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The Philosophical Aspects of Hate Crime and Hate Crime Legislation: Introducing the Special Symposium on the Philosophy of Hate Crime

David Brax, Department of Philosophy, Linguistics and Theory of Science and the Centre for European Research, (CERGU), University of Gothenburg.

Christian Munthe, Department of Philosophy, Linguistics and Theory of Science and the Centre for Ethics, Law and Mental Health (CELAM), University of Gothenburg.

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Introduction

Hate crimes – broadly understood as criminal actions linked to negative attitudes of culturally delimited groups of people – manifest a potentially formidable challenge for almost all societies. This challenge is based in how age-old human and social conflicts with deep psychological and cultural origins can spread harm and terror with detrimental effects on the relations between people within as well as between groups. Understanding the causes, nature and impact of hate crime and designing adequate policy measures to respond to this phenomenon is therefore paramount. But it is also profoundly difficult, due to far-reaching complexities and ambiguities involved. This is illustrated by the fact that not even a *concept* of hate crime is obvious or universally agreed upon (Garland and Chakraborti 2012). Hate crime scholarship is, as a whole, best understood as a proper field in which a number of academic disciplines may engage, from legal studies to sociology, criminology, psychology – and philosophy. However we understand the term 'hate crime', it involves the complicated issue of relations between groups, as they are instantiated in interactions between individuals. This means that the actions themselves, the crimes, are turned into hate crimes due to contexts, background assumptions and conceptual and evaluative frames. These, in turn, mean that these crimes have particular consequences. One or more of these factors set them aside from other categories of crime. These specific features are not merely incidental,

but essential to what makes hate crimes a phenomenon of particular interest, and what makes them particularly serious and in need of special attention. The *philosophy* of hate crime is dedicated to understanding and critically analyzing the most basic aspects of such contexts, assumptions and frames.

Any complex policy problem actualises underlying disagreements about how it should be delineated and what aspects of it are of most importance. In hate crime debates, we thus find different views on what, more precisely, *makes* a crime into a hate crime. This is no mere verbal matter, but has an impact on what concrete offenses are thought to be suitable targets of legal and policy measures. Such conceptual differences exist between countries, between authorities within single countries and between different sectors of public policy. Conceptual differences also exist between and within academic disciplines addressing hate crime as a research topic. Whilst not surprising considering the complexity of the issue, this situation provides further challenges on the academic, legal, and policy-making level. It means that it is difficult to gather and analyse relevant data, and to compare data between different countries. Conceptual ambiguity also may create deep disagreements about, for instance, how widespread or how important the problem is, or how accepted legal, moral or political principles apply to it. Or, in the case when laws or other policy measures have been put into place, how these are to be implemented.

As hate crimes are inextricably linked to criminal law, the matter of how to view and respond to them is robustly *normative* from the start, activating a broad range of values and ideals that may or may not apply. Ambiguity concerning the normative status of hate criminality (however this is defined) has led to disagreements about whether all hate crimes merit the kind of response – i.e. penalty enhancements – we find in the form of hate crime legislations across the world. Such underlying differences in moral outlook may, of course, feed into the conceptual unclarity already touched on, but they are primarily issues of disagreements in their own right. Most people tend to agree that the "hate" aspect of hate crimes is a wrong that "adds insult to injury" and that should be avoided. But does this mean that legal responses, such as penalty enhancements, must be warranted? Some argue that such measures run afoul of important foundational principles of criminal law, or threaten societal values such as freedom of opinion or speech. Hate crimes, then, serve to unfold basic tensions, and possible clashes, between law and morality, or between important societal values (Hurd and Moore 2004). Such tensions, in turn, can be played out in a number of ways when

approached from a philosophical standpoint.¹

About the symposium

This special symposium addresses complexities such as these through contributions by philosophers and other hate crime scholars. It originated in a workshop held in September, 2011, hosted by the Department of Philosophy, Linguistics and Theory of Science, University of Gothenburg, as part of the European Commission sponsored project *When Law and Hate Collide*, including also the Law School at the University of Central Lancashire and the Goethe University of Frankfurt.² In this introduction, we explain the background of this meeting and the present symposium, and offer a brief sketch of the contributions, as well as their context, and raise a few additional philosophical perspectives on hate crime and hate crime legislation to consider in future research.

The idea behind the 2011 symposium was to bring together scholars from different disciplines with different perspectives on hate crime, but all with a manifest interest in the underlying philosophical issues indicated above. Thus, already from the outset, albeit the focus was philosophy, the range of experts invited encompassed also legal studies, sociology and criminology, as this is how the actual hate crime philosophical discourse looks like. We were fortunate to bring together a group of eminent experts in their field for two days of presentations and panel discussions, and videos of the presentations are available online.³ This special symposium builds further on the foundation thus laid, while some new people have been brought in as contributors.

Philosophy of Hate Crime: The Major Themes

Thematically, the contributions to this symposium address the two broad areas of inquiry indicated earlier. The first one is conceptual: What is a hate crime? How should we conceive of it in order to grasp the nature of these crimes? Is it primarily about a distinct set of motives, or a certain kind of explanation for criminal

¹ For an expanded presentation and overview of the philosophy of hate crime, see Brax and Munthe (2013)

² The webpage of this project can be accessed here: http://www.uclan.ac.uk/research/explore/projects/when_law_and_hate_collide.php

³ See: <https://www.youtube.com/playlist?list=PLE54FE83358571BDA>

behaviour? Or is it rather about certain distinctive consequences, for individual victims, for targeted communities and for society as a whole? This aspect is addressed to some extent by all the papers in this section, and is at the forefront of Neil Chakraborti's paper. Chakraborti points out that the term "hate" may not be suitable, and may draw attention away from what's really at issue in many of these crimes. What is being targeted is often the victim's perceived vulnerability, he argues, and thus raises one of the main issues. Al-Hakim employs a related development of the conceptual analysis of hate crimes when addressing the specific case of the homeless as a possible protected group in hate crime policy. Both these contributions concentrate on understanding the group-aspect of what hate crimes are. Kaupinnen raises the issue of what sort of attitude the "hate" aspect of these crimes is supposed to be and, in effect, what is morally important about it. Salter and McGuire add a further layer to such a bridging of the conceptual and the normative issues by pointing out how the way hate crimes are being conceptualised may have an impact on how hate crime victims experience the notion of having been subjected to hate crime when policies targetting such crimes are being implemented.

The second theme is moral and legal: What, if anything, is especially wrong with hate crimes? How is punishment enhancement for these crimes justified? What aspects are important to consider in designing hate crime policies? Salter's and McGuire's point that the subjective, lived experience of a crime victim is not necessarily improved by the additional information about this crime having been a hate crime, or the experiences created by policy responses (e.g. actions by prosecution and police) to such a fact actualises several points of consideration. At the same time, Iganski and Lagou present evidence to the effect that hate crimes tend to cause more emotional harm than other crimes – a claim often considered central to the defense of hate crime legislation. But they also point out that this is so on average, and not true in each instance – a fact they take to impact how hate crime laws should be designed. Kaupinnen addresses the question of the *expressive* dimension of hate crime (often hypothesised to be the explanation of the extra harm just mentioned), and explores whether the denigrating views expressed by hate crimes can be constituted as a part of /addition to the wrongdoing, enhancing to the moral seriousness of a crime. Similar thematics are actualised, e.g., in Al-Hakim's discussion of which groups are to be seen as "deserving" of the extra sort of protection offered by hate crime laws and other policies. Here follows a more detailed paper-by-paper exposé of the contributions.

The Contributions in Summary

In "Hate Crimes Hurt Some More than Others: Implications for the Just Sentencing of Offenders", sociologists Paul Iganski and Spiridoula Lagou present a fresh and illuminating analysis of UK data on the impact of hate crimes. This work much improves on many previous contributions, which have been limited by non-randomness, small samples, lack of controls, et cetera. The analysis supports the claim that hate crimes do indeed tend to cause more psychological harm than parallel crimes (i.e. similar crimes absent the hate element). Victims of racist attacks do tend to experience greater and more longstanding psychological suffering – these findings are robust. As harm is, arguably, the foremost foundation of the rationale of determining penal sanctions, punishment enhancement on the basis of hate crime status thus seems to be justified. But the authors' analysis also show that the extent to which harm is experienced *varies* a lot between victims, giving rise to the so-called *proxy problem* of policy solutions built on the notion of a *blanket* sentencing uplift for hate crimes. The authors therefore discuss the seriousness of this problem and alternative solutions to hate crime legislation that would avoid it.

In "Hate and Punishment", philosopher Antti Kaupinnen analyses the issue of the basis of the supposed moral and legal seriousness of hate crimes, using the framework of *legal expressivism*. On this perspective, “[c]ommunications can expressively harm people by creating or changing the social relationships in which the addressees stand to the communicator”, thus highlighting a further aspect besides subjectively experienced harms of the sort considered by Iganski and Lagou. Kaupinnen develops the notion of crimes and punishments as both being *enacting attitudes*, which serve to justify legal and penal measures. On this account, the problem with a hate crime comes out as not being about underlying (biased or prejudiced) motives directly, but about an essentially communicative property of the criminal offence itself. The penal response to this crime is similarly justified by communicating a counter-message. Kaupinnen points out that “[h]ate or bias crimes dramatize the expressive aspect of crime, since they typically, and sometimes by design, send a message of inferiority to the victim’s group and society at large. Treating the enactment of contempt and denigration towards a historically underprivileged group as an aggravating factor in sentencing may be an appropriate way to counter this message”. Kaupinnen thus argues that people's social status depends not only on attitudes that others express towards her, but on how society, and the law in particular, responds to those attitudes.

Criminologist Neil Chakraborti’s paper "Re-thinking Hate Crime: Fresh Challenges

for Theory and Practice" expands on earlier work with Jon Garland (Garland and Chakraborti 2012), addressing the conceptual variability with regard to hate crime and the resulting uncertainty concerning the scope and legitimacy of existing conceptual frameworks. Chakraborti calls for "greater conceptual clarity over the realities of hate crime victimization and perpetration", and discusses what incorporation of this aspect means for the modeling of hate crimes in theory and policy. Using as a case in point the issue of how to understand the sort of group relevant to the analysis of hate crimes from a theoretical standpoint and the shaping of policy responses, Chakraborti's main message points out a need for *interdisciplinarity*: while hate crime research during the last decades has been sound within its respective disciplinary confines, important aspects are missed in our theoretical understanding of the phenomenon and devised policy responses. There are marginal groups targeted by hate crimes who are "strong enough" to lobby for recognition as hate crime victims, but there are similarly groups that lack this type of representation – groups that may nevertheless or precisely for that reasons be on an equal footing regarding their victimisation. He also points to a need of looking at *intersectionality* as a crucial aspect of hate crime victimisation, the extent to which a person may be targeted because of a *combination* of features, each in different ways motivating special protection. Chakraborti thus sketches a model for looking broadly at *what* aspects of a victim makes them likely to be targeted by hate motivated criminality, forecasting a picture where all hate crimes cannot be viewed as interchangeable in terms of wrongness, harm or background motivation.

In "Making a Home for the Homeless in Hate Crime Legislation", legal philosopher Mohammad Al-Hakim writes about one of the central policy puzzles regarding hate crimes: what categories of victims should be included as protected groups under hate crime legislation? Decisions on this matter have been criticized as being made *ad hoc* in actual policy, with unprincipled outcomes resulting from effective lobbying rather than the presence of *reasons* (See, for instance Jacobs and Potter 1998). Criteria for what (type of) groups to protect are clearly needed. Al-Hakim offers a critical review of a number of such possible criteria, illustrating the value and usefulness of philosophical analysis by systematically setting out and comparing the pros and cons of different models, with a particular focus on how different conceptions of what groups to target may be *under-* and/or *overinclusive*. He settles on an idea of the relevant feature being captured by the political philosophical notion of *disadvantage* (Wolff and De-Shalit 2007) and explores its impact on the test case of homelessness. Rather than a focus on concrete group characteristics, social identity markers or specific features (such as motive) of offenders, disadvantage is general (thus not unfairly biased or excluding or

unequally applied), but at the same time relevant in terms of what values are supposed to be protected by law and policy.

Like Chakraborti, as Iganski and Lagou, Michael Salter and Kim McGuire aim to address over-looked aspects of complexity in hate crime discourse and policy. The paper "Issues and Challenges in the Application of Husserlian Phenomenology to the Lived Experience of Hate Crime and Its Legal Aftermath: An Enlightenment Prejudice Against Prejudice?", they raise the concern that due to the moral nature of hate crimes, researches may be prejudiced about prejudice – about the way its expression in criminal action, as well as our responses, actually impacts on people. Based in a different methodological camp than the other contributors to this symposium, the paper connects to the conceptual theme above, regarding what *counts* or *should* count as a hate crime; in general or of a particular sub-category, thus furnishing some offenses with a particular legal interpretation and activating a battery of policy responses. Salter's and McGuire's main message is in concert with the variability thesis with regard to the harmfulness of hate crimes pursued by Iganski and Lagou, as well as the intersectionality and interdisciplinarity claims of Chakraborti. They employ a phenomenological (Husserlian) stance in order to "suspend and neutralize whatever is ideologically taken for granted about hate crime, and whatever constitutes an 'appropriate' policy response to it". They point out that the experience of an episode can be interpreted by different parties as definitely, probably, possibly or doubtfully an instance of hate crime – meaning that the interpretation, rather than the individual characteristics of the events, may determine its being counted as a hate crime at all. In addition, the *victim's* perception can be influenced by this as well as by later interpretations – in ways which may undermine notions of harmfulness, or make the very execution of hate crime policies the source of the harm. Thus, they argue, "researchers need to identify and analyze the characteristic contributions made by each of these interpretative acts operating both singularly and in their various combinations."

Further Areas of Study and Future Prospects

The areas and the central claims pursued in these contributions cover a number of important philosophical perspectives on hate crimes and related policy. But they do certainly not exhaust or cancel the philosophical discourse. The issue about having hate crime laws fit underlying jurisprudential principles touched upon by Iganski and Lagou can probably be developed further (see, e.g., Hurd & Moore 2004 and Dimock & Al-Hakim 2012), and there are a number of complex boundary problems regarding, e.g., hate speech, political violence and crimes based on

mental instability (Brax & Munthe 2013) to ponder further. However, seen in clusters, the contributions here manifest advanced leaps in main sections of the field. There is, for instance, great prospect in the idea of trying to combine Al-Hakim's perspective with those presented by Chakraborti and Kaupinnen in future in-

quiries, as they may seem to reach for similar types of solutions from different theoretical and disciplinary outposts. The wrong of hate crimes and the justification of hate crime policies may reside in a more heterogeneous compound than previously thought, which remains to unpack. Likewise, Iganski & Lagou, Salter & McGuire, and Chakraborti share a vision of the relevant facts to consider in the normative discussions, in the shaping of scientific and legal concepts, as well as in the design and implementation of specific policies, in order to have them do the good strived for and avoid counterproductivity or negative side effects.

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References

Brax, D and Munthe, C (2013). Introduction to the Philosophy of Hate Crime. Gothenburg: University of Gothenburg. Online access: http://www.uclan.ac.uk/research/explore/projects/assets/PT_1The_Philosophy_of_Hate_Crime_Anthology_Pt_I__munthe_and_brax.pdf

Dimock, S & Al-Hakim, M (2012). Hate as an Aggravating Factor in Sentencing. *New Criminal Law Review*, 15 (4): 572-611.

Garland, J and Chakraborti, N. (2012). Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union. *European Journal of Criminology*, 9 (1): 38-51.

Hurd, H. & Moore, M. (2004): Punishing Hatred and Prejudice, *Stanford Law Review*, 56 (5): 1081-1156

Jacobs, J. B. and Potter, K. (1998). *Hate Crimes. Criminal Law and Identity Politics*. New York: Oxford University Press.

Wolff, J. & De-Shalit, A. (2012). *Disadvantage*. New York: Oxford University Press.