likely to inflict greater individual and societal harm than other kinds of conduct. These harms included (1) a greater likelihood of inflicting distinct emotional harms on the victims and (2) a greater likelihood of inciting community unrest. *See id.* at 487–88. While the Court may not have had in mind precisely the harms discussed here, the terms "distinct emotional harms" and "community unrest" are broad enough to include, or at least express a sympathy for including, injuries to group status, independence, and security. Moreover, the Court spoke in terms of a "greater likelihood" of harm, recognizing that a mere increase in the *risk* of harm, rather than proof of actual harm, was sufficient. Furthermore, the Court understood that the especially powerful subordinating *message* contained in the combina-

The subordinate groups' mere perception of an increased risk of harm may also have unsettling consequences. Sensing greater risks, minorities may step cautiously to avoid certain neighborhoods and seek not to offend majorities by "uppity behavior" or the expression of unpopular views.[142] These defensive behaviors limit excluded groups' political, emotional, and social lives, much in the way that feminists see rape fear as breeding female dependency and a female nature compliant with patriarchal notions of "proper" gendered behavior.[143] Feminists and other critical theorists sense more clearly than May that, even absent increased risks of harm or the perception of such increased risks, the expression of racist and sexist attitudes constitutes subordination in and of itself. Absent such expression, a culture that understands one group as inferior to another could not exist.[144]

May also stresses that members of the dominant group who do not actively challenge such subordinating messages share moral blame for the bias-motivated harms done by other members of the dominant group.[145] First, passive tolerators benefit from the harms committed by other members of their group. For example, kind and compassionate men who would never dream of committing rape benefit when women suffer rape fear that makes them more dependent on, and accepting

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tion of words with violent deeds was the cause of this increased risk. Finally, the message's content and mode of expression were *intended* primarily to inflict harm, rather than to exchange ideas, thus being more conduct than speech for First Amendment purposes. *See id.* at 487. For a more extended discussion of why racially or ethnically discriminatory words or deeds that are harassing or primarily intended to inflict harm are more conduct than speech, see Andrew E. Taslitz & Sharon Styles Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 802–11, 827–30 (1996). While the present Article does not address First Amendment concerns in hate speech regulation, this brief excursus demonstrates that reasoning about constitutional principles and criminal justice policy can and should inform one another. *See generally* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989) (justifying widespread criminalization of certain language practices as consistent with both constitutional law and policy wisdom).

[142] *See supra* notes 127–30 and accompanying text (describing analogous phenomena for women gripped by rape fear); Lawrence, *supra* note 107, at 74. Lawrence states:

> There is a great difference between the offensiveness of words that you would rather not hear . . . and the *injury* inflicted by words that remind the world that you are fair game for physical attack, that evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and that imprint upon you a badge of servitude and subservience for all the world to see.

Id.

[143] *See supra* notes 127–30 and accompanying text.

[144] *See, e.g.*, RICHARD DELGADO, MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT (1997) (critical race theorist); CATHARINE A. MACKINNON, ONLY WORDS (1996) (feminist theorist).

[145] *See* MAY, SHARING RESPONSIBILITY, *supra* note 132, at 49–50, 152–58.

of, the needs of their male companions.[146] Some active and passive dominant group members thus share a kind of brotherhood of oppression.[147] Second, those who mean no harm do much to cause it when they casually express attitudes of mistrust of female competence or fear of black males as dangerous. Such prejudices contribute to the climate of subordination.[148] Third, and relatedly, many of the passive are in a position to reduce the risk of harm by challenging hateful messages yet fail to do so.[149] A society that does not condemn hate crimes in law and in action makes many of us collaborators creating and perpetuating rape and racist cultures.

Note, finally, that May stresses the harm caused by our attitudes.[150] Attitudes are predispositions to act that reveal themselves in the conjunction of our thoughts with our behavior.[151] Only when racial hatred leads to hateful action can we be said to have a hateful predisposition. The sum total of our predispositions, however, constitutes our character.[152] For the reasons noted in this Article's introduction, we are each individually responsible for our character. Therefore, for May, the group-based harms of a racist culture stem from the same source as the individual-based harms of stereotyped justice—the evils of racist personality.

III. A Despised Theory of Human Worth: The Fourteenth Amendment's Abhorrence of the Racist Personality

J.M. Balkin has noted that the American revolution was social as well as political.[153] The founders hoped to create not only a new republican form of government but a new republican society as well.[154] The social and political revolutions were linked because citizens of virtue, who had the ability to put collective interests over personal ones and

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[146] *See* May, Masculinity and Morality, *supra* note 129, at 92–94.

[147] *See id.* at 92–93.

[148] *See* May, Sharing Responsibility, *supra* note 132, at 15–54; *see also* May, Morality of Groups, *supra* note 114, at 135–44; Lawrence, *supra* note 107, at 74–75.

[149] *See* May, Masculinity and Morality, *supra* note 129, at 92–93; May, Sharing Responsibility, *supra* note 132, at 49–50, 83–95, 153–60.

[150] *See* May, Sharing Responsibility, *supra* note 132, at 46–50.

[151] *See id.* at 46.

[152] *See id.* at 15–16, 46–50, 55–70.

[153] *See* Balkin, *supra* note 100, at 2333.

[154] *See id.* at 2334; *cf.* Gordon S. Wood, The Radicalism of the American Revolution 97 (1991) ("Many like Adam Smith believed that all governments in the world could be reduced to just two—monarchies and republics—and these were rooted in two basic types of personalities: monarchists, who loved peace and order, and republicans, who loved liberty and independence.").

to judge men on merit rather than their birth or social privilege, were essential to the success of a republic.[155] While republican ideas are often said to have been quickly eclipsed by liberal ones—which value individual autonomy over collective need[156]—many view citizens of the early republic as having attempted an uneasy fusion of liberal and republican thinking.[157] This fusion took very different forms, however, in the free North and the slaveholding South.[158]

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[155] *See Balkin, supra* note 100. Balkin explains: "They hoped to substitute a natural aristocracy of merit for the aristocracy of birth and social privilege. They hoped, in short, to breed a new sort of person, a republican citizen, equal to all and subordinate to none." *Id.* at 2345. On the kinds of (masculine) citizen virtues that the founders saw as placing a man higher or lower in the aristocracy of merit, see MARK E. KANN, A REPUBLIC OF MEN: THE AMERICAN FOUNDERS, GENDERED LANGUAGE, AND PATRIARCHAL POLITICS (1998) (describing, in rising order of citizen merit, "The Family Man," "The Better Sort," and "The Heroic Man").

[156] *See, e.g.*, EARL J. HESS, LIBERTY, VIRTUE, AND PROGRESS: NORTHERNERS AND THEIR WAR FOR THE UNION vii (2d ed. 1997) (noting that "[e]ven as the nation was being established by the Founding Fathers, ... [t]he republican's emphasis on public virtue as a safeguard of political liberty and his desire to balance the welfare of society with the urge to accumulate wealth seemed increasingly naive to many people"). Professors Hirshman and Larson have summarized the argument that liberalism triumphed as follows:

> Historian Gordon Wood has convincingly argued that, as the period of independence played out, the commercial and impersonal public world superseded the virtuous republic. As the fever of revolution began to pass, problems of economic self-interest and the institutions necessary to fund the national economy moved to center stage. Norms of public behavior shifted from the republican ideal of the selfless public servant to the dominant construct of individualistic entities striving for self-interest and kept in check only by canny constitutional structures.

LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 72 (1998). Professors Hirshman and Larson argue, however, that women are now expected to embody, and to inculcate in their children, private virtues that would make for better citizens. *See id.* at 72, 79–98.

[157] *See, e.g.*, HESS, *supra* note 156, at vii–x (arguing that republican rhetoric played a critical motivating role for both Northerners and Southerners immediately before, during, and immediately after the Civil War); DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 27, 81–90 (1988) (founders' theory, ultimately embodied in the Federal Constitution, was that governmental institutions would reduce the role of the passions, especially the self-interested ones, thus enabling the public virtue of the American people to shine in the light of slow, deliberative debate); *see also* RICHARD D. BROWN, THE STRENGTH OF A PEOPLE: THE IDEA OF AN INFORMED CITIZENRY IN AMERICA, 1650–1870 (1996) (ideology of an informed citizenry as a monitor of, and guardian against, governmental abuses played an especially important role in American history, at least up until adoption of the Reconstruction Amendments). The founders preferred republican governments over plebiscitarian democratic ones partly because they trusted that the most virtuous should lead. But that belief in an aristocracy of virtue did not mean that the founders rejected a bedrock faith in the ultimate virtues of the common (albeit white male) citizen. *See, e.g.*, LUTZ, *supra*, at 85; *see generally* KANN, *supra* note 155. *But see* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 56–142, 191–224, 291–92 (1985) (summarizing the many differing views of the founders on virtue and self-interest, but suggesting that they ultimately hailed the few virtuous "Optimates" as leaders and feared the common "Populares," as a race of pygmies come to infest the public councils).

[158] For clarity, I often speak here of the views of the "North" and the "South." Of course, no

Part III examines these differences, revealing that Northern cultural forces motivating adoption of the Reconstruction Amendments sought to condemn a certain kind of racist personality—one whose racism justified racial violence. Indeed, the Fourteenth Amendment was partly directed at protecting newly freed slaves from physical and economic terrorism. The North, the Reconstruction Congress, and many of the ratifiers saw racial violence, however, as wrong not only because of the harmful acts involved but also because of what those acts revealed about the offender's unvirtuous character or, in modern terms, his racist personality. In the northern view, condemnation of such deeply flawed character was essential to the health of a republican polity. The Fourteenth Amendment, Part III argues, should therefore be seen as authorizing—indeed encouraging, and perhaps mandating—Congress and state legislatures to act to reject racist character and terror. Part III does this by first outlining Southern concepts of virtue and then contrasting them with the very different Northern concepts.

A. *Southern Virtue*

In the South, many intellectual apologists came to view slavery as central to the virtues fundamental to a free republic.[159] Slavery was the "cornerstone" of the "republican edifice."[160] It enabled the paradigm citizen to have the leisure necessary to inform himself about questions of politics, thus making him less likely to be influenced by dema-

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single worldview was shared by all citizens of either geographical region. But out of the diverse views in each region, there evolved widely shared commonalities, attitudes that became particularly influential, even dominant. There were always dissenters, sometimes loud and numerous, as was true of the Northern anti-emancipationist Copperheads and their opponents, the radical abolitionists, who early demanded slavery's immediate end. Nevertheless, dominant views did evolve, as Hess makes clear in his text, on which I significantly here rely. *See* HESS, *supra* note 156. Most important for my purposes are the dominant views of virtue and character during the time of the Fourteenth Amendment's proposal and ratification, views that incorporated many aspects of the original progressive dissenters' (the abolitionists) insights. *See infra* notes 159—231 and accompanying text.

[159] *See, e.g.*, GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 212–40 (1997). Alexander notes that lawyers played a particularly prominent role in constructing pro-slavery ideology, the lawyer-apologists falling into two camps: (1) the political economists, stressing liberal market theory, and (2) the organic social hierarchists, seeking to limit the market's domination of all social life. *See id.* at 211–15. By the 1840s, intellectual leadership had passed to the hierarchists, who relied on a variant of eighteenth century civic republicanism. *See id.* at 213–15.

[160] John Henry Hammond, *Letter to an English Abolitionist*, *in* DREW GILPIN FAUST, THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830–1860, at 177 (1981) ("[S]lavery is truly the 'corner-stone' and foundation of every well-designed and durable 'republican edifice.'").

gogues.[161] Moreover, slavery created the conditions for true equality among citizens, for, said T.R. Cobb, a leading pro-slavery theorist, "every citizen feels that he belongs to an elevated class. It matters not that he is no slaveholder; he is not of the inferior race."[162] Cobb continued, "The poorest meets the richest as an equal; sits at his table with him; salutes him as a neighbor; . . . and stands on the same social platform. Hence, there is no war of classes . . . [but true] republican equality . . . ."[163] Furthermore, by turning labor (the slave) into capital, the class warfare between labor and capital in the North was avoided.[164] To their owners, slaves were not simply market commodities, but dependent beings—and uniquely valued capital—who needed a master's care.[165] The organic social hierarchy of slavery thus promoted a sense of civic and individual obligation to others rather than the unbridled selfishness of Northern market society.[166]

The ideological justification for who should be in the subordinate, slave class—a class of noncitizens dependent on their masters—was racism.[167] Racism and violence were yoked closely together. Black slaves

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[161] *See* ALEXANDER, *supra* note 159, at 217; *see also* THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA, TO WHICH IS PREFIXED, AN HISTORICAL SKETCH OF SLAVERY cxiii (1858) ("The leisure . . . gives [the slaveholder] an opportunity of informing himself upon current questions of politics . . . [and thus] not to be influenced to so great an extent by the 'humbugs' of demagogues.").

[162] COBB, *supra* note 161, at ccxiii.

[163] *Id.*

[164] *See* ALEXANDER, *supra* note 159, at 214–15, 228–32.

[165] *See id.* at 228–32. There were two variants on this theme, one an alchemical one, exemplified by Cobb: "By making the laborer himself capital, the conflict ceases, and the interests become identical." COBB, *supra* note 161, at ccxiv. The other variant avoided magical language in favor of a more overt reliance on the benefits of slaves' dependence on their masters:

> At the North, labour and capital are equal; at the South, labour is inferior to capital. At the North, labour and capital strive; the one, to get all it can; the other, to give as little as it may—they are enemies. At the South, labour is dependent on capital, and having ceased to be rivals, they have ceased to be enemies. Can a more violent contrast be imagined?

WILLIAM HENRY TRESCOTT, THE POSITION AND COURSE OF THE SOUTH 10–11 (1850). Slave dependency was, to Trescott and his brethren, rooted in slaves' natural inferiority, creating an obligation on the stronger (the master) to care for the weaker, thus making slavery into a unique form of property. *See* ALEXANDER, *supra* note 159, at 228–32. At the same time, pro-slavery intellectual thinking was not always internally consistent, recognizing that in practice slaves were often treated as mere commodities. *See id.* at 232–40. Pro-slavery thought is thus most accurately viewed as involving a dialectic between proprietarian (pre-modern, paternalistic) and commodified notions of slaves as property. *See id.* at 232–40.

[166] *See* ALEXANDER, *supra* note 159, at 232–40.

[167] *See, e.g.*, JAMES OAKES, SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH 128–32 (1990) [hereinafter SLAVERY AND FREEDOM] (only the ideology of racism rooted in the idea of the inherent biological inferiority of black-skinned Africans had the power to build support for the peculiar institution among even the many free men who did not own slaves).

were deemed incapable of self-control, emotionally simple, and intellectually inferior[168] and consequently "were deemed inherently more responsive . . . to the motivating force of physical coercion . . . ."[169] The slave management literature stressed that "tangible punishments and rewards, which act at once on their senses, are the only sort most . . . [slaves] can appreciate."[170] Accordingly, slaves' moral and economic health, not to mention their political role in permitting true republican citizenship, required teaching them total and unconditional obedience to their master.[171] That obedience was similarly linked with race, as, wrote one planter, they must learn that "to the white face belongs control, and to the black obedience."[172] While some literature counseled persuasion as a technique, no one cited "a single instance of a slave convinced . . . [solely] by the sheer force of his master's logic."[173] Punishment usually meant whipping,[174] and while the literature often spoke of "whipping as a last resort; in practice, it was the disciplinary centerpiece of plantation slavery."[175] One master stated, "[i]f the law was to forbid whipping altogether the authority of the master would be at an end."[176] As abolitionism gained ground, combatting it, rather than promoting plantation efficiency, became the primary goal of the slave management literature.[177] Management experts started to recommend "increased repression on paternalistic grounds. 'Slaves have no respect or affection for a master who indulges them over much.'"[178]

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[168] *See id.* at 130.

[169] *Id.*

[170] JAMES OAKES, THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS 154 (1998) [hereinafter RULING RACE] (quoting a cotton planter). Although no single theory justifying master-slave relations united the slaveholders, the closest to an ideal to which slaveholders aspired was the set of prescriptions and attitudes reflected in the plantation management literature that flourished from the 1830s until the Civil War. *See id.* at 153.

[171] *See id.* at 154–59.

[172] *Id.* at 154 (quoting *Cotton Planter and Soil of the South*, I (1852)).

[173] *Id.* at 158.

[174] *See id.* at 159–60.

[175] OAKES, RULING RACE, *supra* note 170, at 167.

[176] FREDERICK LAW OLMSTED, A JOURNEY IN THE SEABOARD SLAVE STATES 206, 618 (1856).

[177] *See* OAKES, RULING RACE, *supra* note 170, at 162–64.

[178] *Id.* at 163 (quoting *DeBow's Review*, XVIII (1854)) (recommendations of planter Robert Collins). While the ideal plantation portrayed in the management literature was an abstraction to most large planters, and irrelevant to the majority of slaveholders who owned fewer than ten bondsmen, the literature is significant for two reasons: (1) it likely portrayed a more humane picture of slavery than was the reality, while it still reeked of racism and violence; and (2) it painted a picture of Southern citizen virtue that fit what became the North's image of the South, an image that the North viewed with revulsion, certainly by the time of Reconstruction. *Compare* OAKES, RULING RACE, *supra* note 170, at 164–69 (discussing the reality of Southern masters' cruelty and the hypocrisy of those masters who avoided tainting their own hands, while tacitly encouraging overseers' abuse) *with* HESS, *supra* note 156 (on North's views on Southern "virtue").

Early on, Thomas Jefferson worried about the effects on citizen virtue of teaching, even if only by example, that racial violence was central to good republican citizenship,[179] for violent abuse of slaves was their masters' practice long before it was preached by slavery's intellectual apologists and plantation management literature.[180] Jefferson stated:

> The parent storms, the child looks on, catches the lineaments of wrath, puts on the same airs in the circle of smaller slaves, gives a loose to his worst of passions, and thus nursed, educated, and daily exercised in tyranny cannot but be stamped by it with odious particularities. . . . And with what execration should the statesman be loaded, who permitting one half the citizens to trample on the rights of the other, transforms those into despots, and these into enemies, destroys the morals of the one part, and the amor patriae of the other.[181]

Jefferson's views in this passage—if not in his heart or in his actions—directly contradicted those of the slavery apologists, who had argued that the violence attendant to slavery was necessary to creating caring, duty-bound, equal citizens whose rule would benefit a subordinate black population that could not care for itself.[182] In

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For summaries of how the law supported Southern racial violence against slaves, see generally RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29–135 (1997); THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW 1619–1860, at 182–248, 337–53 (1996); JENNY BOURNE WAHL, THE BONDSMAN'S BURDEN: AN ECONOMIC ANALYSIS OF THE COMMON LAW OF SOUTHERN SLAVERY 101–73 (1998).

[179] *See* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 162–63 (William Peden ed., 1982) (expressing these views). *See generally* CHARLES JOHNSON & PATRICIA SMITH, AFRICANS IN AMERICA: AMERICA'S JOURNEY THROUGH SLAVERY (1998) (on the long history of racial violence against slaves).

[180] As noted earlier, the plantation management literature and the literature of the intellectual elite slavery apologists likely painted a more humane picture of slavery than was true in reality. Nevertheless, theory and reality shared racism and an understanding of the centrality of the credible threat of the master's violence against the slave to maintain the institution. *See supra* notes 167–78 and accompanying text. But racial violence against slaves had a long history preceding the writing of many of the apologists. *See supra* notes 178–79 and accompanying text.

[181] JEFFERSON, *supra* note 179, at 162–63.

[182] While Jefferson often wrote of the evils of slavery, his actions frequently belied his protests. *See* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 105–67 (1996). He was an enthusiastic racist, believing wholeheartedly in the inferiority of, and fearing, black-skinned Africans and their descendants. *See id.* at 107–10, 151–53. Moreover, while he was neither sadistic nor vicious, "for his own slaves . . . punishment could be swift, arbitrary, and horrible." *Id.* at 110, 156. Furthermore, his racist views and actions arguably lent support to the idea that white citizen equality rested on the oppression of the black masses. *See id.* at 107–10. Nevertheless, Jefferson unquestionably "hated" slavery because it turned whites into tyrants. *Id.* at 149. He feared, therefore, that slavery would corrupt white citizen virtue. This fear was a far

practice, slaveholders also lacked Jefferson's compunctions. Indeed, by the 1850s, public denunciation of lenient slave management pushed even "kind" masters toward cruelty to be more favorably regarded by their neighbors.[183] Blatant, excessive cruelty was rarely condemned.[184] Many masters or overseers reveled in race-based physical abuse.[185] During this period, the slave Solomon Northrup recalled being forced by his master to beat another slave while the mistress "stood on the piazza among her children, gazing on the scene with an air of heartless satisfaction."[186] This prompted Northrup to ponder "the effect of these exhibitions of brutality on the household of the slave-holder."[187] For instance, Northrup wrote that his master's oldest son:

> is an intelligent lad of ten or twelve years of age. It is pitiable, sometimes, to see him chastising . . . Uncle Abram. He will call the old man to account, and if in his childish judgment it is necessary, sentence him to a certain number of lashes, which he proceeds to inflict with much gravity and deliberation. Mounted on his pony, he often rides into the field with his whip, playing the overseer, greatly to his father's delight. Without discrimination, at such times, he applies the rawhide, urging the slaves forward with shouts, and occasional expressions of profanity, while the old man laughs, and commends him as a thorough-going boy.[188]

It is important to stress again the role of racism in Southern concepts of virtue, for Southerners saw repression of free blacks as equally necessary as repression of slaves.[189] Indeed, if free blacks were

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cry from abolitionism, but can be seen as a precursor to the post-Civil War sentiments of many Northerners, who retained their racism but rejected slavery in part precisely because of its damage to the white personality. *See infra* notes 196–231 and accompanying text. Abolitionists and later many emancipationists in the North did, however, come to have some concern for the impact of slavery on blacks. During early Reconstruction, the politically dominant sentiment in the North was at least to protect blacks from racial violence and economic harassment. *See infra* notes 213–30 and accompanying text.

[183] *See* OAKES, RULING RACE, *supra* note 170, at 167–68.

[184] *See id.*

[185] *See id.* at 167–76, 180–83. *See generally* JOHN HOPE FRANKLIN & LOREN SCHWENINGER, RUNAWAY SLAVES: REBELS ON THE PLANTATION 42–48 (1999) (documenting physical cruelty toward slaves by masters and overseers as a common reason for slaves' becoming runaways).

[186] SOLOMON NORTHRUP, TWELVE YEARS A SLAVE 196, 201 (Sue Eakin & Joseph Logsdon, eds., 1968) (1853).

[187] *Id.* at 201.

[188] *Id.*

[189] *See* OAKES, SLAVERY & FREEDOM, *supra* note 167, at 133. *See generally* IRA BERLIN, SLAVES

to be seen as doing too well, the whole institution of race-based slavery would be called into question.[190] Laws discouraged manumission and limited the rights of free blacks.[191] These limitations were rooted in a Southern white character whose identity depended on a vision of black character that was not only naturally inferior and dependent, but also dangerous.[192] T.R. Cobb explained: "[R]emove the restraining and controlling power of the master, and the negro becomes, at once, the slave of his lust, and the victim of his indolence, relapsing, with wonderful rapidity, into his pristine barbarism."[193] Cobb concluded, "Hayti [sic] and Jamaica," where slaves had successfully revolted, "are living witnesses to this truth. . . ."[194]

While the South thus embraced racial violence as central to virtuous citizen character, the North eventually came to precisely the opposite conclusion. To the North, the love of racial violence came to represent the essence of the degraded, unvirtuous Southern character. For Northerners, citizen virtue ultimately came to be defined as the opposite of Southern traits. Northerners could not speak of their own virtue other than by contrasting it in the same breadth with attitudes and events in the South that Northerners saw as defining an anti-republican character.[195] The next section of this Article thus examines Northern views of what was wrong with Southern notions of "virtue"

WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH (1974) (documenting Southern oppression of free blacks).

[190] Oakes notes:

> Having justified slavery by resorting to racist ideology, . . . free Southerners were naturally troubled by the presence of blacks who were not slaves. Rather than adjust their ideology to conform to the reality of several hundred thousand free blacks, the slaveholders brought reality itself more into line with their stated convictions.

OAKES, SLAVERY & FREEDOM, *supra* note 167, at 133.

[191] *See id.* These limitations included exclusion of free blacks from political participation, as well as restrictions on their freedom of movement, property rights, and economic options. *See id.*

[192] Jefferson seemed to share this fear, viewing each slave as "[a]n animal whose body is at rest, and who does not reflect . . . dull, tasteless and anomalous . . . ." JEFFERSON, *supra* note 179, at 138, 162. He worried that one day the angry animals would break their pen: "I tremble for my country when I reflect that God is just: that his justice cannot sleep forever: that considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation, is among possible events: that it may become probable by supernatural interference!" *Id.* at 163; *see also* FINKELMAN, *supra* note 182, at 136 (interpreting this passage as showing Jefferson's fear of slave retribution as well as slavery's harm to republican government).

[193] COBB, *supra* note 161, at 49 (citations omitted).

[194] *Id.* On the rebellion in Haiti, then called St. Domingue, see JOHNSON & SMITH, *supra* note 179, at 249–66. On the American response to Jamaican rebellion, to which "the British responded with an ambitious campaign of emancipation within their colonies," see JAMES BREWER STEWART, HOLY WARRIORS: THE ABOLITIONISTS AND AMERICAN SLAVERY 43–45 (rev. ed. 1996).

[195] Professor Hess explained it this way:

as the only way to understand the kind of republican citizen character to which the post-Civil War North aspired.

B. *Northern Views of Southern "Virtue"*

While Northern and Southern attitudes toward the good life were more similar than they often cared to admit,[196] Northern ideas of republican virtue came to differ from those of the South in important ways. The Civil War reignited Northern republican spirit.[197] Many Northerners feared the impact of slavery on Southern whites, viewing slavery as damaging white virtue by debasing labor (since it was done by a despised racial minority); and creating an elite class of slaveholders with a tremendous influence on local, state, and national politics (especially regarding the spread of slavery to the West).[198] Slavery bred a Southern character comfortable with repression of rights—white as well as black—including suppression of free speech, freedom from unreasonable searches and seizures, and rights of association in an effort to silence public debate on the slave question.[199] In this manner, slavery as an institution came to be seen as encouraging traits that reveled in crushing the freedoms of even free whites.[200] The North also saw slavery as inconsistent with its deep belief in the virtue of self-control, a trait recognized by the Civil War era as especially important to a free people.[201] General John Logan, expressing common sentiment, explained that self-control was necessary to live together "in obedience to the better instincts of humanity and to repress the selfishness,

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> While convinced of their own character—as individuals and as a people—Northerners reversed the image of virtue when pondering the nature of their enemies. Working within the context of their values, they pictured the Confederacy as the antithesis of everything associated with their own ideology. They saw justification for the war upon slavery in the conduct of the Rebel war effort, in the social attitudes of Southerners, and even in the personal characteristics of individual Confederates.

HESS, *supra* note 156, at 78.

[196] *See, e.g., id.* at 16 (noting Southern mainstream shared many Northern attitudes, an observation unrecognized by the North); OAKES, SLAVERY AND FREEDOM, *supra* note 167, at 40–79 (demonstrating many shared values between North and South, including especially those characteristic of capitalism).

[197] *See* HESS, *supra* note 156, at xiv ("The Civil War was the last great hurrah of republican ideology . . . .").

[198] *Id.* at ix–x.

[199] *See* Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. (forthcoming 1999) [hereinafter Taslitz, *Informed Citizen*] (summarizing this argument and relevant sources).

[200] *See id.* at 21–31; HESS, *supra* note 156, at 19–20.

[201] *See* HESS, *supra* note 156, at 9–10, 21.

avarice, ambition, injustice of the fallen nature [of men]."[202] Northerners believed in self-interest too, but argued that an informed self-interest would lead each citizen to self-control and virtue.[203] Accordingly, serving the common good served the individual as well.[204]

Northerners did not see that the Southern mainstream shared many Northern capitalist values, albeit with a more anti-egalitarian twist.[205] Instead, the North branded the entire South by the South's most radical visionaries and read Southern literature selectively, thereby portraying the war as a battle over national character.[206] The Southern slaveholding elite, concluded the North, made the rich indolent and the common man subservient.[207] "A cringing servility," one Northern soldier noted, "must be generated and maintained on the one side and a haughty and exacting superciliousness on the other."[208] Slavery further bred a Southern character incapable of self-control,[209] which meant that Southerners gave free reign to selfishness, ambition, and brute force. Southerners were characterized by cruel, unmanly treatment of others. The loss of self-control and rise of cruelty were magnified by the common man's ignorance, which made him easily misled by his leaders.[210] The attack on Fort Sumter that began the war was seen as proof of the violent, ignorant Southern character.[211] Southerners "had unlearned the art of self-government, and could not be trusted to maintain control of their passions."[212]

Of course, Northerners were mostly racists by modern standards.[213] But their racism was of a different order, especially after the

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[202] JOHN A. LOGAN, THE VOLUNTEER SOLDIER OF AMERICA 376–78 (1887).

[203] *See* HESS, *supra* note 156, at 10–11.

[204] *See id.* at 11–12. De Tocqueville put it this way:

> In the United States hardly anybody talks of the beauty of virtue, but they maintain that virtue is useful and prove it every day. The American moralists do not profess that men ought to sacrifice themselves for their fellow creatures *because* it is noble to make such sacrifices, but they boldly aver that such sacrifices are as necessary to him who imposes them upon himself as to him for whose sake they are made.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 121–22. (Phillips Bradley ed. and Henry Reeve trans., Vintage 1990) (1838).

[205] *See* HESS, *supra* note 156, at 13–14; *see also* GEORGE SIDNEY CAMP, DEMOCRACY 100, 102–04 (1841).

[206] *See* HESS, *supra* note 156, at 16–17.

[207] *See id.* at 20.

[208] *Id.*

[209] *See id.* at 19–24.

[210] *Id.* at 24.

[211] *See* HESS, *supra* note 156, at 23–27, 29, 78–79.

[212] *Id.* at 24. On the importance to Northern ideology of an educated, informed citizenry, see Taslitz, *Informed Citizen*, *supra* note 199.

[213] *See* HESS, *supra* note 156, at 98–102.

war and during the early period of Reconstruction.[214] Their racism did not justify the brutality of slavery, which so corrupted citizen virtue.[215] Indeed, many Northerners concluded that blacks who fought in the war showed sufficient virtue to merit their freedom.[216]

Furthermore, Southern intransigence after the war largely took the form of race-based violence that the North abhorred.[217] For example, "[i]n 1866, various southern white militias 'composed of Confederate veterans still wearing their gray uniforms . . . terrorized the black population, ransacking their homes . . . and other property and abusing those who refused to sign plantation labor contracts.'"[218] The Ku

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[214] *See id.* at 98–102; *infra* notes 215–30 and accompanying text.

[215] *See* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 291 (1997) Smith noted:

> Though they insisted that blacks were endowed by the creator with moral equality in terms of basic rights, not even the most radical white Republicans really tried to refute claims for the intellectual, emotional, and biological inferiority of blacks. Many instead conceded such inferiority, only urging that it did not justify denials of the rights in the Declaration of Independence.

Id.; *see also infra* notes 216–30 and accompanying text. While Northerners long held a distaste for the abolitionist label, they did thus ultimately embrace what they called "emancipationist" ideas, partly because they were seen as necessary to preserving white citizen virtue. *See, e.g.*, HESS, *supra* note 156, at 81–114.

[216] *See, e.g.*, ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 261 (1995) ("Yet the Republicans did develop a [pre-Civil War] policy which recognized the essential humanity of the Negro . . . . [a]lthough deeply flawed by an acceptance of many racial stereotypes . . . ."); ERIC FONER, THE STORY OF AMERICAN FREEDOM 97 (1998) [hereinafter AMERICAN FREEDOM] ("[T]he enlistment of 200,000 black men in the Union armed forces during the second half of the war placed black citizenship on the postwar agenda. The inevitable consequence of black military service, one senator observed in 1864, was that the 'black man is henceforth to assume a new status among us.'"); SMITH, *supra* note 215, at 298 ("Never one to romanticize white humanitarianism, W.E.B. DuBois contended that for a 'brief period' in the late 1860s and early 1870s, 'the majority of thinking Americans of the North believed in the equal manhood of Negroes.'"); PHILLIP SHAW PALUDAN, A PEOPLE'S CONTEST: THE UNION AND CIVIL WAR 1861–1865, at 198–230 (2d ed. 1996) (tracing evolution of Northern emancipationist sentiment from war necessity, to sympathy for blacks who fought in the war, to, for many, moral necessity). Northern views on race were diverse, however, and there were some who held extraordinarily progressive views for their time. *See generally* STEWART, *supra* note 194; DAVID A.J. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW (1998) [hereinafter WOMEN, GAYS, AND THE CONSTITUTION].

[217] *See, e.g.*, MARY FRANCES BERRY, BLACK RESISTANCE, WHITE LAW: A HISTORY OF CONSTITUTIOANL RACISM IN AMERICA 61–80 (1994) (summarizing the history of post-Civil War Southern racial violence); JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 65 (2d ed. 1994) ("It is almost impossible to exaggerate the Northern revulsion to incidents like the Memphis and New Orleans riots [against newly-freed slaves] and other altercations of less magnitude. Small wonder that the Fourteenth Amendment seemed more and more indispensable to the establishment of a just peace in the South.").

[218] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 258 (1998) (quoting ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1986–1877, at 203 (1988) [hereinafter RECONSTRUCTION]).

Klux Klan, in action by 1866, similarly played a role in intimidating, whipping and beating blacks into signing onerous labor contracts with their landlords.[219] The Black Codes, adopted by the Southern states to replace the Slave Codes, then employed to arrest blacks who breached labor contracts, prohibited them from leaving their master's premises and authorized hiring out black children and blacks unable to pay vagrancy fines.[220]

Even apart from the Black Codes, however, the actions of Southern government officials supported anti-black violence.[221] When blacks in 1866 and their white Republican allies convened in a hall in New Orleans to discuss extending the franchise to freedmen, they were attacked and slaughtered by a mob led by the city police, a force largely made up of militant Confederate veterans.[222] Similarly, in Memphis, city police played a key role in triggering violence against former black servicemen.[223] A similar wave of violence against white Republicans swept the South, but they were targeted precisely because they were friends of the freedmen.[224] As these incidents suggest, Southerners had not learned virtue from their defeat, and crushed early postwar Northern optimism about Southern Reconstruction.[225] Stopping the economic and physical terrorism that stemmed from the Southern character under slavery required more drastic action. Undisputedly, the drafters of the Fourteenth Amendment sought to halt racially-motivated violence, and thereby provide former slaves the same protection from violence as was enjoyed by white citizens.[226]

Ultimately, the North acknowledged that extending political, in addition to civil, rights to blacks via constitutional amendment was essential to achieving a lasting change in the Southern character.[227]

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[219] *See* HERBERT SHAPIRO, WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY 5 (1988) (on the Ku Klux Klan and labor contracts); *see also* JEFFREY ROGERS HUMMEL, EMANCIPATING SLAVES, ENSLAVING FREE MEN: A HISTORY OF THE AMERICAN CIVIL WAR 316–20 (1996) (on Klan violence more generally).

[220] *See, e.g.*, FONER, RECONSTRUCTION, *supra* note 218, at 199–201; *see also* W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 160–81 (1935). Anger at Southern intransigence in adopting the Black Codes, combined with a variety of other motivations, led Congress to pass the Civil Rights Act of 1866, which "canceled the Black Codes." KENNEDY, *supra* note 178, at 85.

[221] *See* SHAPIRO, *supra* note 219, at 5–7.

[222] *See id.* at 6.

[223] *See id.* at 6–7.

[224] *See, e.g., id.* at 5–29; FONER, RECONSTRUCTION, *supra* note 218, at 425–38.

[225] *See* FONER, RECONSTRUCTION, *supra* note 218, at 216–80 (tracing decline in Northern postwar optimism in the face of Southern intransigence).

[226] *See, e.g.*, ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 20–44 (1994). *See generally* FONER, RECONSTRUCTION, *supra* note 218.

[227] *See* HESS, *supra* note 156, at 112. For a more detailed explanation of the historical forces behind these shifting views, see AMAR, *supra* note 218, at 181–214, 268–78.

The Reconstruction Amendments, therefore, while not condemning racist personality per se, should be seen as condemning the kind of racist personality that viewed racially-motivated violence as central to white equality and social order. Northerners during and immediately after the Civil War considered citizen virtue as central to the success of republican governments and recognized that virtuous character is shaped, at least in part, by circumstances, such as the power of free institutions to mold a republican personality.[228] Like their predecessors in 1789, the framers of the 1860s envisioned a new social order, in addition to a novel political one.[229] The 1860s framers, however, saw, in a way that the original framers did not, that a just social order cannot expose individuals to loss of civil or political rights because of their membership in a particular racial group, nor can a racial or similarly classified group as a whole be consigned to second-class citizenship.[230]

This vision cannot be realized, however, by the courts acting alone and, perhaps, not by judicial action at all. Only legislatures are equipped to enact the broad-based measures that are required to combat the evils of Southern character. That is, in part, why the Fourteenth Amendment includes section five, which declares that, "The Congress shall have power to enforce this article by appropriate legislation."[231] Regulating hate crimes—which involve precisely the kind of racially-motivated violence that the Fourteenth Amendment meant to reject—requires legislative action. Hate crimes legislation thus merely embodies the moral judgment of the Fourteenth Amendment's framers that violence intended to subordinate because of race evidences an unvirtuous character that merits our strongest condemnation.

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[228] *See* HESS, *supra* note 156, at 73–80.

[229] The new social order was one of equal republican citizens whose virtuous character was the antithesis of Southern citizen ideals. *See supra* notes 195–228 and accompanying text.

[230] *See generally* KARST, *supra* note 107, at 15–27, 49–57 (suggesting Fourteenth Amendment best interpreted as promoting a sense of equal belonging to a shared political community); DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS (1993) [hereinafter CONSCIENCE AND THE CONSTITUTION] (Reconstruction Amendments embody a general political theory rooted in abolitionist thinking that structures the American political community in terms of universal human rights).

[231] U.S. CONST. amend. XIV, § 5; *see also* TASLITZ, *supra* note 49 (explaining why the Constitution sometimes mandates legislative rather than judicial action). *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (arguing for a stronger legislative, rather than solely judicial, role in interpreting and implementing the federal Constitution).

C. *On Interpretive Method*

In stressing the "moral judgment of the Fourteenth Amendment's framers," I am not arguing, however, that Congress specifically intended to mandate the adoption of statutes similar to modern hate crimes legislation. Obviously, they did not. Indeed, two of the leading hate crimes critics, Professors James B. Jacobs and Kimberly Potter, have pointed out that the two post-Civil War civil rights statutes, respectively sections 241 and 242 of Title 18 of the United States Code,[232] were drafted to ensure that laws were enforced equally on behalf of all victims, regardless of race, prejudice, or criminal motivation.[233] Unlike modern statutes, the post-Civil War statutes ignored the victim's race, gender, and sexual orientation and focused on government actors' thoughts and deeds, not private criminal actors' motivation.[234]

History's role in constitutional interpretation, however, need not serve a narrow originalism, as a wide variety of modern interpretive theorists have explained.[235] David Richards' view is particularly helpful. He summarizes his constitutional interpretive theory as follows:

> The Reconstruction Amendments responded to the gravest crisis of constitutional legitimacy in our history, and are best interpreted as negative and affirmative constitutional principles responsive to that crisis and any comparable future ones. Our interpretive attitude must be to make the best sense of them in light of the genre of American revolutionary constitutionalism that they assume and to critically elaborate them in deference to the narrative integrity of the story of the American people and their struggle for politically legitimate government that respects human rights.[236]

For Richards, it is the *principles* enacted by these Amendments, not the precise conceptions of their application by the Reconstruction Congress, or the Amendments' ratifiers, that matters.[237] Indeed, Richards expressly rejects reliance on the concrete views of the

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[232] *See* 18 U.S.C. §§ 241, 242 (1994). For a history of these statutes, see Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113 (1993).

[233] *See* JACOBS & POTTER, *supra* note 1, at 37.

[234] *See id.*

[235] For an outstanding survey, analysis, and critique of the various forms of originalism and the role of history in constitutional interpretation, see MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 97–128 (1993).

[236] RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION, *supra* note 216, at 16–17.

[237] *See id.* at 18, 21–22.

Reconstruction Congress as reflecting momentary political compromises rather than durable, albeit evolving, principles that the Amendments embody.[238] Richards goes so far as to argue that the views of feminist abolitionists—views specifically repudiated, in part, by the Reconstruction Congress— best promote the political legitimacy and morality that our current generation of constitutional thinking demands.[239]

Unlike Richards, I do not rely on the views of a wise but small minority, i.e., the radical feminist abolitionists. Rather, I rely on the ideological views of the Northern majority, the victors, on matters of broad political morality. There are those who treat the Constitution much like an ordinary statute: the command resulting from political compromise.[240] Under such a view, the South's understanding of the Reconstruction Amendments has great weight, for compromise with southern views was necessary to the Amendments' ultimate adoption.[241] Such a view renders, however, the long struggle against slavery of little meaning. As Professor Bruce Ackerman's detailed recent review of the Reconstruction Amendments' history suggests, those Amendments are most fairly understood as having been imposed by the victors,[242] yet we

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[238] *See id.* at 18–22, 27–32.

[239] *See id.* at 27–28.

[240] I think this is a fair characterization of at least the implicit approach in a novel, recent originalist work, JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1997).

[241] *See id.* (stressing Southern elite views of the Fourteenth Amendment's meaning).

[242] Ackerman's argument is far more complex and subtle than my text suggests. His latest work, however, on the Reconstruction Amendments stresses the history of Northern efforts to ram those Amendments down protesting Southern throats, a history that suggests that the victors' views matter more than the losers'. *See* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998). On the other hand, Ackerman declares that the framing of the Fourteenth Amendment cannot be seen as "an outrageous case of textualist rupture and sectional imposition," *id.* at 184, because the South was always deeply involved in the constitutional conversation. Furthermore, Northern Republicans won a majority in the triggering election of 1866 so decisive as to leave them in control of Congress even if conservative Southern representatives were counted in measuring who had the majority. *See id.* at 178–84. But Ackerman then describes in great detail how the North imposed the Fourteenth Amendment on the South, for example, passing the Reconstruction Act on March 2, 1867, prohibiting seating Southern representatives until their state legislatures, and three-fourths of all the states, approved the Fourteenth Amendment. *See id.* at 186–252. Ackerman's work is most fairly understood as demonstrating that the North's acts in coercing the South into ratifying the Fourteenth Amendment were not "outrageous" but legitimate acts of "We, the People," though that is not necessarily a characterization of which Ackerman would entirely approve. Ackerman is thus less interested in any particular group's purported understandings than in his nuanced notion of when and how "We the People" act to achieve constitutional change. His argument indeed seems in part to be that the broader sweep of American history matters more than do constitutional formalities. *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3–57, 131–62 (1991).

have recognized the Amendments' constitutional legitimacy for over 125 years. The Northern victors ultimately came to see the Civil War in moral terms, and, to the extent that any group's views matter, the victors' views at the level of moral principle deserve the most weight.

I do not shy away, however, from the reality that my interpretive claims are themselves moral judgments. Professor Robin West has explained that our constitutional history reflects a tension between an "authoritarian" impulse that views interpretation as a quest for discerning the command of a sovereign authority and a "normative impulse" that views interpretation as a quest for the answer to this question: How should we constitute ourselves as a political community?[243] The authoritarian impulse is rigidly bound by the text, either as free-standing authority or as the reflection of the original intent of its authors. The text—and sometimes the intent of its framers—tell us how to live.[244] The normative impulse views text as persuasive and facilitative, and text and the history behind it as a source of insight into how others answered similar questions in the past.[245] Text and history, however, help to illuminate, rather than mandate, how we should constitute our political community today.[246]

Both impulses, as West explains, are always at work to one degree or another,[247] a point that seems especially sound for broad, ambiguous, aspirational terms like "due process" and "equal protection."[248] I prefer to be candid about this observation. Consequently, I believe the history recounted here of Northern concepts of virtue is helpful in imagining a political community more cohesive and legitimate than the one embraced by the false color blind neutrality of the hate crimes critics. Why hate crimes legislation—rather than its absence—promotes such cohesiveness and legitimacy is the subject of the next, and final, Part of this Article.

IV. Hate Crimes and Identity Politics

By now it should be clear that the critics of hate crimes legislation are wrong to argue that these statutes contribute to divisive identity

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[243] *See* West, *supra* note 226, at 192–98.

[244] *See id.* at 195–98.

[245] *See id.* at 192–98.

[246] *See id.*

[247] *See id.* at 196.

[248] *Cf.* Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 7–38 (1996) (defending interpreting constitutional clauses that are drafted in "exceedingly abstract moral language" in the "way their language most naturally suggests," namely, incorporating abstract moral principles by reference).

politics.[249] "Identity politics," as the critics define it, means that individuals relate to one another solely as members of competing groups who recognize the strategic advantages of being labeled "disadvantaged" or "victimized."[250] Such politics, say the critics, raise social conflicts and undermine the unity of American society.[251]

These critics, however, misconceive the social functions served by hate crimes legislation. Such legislation sends two powerful, complementary messages: first, that persons deserve to be judged as unique individuals, not merely group members; and second, that the fates of the individual and the groups to which he belongs are linked, and that all groups and their members deserve *equal* respect in a republican polity.[252] Such equal respect enhances the political, social, and economic prospects for us all.[253] Hate crimes legislation is based, therefore, not on a model of scarcity in which competing groups battle over a shrinking pie, but on a model of abundance in which cooperating groups create a larger pie.[254]

Even more importantly, the fact is that hate crimes legislation embodies the judgment that group hatred-motivated violence is fundamentally inconsistent with a republican government and culture. All societies must battle criminal violence, but a republican society must in particular battle violence stemming from group animus because such violence centrally defines the master-slave relationship.[255] To tolerate such violence is to let the seeds of slavery in fact, if not in law, take root in a way that is inconsistent with a coherent republicanism.[256] An incoherent republicanism smacks of illegitimacy, at least among the groups victimized by the violence. That illegitimacy is far more divisive than the welcoming attitude toward individual group identification that hate crimes legislation reflects.

Professor Phillip Pettit's analysis of republicanism makes this point clearer. Pettit argues that one critical strand of republican thinking, in

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[249] JACOBS & POTTER, *supra* note 1, at 130–32.

[250] *See id.* at 5.

[251] *See id.* at 10, 130–32.

[252] *See supra* Parts I, II, III.

[253] *See supra* notes 99–152 and accompanying text.

[254] On the alternative philosophies of scarcity and abundance, see REGINA M. SCHWARTZ, THE CURSE OF CAIN: THE VIOLENT LEGACY OF MONOTHEISM xi, 2–4, 34–38, 83 (1997). Northern philosophy at the end of the Civil War was indeed one of abundance, for ending slavery and promoting greater (albeit not perfect) racial equality would unleash sleeping Southern productive capacity and expand the benefits of freedom for Northerners and Southerners alike. *See* HESS, *supra* note 156, at 104–05.

[255] *See infra* notes 257–86 and accompanying text.

[256] *See infra* notes 257–86 and accompanying text.

a tradition stretching back to Cicero, holds that domination is the ultimate social evil and that slavery centrally exemplifies such domination.[257] Slavery is defined as the power of one person (the master) arbitrarily to interfere with the choices of another person (the slave), even if that power is never exercised.[258] Slavery leaves the subordinate party "vulnerable to some ill that the other is in a position arbitrarily to impose."[259] The master need neither offer reasons for nor consider the interests of the slave in imposing this evil.[260] Violence, of course, is one of the key ways in which a master exercises this power.[261]

One of the core evils wrought by criminal violence, moreover, is the damage it may do to the apportionment of nondomination in society as a whole.[262] When crime is perpetrated on a person because of his group membership, everyone in the victim's vulnerability class (i.e., his group) faces the permanent possibility of such interference.[263] That group then becomes subject to another's arbitrary interference, becoming, by definition, slaves.

Part III of this Article demonstrated that the strand of republicanism identified in Professor Pettit's analysis is embodied in our post-Reconstruction Constitution.[264] Battling recurring manifestations of the essence of slavery—as hate crimes legislation seeks to do—should thus be seen as inherent in an American notion of a unified republican culture.

Professor Margalit would go even farther, arguing that similar principles govern all just societies, not merely republican ones.[265] For him, a decent society is a prerequisite to a just society.[266] A "decent" society, according to his definition, is one whose institutions do not, by their laws or behavior, humiliate people.[267] Humiliation stems from

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[257] *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM & GOVERNMENT 4–23 (1997).

[258] *See id.* at 31–36, 52–57.

[259] *Id.* at 4–5.

[260] *See id.* at 31–36, 52–57.

[261] *See id.* at 53, 57.

[262] *See* PETTIT, REPUBLICANISM, *supra* note 257, at 67, 92–95, 154–56. *See generally* JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESSERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1994).

[263] *See* PETTIT, REPUBLICANISM, *supra* note 257, at 133–34, 154–56 (stating republicans recognize grievances of many social groups, including multi-culturalists, as republican causes aim at the fair dispensation of, and increase in, non-domination, potentially a goal especially well-served by the criminal law).

[264] *See supra* Part III.

[265] *See* AVISHAI MARGALIT, THE DECENT SOCIETY (Naomi Goldblum trans., 1996).

[266] *See id.* at 1–4.

[267] *See id.* at 1.

the human capacity for symbol-based anguish.[268] Humiliation consists of rejection from the family of man.[269]

The idea of rejection from the family of man, argues Margalit, is, however, too abstract for practical social and political action.[270] But once we understand the critical role of "encompassing groups"—groups that are central to identity, that "shape [your] life as a human being"[271]—a more practical working definition is suggested: humiliation is the institutional rejection of encompassing groups and their members *because of* their group identity.[272] To reject such groups or to discriminate against them in the apportionment of protection, status, and other goods and services is to reject the way we express ourselves as human beings and thus inconsistent with a decent society.[273] Decent societies do not create second-class citizens.[274]

Of course, it may be argued that hate criminals are private citizens committing wrongs in private ways. Social institutions are not involved. Margalit rejects this perspective[275] because, for him, social institutions

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[268] *See id.* at 84–85.

[269] *See id.* at 135–37.

[270] *See* MARGALIT, *supra* note 265, at 135–37.

[271] *Id.* at 137. It is beyond the scope of this Article to resolve the question of what groups should be considered "encompassing" and thus should be covered by hate crimes legislation, but Margalit helpfully identifies six characteristics. *See id.* at 138–40. Professors Jacobs and Potter argue that the mere existence of a dispute over whom hate crimes laws should protect demonstrates the pernicious nature of such laws. *See* JACOBS & POTTER, *supra* note 1, at 132–34. First, they argue, hate crimes laws cannot protect all culturally salient groups because the power of these laws turns on their exclusionary nature. *See id.* at 132–33. To the contrary, I have argued here, the power of hate crimes laws lay in their *inclusionary* message: *all* culturally salient groups and their members are entitled to *equal* respect. Second, Jacobs and Potter contend that conflicts in particular cases over whether or not a crime involves protected "hatred" promote intergroup rivalry. *See id.* at 137–42. For example, Orthodox Jews in New York City complained because an alleged crime by a Jew against an African American was labeled a bias crime. *See id.* at 138. But the Jews did so because of their perception that another alleged crime by an African American against a Jew was not so labeled—that is, the Orthodox Jews believed that they were not given equal respect. The dispute, in other words, stemmed from a perceived failure to apply hate crimes legislation evenhandedly—a perceived breakdown in implementation, not in the underlying justification of the laws. In any event, disagreement among affected groups about the outcomes in high-profile criminal cases is likely apart from any hate crimes legislation. The William Kennedy Smith case (in which a wealthy medical student was acquitted of rape, to the chagrin of many feminists) is one notable example. *See* TASLITZ, *supra* note 49, at 82–91. Furthermore, conflict over inclusion does not necessarily mean balkanization. The Civil Rights Movement and allied movements of the 1950s and 1960s involved precisely such conflict, yet the ultimate result has been improved intergroup communication and an enhanced sense of a broad American community to which all citizens belong. *See generally* SAMUEL WALKER, THE RIGHTS REVOLUTION: RIGHTS AND COMMUNITY IN MODERN AMERICA (1998).

[272] *See* MARGALIT, *supra* note 265, at 135–38.

[273] *See id.* at 137–38, 140–42, 153, 158–61, 167–69.

[274] *See id.* at 151–52.

[275] *See id.* at 173–76. Margalit initially argues that we must worry more about institutional

must be defined broadly, and social inaction in the face of group-degrading violence is a social responsibility.[276] Ridicule, hatred, oppression, and discrimination against encompassing groups is thus simply indecent.[277]

Both Pettit's and Margalit's analyses, furthermore, suggest that the antidote for anti-republican and indecent behavior is fundamentally about molding particular kinds of human character. When Pettit talks about a master-slave relationship, he paradigmatically talks about masters unwilling to renounce their arbitrary power over their slaves.[278] A master revels in the fear and deference that stem from his and his slave's common knowledge of the master's power to coerce the slave's body or will.[279] He wants a slave who cannot look him in the eye.[280] A relationship of domination presupposes a master with a predisposition to dominate—a dominator.[281]

When Margalit talks about social institutional responsibility for humiliating private violence, he paradigmatically talks about the Ku Klux Klan as a group based on humiliating others.[282] The image is of

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than individual expression because the former does more harm, in part because it is more likely to be perceived as stemming from the society as a whole. *See id.* at 171–72. While he worries that it is a "close question," he ultimately comes down squarely for viewing the society's institutional failure to prevent or punish individual acts of humiliation directed at minority group members *as such* as an institutional harm, an act of indecency. *See id.* at 175–76. He would therefore go as far as to ban the existence of groups like the KKK entirely or, failing that, to deny them a public presence in our culture. *See id.* at 173–74.

[276] *See id.* at 173–75.

[277] *See* MARGALIT, *supra* note 265, at 140–41.

[278] *See* PETTIT, REPUBLICANISM, *supra* note 257, at 22–23, 31, 54–55, 64, 66. Thus, Pettit speaks not only of the master-slave "relationship" but of *being* a citizen or a slave. *See id.* at 31. He notes that even a kind master by definition is still one ready to exercise domination. *See id.* at 22–23, 54. This master's kindness, however, reduces but does not eliminate domination only if it takes the form of the master's limiting his own power to act arbitrarily. *See id.* at 64. Furthermore, he sees good laws as those that inhibit potential "dominators," again the language of character. *See id.* at 67–68. This point is made even clearer when Pettit approvingly cites Mary Wollstonecraft's description of the effect of gendered slavery on women: "'It is vain to expect virtue from women till they are, in some degree, independent of man . . . . Whilst they are absolutely dependent on their husbands they will be cunning, mean, and selfish.'" *Id.* at 61 (quoting MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMEN 299, 309 (reprinted with new notes, Penguin Books 1992) (1792)). Pettit further stresses that only citizen virtue can ultimately sustain a republican society. *See id.* at 245–70.

[279] *See id.* at 63–64.

[280] *See id.* at 71.

[281] *See id.* at 63–64.

[282] *See* MARGALIT, *supra* note 265, at 173–76. Even more clearly, Margalit sees KKK members as committed to a "form of life" based on humiliating others. *See id.* at 174. For Margalit, race hatred is a way of being, an all-pervasive denigrating attitude expressed in humiliating action—that is, a predisposition to act or, in everyday parlance, a hateful character or personality.

men eagerly, hungrily elated by their perceived subordinates' pain,[283] the very definition, say some philosophers, of the word "evil."[284] Here too, the sense is not of men actuated by momentary, passing hatred, but rather *haters*, men consumed and constituted by their anger.

Hate crimes legislation rejects not just racial hatred but racists. We each live lives that are at once private and public, part family man and friend, part citizen.[285] These roles are both separate and intertwined, thereby rendering the public/private distinction an often hazy one to discern.[286] Hate crimes laws reject both hateful messages and the haters who spew them while embracing respectful messages among equal republican citizens who pronounce and hear them. That is a recipe for uniting, not splintering, American society.

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[283] *See, e.g.*, SHAPIRO, *supra* note 219, at xxi, 5, 10, 14–15, 82, 97–98, 123, 132–33, 198–200, 254, 257–60, 297, 320, 380, 410, 443, 457 (describing the Klan and its activities).

[284] Taslitz, *Two Concepts*, *supra* note 11, at 6 (defining "evil").

[285] This is a common feminist insight. *See, e.g.*, ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 254–55 (1988); RUTH LISTER, CITIZENSHIP: FEMINIST PERSPECTIVES 119–94 (1997).

[286] *Cf.* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 1–50 (1993) (discussing flaws in the state/private action dichotomy). *See generally* MARGALIT, *supra* note 265.