

Why punish hate?

by Frederick M Lawrence

In this excerpt from Chapter 7 of his recent book *Punishing Hate: Bias Crimes Under American Law* (Harvard University Press, 1999), Professor Lawrence of Boston University considers the often controversial debate over the treatment in law of crimes motivated by racial hatred and the wider issue of punishment theory.

The last several decades have seen a dramatic increase in the awareness of bias crimes – both by the public generally and the legal culture in particular – and the need for a legal response. We need look no further than the marked rise in the number of bias crime laws.

These developments, however, can obscure the controversy that often surrounds the debate over the enactment of a bias crime law. For example, during the debate over Arizona's bias crime law, enacted in 1997, one legislator objected on the grounds that 'I still don't believe that a crime against one person is any more heinous than the same crime against someone else.' Another put the matter more bluntly: 'a few Jews' in the legislature were making the issue 'emotional and divisive.'ⁱ Acrimony has surrounded the debate over many state laws. Is it really worth it?

This question is not entirely rhetorical. Obviously, the entire thrust of the preceding chapters argues that bias crimes laws are justifiable and constitutional. But to a large extent, I have assumed the need to punish hate as my starting point. The implicit premise of the task has been to provide justifications for the punishment of racially-motivated violence in criminal law doctrine, and to square this punishment with free expression doctrine.

Before concluding, it is wise to step back from this assumption, to ask not merely whether it is justified to punish hate, but is it *necessary* to punish hate. A state may do so – but should it? The question is clearer if not conceived as a choice between punishing bias crimes and not doing so. Were the choice truly this stark, the answer would be obvious and compelling. One of the arguments advanced for including sexual orientation in bias crime statutes, for example, is that assaults against gays and lesbians are notoriously under-investigated by the police and under-prosecuted by local district attorneys.ⁱⁱ (A similar argument is often made concerning laws aimed at domestic violence.) The obvious and compelling response to this situation is that 'gay bashing', like domestic violence, should be properly treated by the criminal justice system. The argument based on under-enforcement, however, does not support the conclusion that sexual orientation should be a bias crime, because it is based on a false choice or, better put, an incomplete choice. The choice between punishing gay bashing as a bias crime or not at all, omits the option of properly handling these crimes as parallel assaults, without regard to the bias motivation. If these cases were

investigated as carefully and prosecuted as vigorously as any other assault, then our concerns would be satisfied without the need to include sexual orientation in a bias crime law. One could argue that the inclusion of sexual orientation in bias crime laws is the best way, or perhaps the only way, to improve the manner in which the criminal justice system responds to these crimes. If true, it represents a strong, fairly obvious, justification. But, to be tested properly, the 'Is it really worth it?' question must assume that the criminal justice system otherwise works or could be made to work. Is it really worth the acrimony that often accompanies the debates over bias crime laws, to prosecute these crimes *as* bias crimes?

There is one other tempting answer to 'Is it really worth it?' that ultimately fails. This answer argues that mere investigation and prosecution of bias crimes are not the only goals. For the reasons discussed in Chapter 3, bias crimes require not only punishment, but greater punishment than parallel crimes. One could argue that bias crime laws are worth it in order to obtain enhanced punishment of racially-motivated violence. There is, however, a softer means of achieving that end, one that would avoid the need to enact bias crime laws *per se*. Consider, for example, the manner in which the law treats racially-motivated violence in Great Britain. Other than the crime of incitement to racial hatred, a crime limited largely to distribution of racist pamphlets, and very difficult to prosecute, there is no specific crime for racially-motivated violence in the UK [but please see author's endnote concerning the provisions of the *Crime and Disorder Act 1998*, enacted after his manuscript went to press].ⁱⁱⁱ In the case of a racially-motivated assault, however, British law enforcement officials may take the perpetrator's motivation into account in deciding whether to pursue the case, and the Court may similarly take motivation into account in determining the proper sentence. Enhanced punishment of bias crimes therefore exists, at least in theory, without the need for an expressed bias crime law. This brings us back to the question: 'Is it worth it?'

The answer is that it is well worthwhile to have laws that expressly punish racially-motivated violence. In order to see why, we must return to the general justifications for punishment, and now augment that discussion with a consideration of the expressive value of punishment or what is sometimes known as the denunciation theory of punishment. The expressive value of punishment allows us to say not only that bias crime laws are warranted, they are essential.

THE EXPRESSIVE VALUE OF PUNISHMENT

Criminal punishment carries with it social disapproval, resentment and indignation. Compare the social stigma involved in a conviction for criminal tax evasion with that triggered by a civil finding of under-payment of taxes. Criminal punishment inherently stigmatises. One of the strongest modern statements of this view of punishment is found in the report of the Royal Commission on Capital Punishment:

'Punishment is the way in which society expresses its denunciation of wrong doing; and in order to maintain respect for law, it is essential that punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them ... [T]he ultimate justification for any punishment is, not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime.'^{iv}

Regardless of one's view of capital punishment, this description of punishment is compelling. Henry Hart saw the expressive value of punishment as the key to the distinction between the criminal and the civil:

'What distinguishes a criminal from a civil sanction, and all that distinguishes it ... is the judgment of community condemnation which accompanies and justifies its imposition.'^v

This insight allows us to expand the understanding of punishment theory developed in Chapter 3 where we considered both retributive and utilitarian, or consequentialist, theories of punishment. Expressive punishment theory is neither wholly separate from, nor wholly contained by, retributive and consequentialist approaches to punishment.

Emile Durkheim was one of the first to focus upon the role of social denunciation in punishment. Durkheim argued that punishment represents societal condemnation of certain behaviour and that social cohesion emerges from the act of punishment.^{vi} In his classic *The Division of Labour in Society*, Durkheim rejected consequentialist justifications of punishment on practical grounds:

'[Punishment] does not serve, or serves only very incidentally, to correct the guilty person or to scare off any possible imitators. For this dual viewpoint its effectiveness may rightly be questioned; in any case it is mediocre.'^{vii}

The real function of punishment, according to Durkheim:

'is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour.'^{viii}

The criminal law represents the expression of the 'common consciousness' of the community. When this shared expression of values is violated, that is, when a crime is committed, the society faces a choice between not responding and responding through criminal punishment. If there is no response, 'there would result a relaxation in the bonds of social solidarity.'^{ix} The only appropriate response, punishment of the wrongdoer:

'is a sign indicating that the sentiments of the collectivity are still unchanged, and the communion of minds sharing these same beliefs remains absolute.'

Without punishment, the collective moral consciousness could not be preserved.^{ix}

Durkheim's denunciation theory of punishment has been subject to two main strands of critique, one based in sociology

and the other in punishment theory. The sociological critique questions the linkage, by sheer assertion, between law and moral consensus. There is no room for social conflict in a theory that posits a single collective consciousness that is expressed in the criminal law.^x If we understand the criminal law to have been produced through social conflict, and not through the expression of a universal societal norm, then, according to this critique, denunciation loses much of its lustre as a justification for criminal punishment.

The punishment-theory critique questions the requirement, again by sheer assertion, that denunciation of the violation of social norms should proceed by criminal punishment of the wrongdoer. The denunciatory effect could be achieved in any number of means – for example, public pronouncement by the head of state or a judge, or shooting off a cannon in the public square – so long as the convention is understood by the audience. That punishment is the proper convention requires an independent justification for punishment, a justification that denunciation itself does not provide. Denunciation thus cannot stand on its own as a theory of punishment and ultimately relies upon some other justification for its validity.

Nigel Walker captured this critique well: 'denouncers are really either quasi-retributivists or crypto-[consequentialists].'^{xi} They are quasi-retributivists because the convention of punishment as the means to denounce makes sense only where the defendant deserves to be punished. Punishment without desert would leave the denunciation vague at best. Alternatively, they are crypto-consequentialists because they justify punishment by the social utility that it produces. Unlike that of classic consequentialists, denouncers' utility comes in the form of social cohesion, not, strictly speaking, crime reduction. But it is a utility calculus nonetheless.^{xii} Understood this way, Durkheim is seen not as a ground-breaker proposing a third approach to punishment theory, but rather as a utilitarian in the mould of those who advocated the educative theory of punishment such as Alfred Ewing and Bernard Bosanquet.^{xiii}

Both the sociological and punishment-theory critiques of the denunciation theory have merit. Neither calls for an abandonment of that theory, but each calls for its modification. The sociological critique is right to challenge the criminal law as some universal expression of the community's will. Such a wooden view of the law is inconsistent with all we have come to understand about the process by which legislation is created and law is made.^{xiv} But we can relax this extreme view of the criminal law without doing serious violence to the fundamental usefulness of the expressive value of punishment. First, while it is certainly true that criminal laws do not receive unanimous support, there is a considerable social consensus underpinning the criminal law. Most criminal prohibitions, at least at a general level, derive widespread public support.^{xv} Moreover, we would expect that this level of support would be even higher if we look to find, not those who believe that any particular criminal law or even principle of criminal law represents the moral view of the community, but those who believe that the rule of law generally represents the moral view of the community. Those who believe both that a sufficient weight of the criminal law does reflect the community's sense, and that there is a basic legitimacy to the system that produces criminal law, would thus also believe that there is a moral weight to the criminal law generally, even to

those specific laws with which they might happen to disagree. Obedience to the law thus represents a moral value of a broad spectrum of the community.

Even so, there will never be unanimity as to the moral sense of the community and indeed there may be dispute as to whether there is a single 'community' that may have a single view. This too may be accommodated by the expressive view of punishment when we exchange the descriptive claim of universal consensus for a normative claim of what the community's values ought to be. Obviously, there will be dispute over the moral value of the criminal law. My argument, however, is two-fold. First, the areas of dispute are not as widespread as may first be imagined – all reasonable people will agree that, all things being equal, it is worse to kill than to injure, and that it is worse to cause unjustified harm purposefully than accidentally. Second, as to those areas of dispute, the stakes of the argument are not merely who ought to go to jail, but what the moral view of the community about such conduct *should* be.

The punishment-theory critique of Durkheim may also be accommodated in a means that yields a richer expressive theory of punishment. The punishment-theory critique properly contends that expressive theory is not a free-standing independent justification for punishment. As we saw in Chapter 3, however, much of the work in contemporary philosophy of punishment has concerned 'mixed theories' of punishment, drawing on aspects of both utilitarian and retributivist thought. So long as expressive theory is not merely redundant with retributive or consequential arguments, it legitimately takes its place among these eclectic approaches. The expressive values of punishment take us beyond classic statements of other punishment theories. To be coherent, expressive punishment does require individual culpability and retributive desert. Whereas deontological notions of desert focus only on the wrongdoer and either the debt that he owes to society or the punishment that society owes him, expressive theory looks to the societal aspects of this punishment. Expressive theory may actually help elucidate some of the murkier aspects of retributive theory.

Consider Kant's famous teaching that, on the last day before an island community disbands 'to separate and scatter ... throughout the world,' it should execute its last imprisoned murderers.^{xvi} Typically, this is taken as the paradigmatic expression of Kantian retributivism – this extreme punishment is necessary even after all consequences have become irrelevant. Kant justifies the punishment:

'in order that everyone may realise the desert of [the murderers'] deeds.'^{xvii}

Joel Feinberg has found expressive aspects in the continuation of Kant's formulation. If the island community members did not execute their murderers, Kant wrote:

'they might all be regarded as participators in the murder as a public violation of Justice.'

Feinberg argues that this punishment, as a means of demonstrating public non-acquiescence with the crime, is more symbolic and expressive than it is retributive.^{xviii}

Expressive theory also has a consequentialist aspect. However, we can distinguish those consequences that seek to reduce

crime, whether by incapacitation, deterrence, or rehabilitation, from those consequences that announce values. The ultimate audience for punishment that seeks to reduce crime is composed of criminals and would-be criminals. The ultimate audience for punishment that seeks to announce values is composed of law-abiding citizens.^{xix} The utilitarian dimension of denunciation, therefore, looks to a greatly expanded set of considerations over those traditionally considered by consequentialist approaches to punishment.

Expressive punishment theory, although derivative of retributive and consequentialist theories of punishment, builds on these theories and expands our understanding of punishment. In the final analysis, the punishment-theory critique may simply miss the mark – it criticises denunciation theory for failing to answer adequately a question that denunciation theory does not conceive to be central to its mission. Expressive theory may be concerned less with providing a full justification of punishment than with understanding the full impact of punishment. Indeed, Durkheim may well not have seen his project as one of justifying punishment, which he took to be a sociological fact of all cultures, but rather as one of investigating the role of punishment in advanced societies.^{xx} Recognizing the expressive value of punishment, by itself, may provide limited help in answering the initial normative question as to whether society may punish its members. Once we answer that question affirmatively, however, societal denunciation must inform our decisions about the nature of that punishment.

THE EXPRESSIVE VALUE OF PUNISHING BIAS CRIMES

We may now return to the question we raised at the outset of this chapter: is it really worth it? Is it really worth the acrimony that often accompanies the debates over bias crime laws, to prosecute these crimes *as* bias crimes?

What happens when proposed bias crime legislation becomes law? This act of law-making constitutes a societal condemnation of racism, religious intolerance, and other forms of bigotry that are covered by that law. Moreover, every act of condemnation is dialectically twinning with an act of expression of values – in Durkheim's terms social cohesion. Punishment not only signals the border between that which is permitted and that which is proscribed, but also denounces that which is rejected and announces that which is embraced. Because racial harmony and equality are among the highest values held in our society, crimes that violate these values should be punished and must be punished specifically as bias crimes. Similarly, bias crimes must be punished more harshly than crimes that, although otherwise similar, do not violate these values. Moreover, racial harmony and equality are not values that exist only, or even primarily, in an abstract sense. The particular biases that are implicated by bias crimes are connected with a real, extended history of grave injustices to the victim groups, resulting in enormous suffering and loss. In many ways these injustices, and their legacies, persist.

What happens if bias crimes are not expressly punished in a criminal justice system, or, if expressly punished, not punished more harshly than parallel crimes? Here, too, there is a message expressed by the legislation, a message that racial harmony and

equality are not among the highest values held by the community. Put differently, it is impossible for the punishment choices made by the society *not* to express societal values. There is no neutral position, no middle ground. The only question is the content of that expression and the resulting statement of those values.

Two cases, one of which involves the debate over a bias crime law, illustrate the point. Consider first the case of the creation of a legal holiday to commemorate the birth of Dr Martin Luther King, Jr. Once the idea of such a holiday gained widespread attention, the federal government and most states created Martin Luther King Day within a relatively short period of time.^{xxi} It was impossible, however, for a state to take ‘no position’ on the holiday. Several states, including South Carolina, Arizona, New Hampshire, North Carolina and Texas, did not immediately adopt the holiday. These states were perceived generally as rejecting the holiday. More significantly, they were perceived as rejecting the values associated with Dr King, which were being commemorated by the holiday marking his birthday. Civil rights groups brought pressure against these states with economic boycotts, and the like.^{xxii} Once ignited, the debate over Martin Luther King Day became one as to which there was no neutral position. The lack of legislation was a rejection of the holiday and the values with which it was associated.

The second case concerns the debate in 1997 over a bias crime law in Georgia, the site of one of the most acrimonious of the legislative battles over such legislation. The tension surrounding the debate was heightened by the recent bombing of a lesbian nightclub in Atlanta. Ultimately, the legislation failed to make it to the floor of the Georgia legislature for a vote. As with Martin Luther King Day, there was no middle position for Georgia to adopt. Either a bias crime law would be established, with the attending expression of certain values, or it would not, with a rejection of these values and an expression of other, antithetical values. The values expressed by the rejection of the law are aptly caught by the unusually blunt views of one Georgia legislator: ‘What’s the big deal about a few swastikas on a synagogue?’ Others derided the legislation as the ‘Queer Bill’.^{xxiii}

Thus far we have considered the enactment of a bias crime law to be a simple binary choice: a legislature enacts a bias crime law or it does not. To do so denounces racial hatred, and to fail to do so gives comfort to the racist. We can make a similar observation in the more subtle context of establishing grades of crimes and levels of criminal punishment. In Chapter 3, we discussed the ways in which both retributive and consequentialist theories of punishment embraced a concept of proportionality. Now we can see that expressive punishment theory does as well. Conduct that is more offensive to society should receive relatively greater punishment than that which is less offensive. We would be shocked if a legislature punished shoplifting equally with aggravated assault. We might disagree as to whether one was punished excessively or the other insufficiently, but we would agree that these crimes ought not to be treated identically. Society’s most cherished values will be reflected in the criminal law by applying the harshest penalties to those crimes that violate these values. There will certainly be lesser penalties for those crimes that in some respects are similar but do not violate these values. The hierarchy of societal values involved in criminal conduct will thus be reflected by the lesser crime’s status as a lesser included offence within the more serious crime.

The enshrinement of racial harmony and equality among our highest values not only calls for independent punishment of racially-motivated violence as a bias crime and not merely as a parallel crime; it also calls for enhanced punishment of bias crimes over parallel crimes. If bias crimes are not punished more harshly than parallel crimes, the implicit message expressed by the criminal justice system is that racial harmony and equality are not among the highest values in our society. If a racially-motivated assault is punished identically to a parallel assault, the racial motivation of the bias crime is rendered largely irrelevant and thus not part of that which is condemned. The individual victim, the target community, and indeed the society at large thus suffers the twin insults akin to those suffered by the narrator of Ralph Ellison’s *Invisible Man*.^{xxiv} Not only has the crime itself occurred, but the underlying hatred of the crime is invisible to the eyes of the legal system. The punishment of bias crimes as argued for in this book, therefore, is necessary for the full expression of commitment to American values of equality of treatment and opportunity.

ⁱ Governor Signs Bill on Hate Crime, Move Catches Both Sides Off-Guard’, *The Arizona Republic* (29 April, 1997); George Roche, ‘Activists Beating the Hate Drums for More Power’, *Tulsa World*, (12 April, 1990).

ⁱⁱ See, e.g., Hate Crimes Statistics Act of 1988: Hearings on S. 702, S. 797, S. 2000 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Congress, 2nd Session, 242 (1988) (statement of Leonard D Goodstein, Executive Vice President and Chief Executive Officer of the American Psychological Association).

ⁱⁱⁱ Public Order Act of 1986, 1986 Chapter 64, p. 2691–2730 Eliz II 1986 (especially, Part III, s. 17–29, Racial Hatred). This omission of a bias crime law is not due to oversight. As recently as 1994, a bill was introduced in Parliament. See [1994] Crim L Rev at 313–14. The bill failed for lack of government support. The government preferred to treat bias crimes generally, using the provisions of the existing law that proscribes assaults. In 1997, the labour government announced its intention to submit racial violence legislation. [The manuscript of *Punishing Hate* went to press prior to the enactment of the racial violence crime provisions of the *Crime and Disorder Act* 1998, s. 28–32 and 82 of which created a bona fide bias crime law for the first time in the UK.]

^{iv} Royal Commission on Capital Punishment, Minutes of Evidence, Ninth Day, 1 December, 1949, Memorandum submitted by the Rt Hon Lord Justice Denning (1950).

^v Henry M Hart, Jr, ‘The Aims of the Criminal Law,’ 23 *Journal of Law and Contemporary Problems*, 404 (1958).

^{vi} Emile Durkheim, *The Division of Labour in Society*, 62–63 (WD Hall trans. 1984). See also *Durkheim and the Law*, 61–63 (Steven Lukes and A Scun, eds, 1983); Steven Lukes, *Emile Durkheim: His Life and Work*, 160–163 (2d ed 1985); Robert Reiner, ‘Crime, law and deviance: The Durkheim legacy’, in Steve Fenton, *Durkheim and Modern Sociology*, 176–182 (1984).

^{vii} Durkheim, *The Division of Labour in Society*, 62–63

^{viii} *Ibid.*, 63.

ix Ibid.

^x See, e.g., Robert Reiner, 'Crime, law and deviance: The Durkheim legacy', 177–178.

^{xi} Nigel Walker, *Punishment, Danger and Stigma*, vii (1983).

^{xii} Ibid., 22–45. See also HLA Hart, *Punishment and Responsibility*, 170–173 (1968).

^{xiii} See, e.g., Alfred Ewing, *The Morality of Punishment*, (1929); Bernard Bosanquet, *Some Suggestions in Ethics* (1918). Ewing's attempt to produce a utilitarian theory based in part on the educative effect of punishment is discussed in Chapter 3.

^{xiv} See, e.g., Allan J Cigler and Burdett A Loomis, eds, *Interest Group Politics*, (1983); Dennis C Mueller, *Public Choice II*, (1989); Mancur Olsen, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1971).

^{xv} See Paul H Robinson and John M Darley, *Justice, Liability, and Blame*, (1995). Professors Robinson and Darley's study of community attitudes on various issues of criminal law doctrine is the most comprehensive recent study of its kind. Their work illustrates areas of confluence and divergence of public opinion and doctrine. For their conclusions concerning the significant level of confluence where central issues of criminal law doctrine are concerned, see pages 203–204.

^{xi} Immanuel Kant, *The Philosophy of Law*, 198 (trans. Hastie 1887).

^{xvii} Ibid.

^{xviii} Joel Feinberg, 'The Expressive Function of Punishment,' in Joel Feinberg, *Doing and Deserving*, (1970), 103–104.

^{xix} 'Ibid.', 78–79, 86–87 in Duff & Garland; Ronald J Rychlak, 'Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment', 65 *Tulane Law Review* 299, 332–335 (1990). See, generally, David Garland, *Punishment and Modern Society* (1990).

^{xx} Durkheim, *The Division of Labour in Society*, 44–52, 62–64. Durkheim reviewed the role of punishment in primitive cultures as an emotional and mechanical process and then traced the development of punishment in advanced cultures with its function as maintaining societal cohesion.

^{xxi} The federal statute creating a legal holiday to commemorate the birth of Dr King, codified at 36 USC §169(j), was enacted in 1983. By 1989, two thirds of the states had passed similar legislation. By 1991, roughly 40 states had such holidays.

^{xxii} For example, the National Football League refused to grant the 1993 and 1995 Super Bowls to Phoenix and Houston, respectively, in part because Arizona and Texas had failed to establish a Martin Luther King, Jr holiday. Rose Mofford, then Governor of Arizona, said that 'we lost \$256 million last year because of the lack of a Martin Luther King holiday.' 'Mofford Wants King Day on Special Session Agenda,' *The Phoenix Gazette*, (September 15, 1989); 'MLK Holiday as Political Football,' *Houston Chronicle*, (May 25, 1991).

^{xxiii} 'Hate Crime Bills Die Quietly,' *Fulton County Daily Report*, (March 24, 1997).

^{xxiv} Ralph Ellison, *Invisible Man*, (1953)

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