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# Hate Crime Law and the Limits of Inculcation

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Janine Young Kim\*

# Hate Crime Law and the Limits of Inculcation

## TABLE OF CONTENTS

I. Introduction .....	846
II. The Case Against Greater Culpability .....	851
A. The Uniqueness of the Hate Motive .....	852
B. Punishing Bad Character .....	855
III. The Evaluative Conception and Greater Culpability....	860
A. The Contours of the Evaluative Conception .....	861
B. Inculcation Under the Evaluative Conception .....	868
IV. The Hate Motive and Greater Culpability .....	876
A. Choice, Race, and Racism .....	879
B. The Strength of the Norm Against Racism .....	884
C. The Tyranny of the Reasonable Person .....	887
V. Conclusion .....	893

## I. INTRODUCTION

The enactment of hate crime law—law that enhances the punishment of those whose crimes are motivated by legislatively identified animus or bias (“hate motive”)—is widespread in the United States. According to the Anti-Defamation League, almost every state has passed hate crime law in one form or another, whether the hate motive is treated as an element of a criminal offense or as an aggravating factor at sentencing.<sup>1</sup> Notwithstanding its overwhelming popularity,

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1. Only Wyoming has not enacted any form of hate crime law. Arkansas, Georgia, Indiana, and South Carolina criminalize institutional vandalism only; the Utah legislation is more broadly-worded to enhance criminal penalties based on violation of the victim’s constitutional or civil rights. See ANTI-DEFAMATION LEAGUE, STATE HATE CRIME STATUTORY PROVISIONS, [http://www.adl.org/PresRele/HatCr\\_51/4580\\_51.htm](http://www.adl.org/PresRele/HatCr_51/4580_51.htm) (last visited Feb. 14, 2006) (to see the chart summarizing the provisions, click on “Map: State Hate Crime Statutory Provisions,” then on “Chart”). Hate crime law may automatically add a specified term of years to an

hate crime law has always provoked and continues to provoke contentious debate within legal academia. This debate has proceeded mainly along three distinct, though not unrelated, strands of thought. The first is the (un)constitutionality of hate crime law because of its effect on free expression.<sup>2</sup> The second is the political or pragmatic wisdom (or foolhardiness) of hate crime law as an instrument for the eradication of prejudicial beliefs and conduct.<sup>3</sup> These are the dimensions of the debate that have been most visible, especially in more popular discourse. This Article, while doubtless having some implications for these first two strands, focuses chiefly on the third: the (non)conformity of hate crime law to the theories and doctrines of the criminal law.<sup>4</sup>

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offender's sentence, increase the minimum and maximum sentence to be imposed, or increase the maximum sentence only. See David Goldberger, *The Inherent Unfairness of Hate Crime Statutes*, 41 HARV. J. ON LEGIS. 449, 453–54 (2004).

2. See, e.g., JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 128 (1998) (“[I]n our view, the First Amendment is implicated when extra punishment is meted out for bigoted beliefs and motives.”). The constitutional debate may have been dampened somewhat by the Supreme Court’s decision in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), upholding the constitutionality of Wisconsin’s hate crime law against a First Amendment challenge. See Anthony M. Dillof, *The Importance of Being Biased*, 98 MICH. L. REV. 1678, 1678 (2000) (reviewing FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW (1999) [hereinafter F. LAWRENCE]) (referring to the *Mitchell* decision as one reason to declare that the “battle over bias-crime laws is largely over”).
3. See, e.g., F. LAWRENCE, *supra* note 2 (arguing that enhancing punishment for hate crimes is “necessary for the full expression of commitment to American values of equality of treatment and opportunity”); Claudia Card, *Is Penalty Enhancement a Sound Idea?*, 20 LAW & PHIL. 195, 195 (2001) (“[E]ngaging in the practice of penalty enhancement for hate crimes . . . may be shirking rather than taking responsibility for making the needed changes.”); Lawrence Crocker, *Hate Crimes Statutes: Just? Constitutional? Wise?*, 1992/93 ANN. SURV. AM. L. 485, 505–06 (casting doubt on the wisdom of hate crime law because it makes “racial classification more, not less, significant,” thereby exacerbating the antagonism among races).
4. See, e.g., Heidi M. Hurd, *Why Liberals Should Hate “Hate Crime Legislation”*, 20 LAW & PHIL. 215, 216 (2001) (“[I]f hatred and bias are construed as mens rea elements, then they are alien to traditional criminal law principles.”); Carol Steiker, *Punishing Hateful Motives: Old Wine in a New Bottle Revives Calls for Prohibition*, 97 MICH. L. REV. 1857, 1860–61 (1999) (“[H]ate crime legislation is not a significant departure from the rest of the substantive criminal law, and . . . the failure of many commentators . . . to recognize this continuity camouflages the extent to which the debate surrounding hate crime laws is fundamentally grounded in differences about politics or political strategy.”). One scholar has attempted to show that hate crime laws are analogous with international criminal law. See Allison Marston Danner, *Bias Crimes and Crimes Against Humanity: Culpability in Context*, 6 BUFF. CRIM. L. REV. 389, 406 (2002).

The enhanced punishment of the hate crime offender is based on several rationales in criminal law theory:<sup>5</sup> (i) the greater wrongdoing thesis, which posits that a hate crime harms not only its immediate victim (as all crimes do), but also causes greater injury to the victim's community and society at large;<sup>6</sup> (ii) the expressive theory of punishment, which suggests that the criminal law can and should be used as a tool for expressing society's commitment to the norm against prejudice;<sup>7</sup> (iii) the culpability thesis, which argues that hate crime offenders are more blameworthy than offenders who commit crimes without the hate motive;<sup>8</sup> and (iv) the equality thesis, which sees hate crime law as a means of evenly distributing the "state-produced good" of protection against crime.<sup>9</sup> Of these, I take up the culpability thesis because I believe that much of the current debate addressing this topic presents a partial and misleading picture of both criminal culpability in general and the hate motive in particular.

The incompleteness of the debate stems in large part from the fact that the discourse on hate crime law is taking place against the backdrop of an upheaval within criminal law theory that challenges conventional accounts of culpability and *mens rea*. The critique brought to bear by those scholars who engage in an "evaluative"<sup>10</sup> analysis of the law sheds new light on a fundamental question regarding blame and punishment that critics of hate crime law have yet to fully recognize and integrate into their doctrinal position: namely, how does the criminal law take account of the moral quality of an individual's

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5. This list is taken from Heidi Hurd and Michael Moore's recent survey of the hate crime debate. Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1083–85 (2004).
  6. See, e.g., F. LAWRENCE, *supra* note 2, at 39–44 (outlining the greater harms associated with hate crimes).
  7. See, e.g., Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1641 (1998) ("We expect punishment to voice our moral outrage, in addition to protecting us from harm and imposing deserved suffering.").
  8. See, e.g., F. LAWRENCE, *supra* note 2, at 58–61 (explaining that the hate crime offender is more culpable because of her motive under either consequentialist or deontological theories of punishment).
  9. Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507, 509 (1999).
  10. I borrow this term from Dan Kahan and Martha Nussbaum's seminal article on the role of evaluation in the criminal law. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996). Kahan and Nussbaum's approach to culpability has been associated with the works of several other criminal law theorists, including Peter Arenella, Kyron Huigens, Victoria Nourse, and Samuel Pillsbury. Their theories have been variously labeled "the new normativity," see Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 STAN. L. REV. 1435, 1435 (1998), "the new culpability," by the symposium organizers at the *Buffalo Criminal Law Review* in 2002, and even "virtue jurisprudence," see R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 BUFF. CRIM. L. REV. 147, 154 (2002).

choices? With their overtly normative approach to criminal culpability, these evaluativists have argued—rather persuasively—that the criminal law passes judgment upon the content of an individual’s chosen motives in order to lay blame and measure punishment. The evaluative view of criminal culpability is significant to the hate crime debate because it substantially undermines the argument critics make that hate crime law represents a doctrinal departure from existing law.

But the debate is incomplete for another reason. Once we expand our notion of culpability to include the moral evaluation of chosen motives, and thereby link the hate motive to the classic themes of criminal mental states, we discover, ironically, that hate crime law then poses a difficult challenge for the evaluative approach itself. This is because hate crime law poses a more complex version of the question I identified above: namely, how does the criminal law take account of the moral quality of an individual’s choices *as they relate to such a heavily fraught social issue as race*?<sup>11</sup> The evaluative approach to the criminal law, alone, does not provide an adequate answer to this question and may in fact divert us from arriving at a considered answer because of its own assumptions about choice and blame. These assumptions tend to obscure the work of critical race theorists that casts doubt on the availability of a sufficiently free choice to not harbor the hate motive, as well as on our ability to judge the motive’s content; in other words, critical race scholarship makes *more* difficult the task of fitting the presumed motivations for hateful criminal acts within the evaluative framework of moral choice.

Although my primary objective in this Article is to examine how these crosscurrents of legal thought intersect and enrich our understanding of both criminal culpability and hate crime law, my analysis does lead me to some tentative conclusions about the latter that should already be apparent from this introduction. First, I do believe that hate crime law is consistent with existing criminal law doctrine. Part II of this Article lays the foundation for a defense of this position by considering the scope and conditions of culpability outlined by Heidi Hurd and Michael Moore in their recent article on hate crime law.<sup>12</sup> I argue that despite the internal soundness of their logic, Hurd and Moore’s rejection of hate crime law on doctrinal grounds is problematic because their critique of hate crime law applies with equal force to numerous established doctrines that remain unquestioned or reaffirmed in their article.

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11. Obviously, “race” can be replaced with gender, religion, sexuality, disability, etc. depending on the protected category one chooses to study. As I explain later, I focus exclusively on race in this Article.

12. Hurd & Moore, *supra* note 5.

This, I argue in Part III, is a symptom of their failure to identify correctly the law's criteria for inculcation and deserved punishment. I contrast Hurd and Moore's assumption of a value-neutral criminal law against the evaluative conception, which offers a more consistent and coherent reading of criminal law doctrines on culpability precisely because it acknowledges the opposite: that the criminal law is and has long been value-laden. Under the evaluative conception of the criminal law, the debate over hate crime law is transformed from one that depends on doctrinal precedent to one that focuses on moral legitimacy.<sup>13</sup>

Part IV is concerned with these new terms of the hate crime debate. Although there seems to be some reason to believe that hate crime law is morally legitimate under the evaluative view, I suggest that the issue is thornier than it might first appear. In this Part, I turn to critical race theory to explore the moral problems that remain even when the usual doctrinal critiques are overcome. I ultimately conclude that proponents of hate crime law will face a serious obstacle due to a key theoretical conflict between the moral premises of an evaluative criminal law and the prevailing explanations of race and racism in our society. Resolution of this conflict in favor of enacting hate crime law is unlikely to be achieved without significantly compromising either or both theories; that price, I suspect, is both morally and politically too costly to bear.

In discussing my moral reservations about hate crime law, I assume the race-motivated killing as the hate crime at issue. I do this for several reasons. First, choosing a specified crime allows me to make my arguments with more particularity than I could if I attempted to address hate crimes in general. In addition, homicide is a useful parallel crime because its explicit grading of crimes based on mens rea provides a ready-made heuristic tool for assessing degrees of culpability.<sup>14</sup> I also choose to highlight race in this Article because it is a category almost universally recognized in hate crime legislation, and is considered by many to represent the best case for hate crime law. Race-motivated hate crime is probably the case most often dis-

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13. It is very difficult to distinguish between doctrinal and moral principles in the criminal law since so many of its rules are derived from moral theories of punishment and cannot be fully understood without them. Despite this difficulty, I try to disentangle them here for the sake of clarity and because Hurd and Moore make the distinction. By "doctrine," I refer to what the criminal law is or does—that is, its rules and structure. By "moral principles," I refer to the underlying general principles that inform and justify such rules and structure—what the criminal law can be or can do.

14. I use "parallel crime" in the way that Frederick Lawrence has defined it: a similar crime but lacking the hate motive. F. LAWRENCE, *supra* note 2, at 4. Accordingly, whenever I use comparative adjectives such as "greater," "lesser," "better," or "worse," I am comparing the hate crime against its parallel crime unless otherwise stated.

cussed among legal scholars as well as the general public,<sup>15</sup> and race theory itself has a wealth of research and analyses from which I can draw to propel the debate.

At the most basic level, this Article studies the nature of the relationship between enhanced culpability and enhanced punishment. My analysis unfolds in two steps: first, I reexamine the doctrinal legitimacy of hate crime law as a way of investigating the limits of inculpation in general, and second, I ask whether hate crime law is defensible in light of such limits.

## II. THE CASE AGAINST GREATER CULPABILITY

At the outset, some background on the relevance of culpability to punishment is in order. Culpability is one prong of the wrongdoing-culpability paradigm that has been described as the central hypothesis of modern, desert-based criminal law theory.<sup>16</sup> Paraphrasing Michael Moore, a person may be punished only if she has taken a wrongful action and has done so culpably.<sup>17</sup> It is plain that the wrongdoing-culpability paradigm not only informs criminal law doctrine—it roughly corresponds to the actus reus/mens rea structure of crime definition—but also invites moral assessment of the offender for purposes of imposing punishment. This is particularly true of the culpability prong, which is commonly equated with blameworthiness.<sup>18</sup>

For purposes of this Article, the importance of the paradigm lies in its effect on the measure of proportionality in punishment. The level of harm and/or culpability determines the relative gravity of crimes and, accordingly, the appropriate amount of punishment inflicted.

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15. See William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1222 (2004). Statistically, racially motivated hate crimes make up the largest percentage of total hate crime incidents reported year after year, often exceeding the number of hate crimes based on religion, ethnicity, sexual orientation, and disability combined. FBI, UNIFORM CRIME REPORTS: HATE CRIME STATISTICS (1995–2003), <http://www.fbi.gov/ucr/ucr.htm>. Rubenstein observes, however, that these statistics fail to tell the complete story about the incidence of hate crimes on discrete populations, and argues that when the statistics are adjusted for relative population size, gay people have reported more hate crimes than any other group. Rubenstein, *supra*, at 1229.
  16. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 461 (1978); Kenneth W. Simons, *On Equality, Bias Crimes, and Just Deserts*, 91 J. CRIM. L. & CRIMINOLOGY 237, 238 (2000); see also Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015, 1024 (1997) (“[T]o the extent that bias crime statutes cannot be justified within the wrongdoing-culpability framework, they are unjustified.”).
  17. MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 33 (1997).
  18. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 64 (1968); Kimberly Kessler Ferzan, *Don't Abandon the Model Penal Code Yet! Thinking Through Simons's Rethinking*, 6 BUFF. CRIM. L. REV. 185, 185 (2002); Hurd & Moore, *supra* note 5, at 1117.

Thus, the inquiry into culpability by the criminal law is not merely a philosophical exercise in the legal and moral implications of human activity; it is intended to “govern what is done or may be done with the offender.”<sup>19</sup> Under this view, if committing a hate crime is considered to be more culpable than committing a parallel crime, it is legitimate to punish more harshly for the hate crime.

Hurd and Moore’s rejection of hate crime law is not about the relevance of culpability; they appear to accept the proposition that a person who is more culpable may be punished more severely.<sup>20</sup> However, they argue that a person who commits a hate crime is not in fact more culpable than a person who commits a parallel crime. Their contention has less to do with the apparent immorality of racism and more to do with the ways legal culpability differs from moral culpability. Central to their thesis is the belief that the hate motive is unlike the other mental states and motives that typically give rise to criminal liability. It is unique because it is a function of bad character, not a temporary or “occurrent” state of mind. Describing hate crime law in this way allows Hurd and Moore to make a further normative claim against hate crime law: that punishing an individual for her bad character is morally unjustified. In the remainder of this Part, I examine Hurd and Moore’s descriptive claims. Their moral argument will be taken up in Part III.

### A. The Uniqueness of the Hate Motive

Hurd and Moore’s analysis of culpability assumes that there are two categories of culpable mental states: the “standard” mens rea states of purpose, knowledge, recklessness, and negligence,<sup>21</sup> and the “exceptions” thereto.<sup>22</sup> They argue that because the hate motive does not fit into either category—that is, there is no precedent for the hate motive in either the standard states or any exception—the hate motive must be irrelevant to the culpability inquiry.

It is obvious that the hate motive does not resemble the standard states in at least one respect: the standard states do not expressly inquire into the motive or reason behind an offender’s act. It is equally clear, however, that this is not fatal to the legitimacy of hate crime law. Hurd and Moore acknowledge that there are well-established exceptions that do take into account an individual’s reason for

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19. Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1427 (1968) (quoting Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. & CRIMINOLOGY & POLICE SCI. 524, 525 (1955)).

20. Hurd & Moore, *supra* note 5, at 1117–18.

21. *Id.* at 1118–19.

22. *Id.* at 1118 n.103.



acting to decide the proper degree of culpability and punishment.<sup>23</sup> Nevertheless, they argue that such exceptions are sufficiently different from the hate motive to be of no avail.

The first of the exceptions that Hurd and Moore consider is the criminal law's treatment of good motives that reduce or obviate punishment. For example, the punishment of a person who intentionally kills out of passion may be mitigated if that passion is found to have been adequately provoked. Similarly, a person who intentionally kills in order to save herself might be wholly exonerated if found to have acted reasonably. Although these traditional defenses demonstrate that motives are at times very relevant to ascribing and gauging criminal responsibility, Hurd and Moore dismiss them as inapt examples for advancing the hate crime debate. They argue that the motives in these two scenarios are unlike the hate motive in that they are exculpatory, and this function renders them unusable as precedent for hate crime law.<sup>24</sup>

Hurd and Moore next dismiss the possibility that the premeditation doctrine could provide a precedent for the law's consideration of the hate motive. They argue that although motive may have evidentiary significance to the premeditation inquiry—the presence of a motive supports the likelihood of prior thought—the doctrine does not *require* a finding of a motive, let alone any particular motive. Unlike hate crime law, premeditation is focused on how a person kills, not why.<sup>25</sup>

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23. *Id.* at 1119. This acknowledgment indicates that Hurd and Moore do not subscribe to the much-abused irrelevance of motive maxim. However, they seem to espouse a variant of it when they assume that a consideration of motive is at best exceptional to the criminal law. For an explanation and critique of the irrelevance of motive maxim, see Guyora Binder, *The Rhetoric of Motive and Intent*, 6 *BUFF. CRIM. L. REV.* 1 (2002).

24. Hurd & Moore, *supra* note 5, at 1119–20. Hurd and Moore further contend that any analogy made to the heat of passion defense, which arguably mitigates punishment for crimes motivated by hatred or anger, fails because hate crime law enhances punishment using “the very same condition that exculpates.” *Id.* at 1120. This interpretation of a hate crime rests on the assumption that the typical offender is an abnormally rabid racist who loses control—a notion that has been widely discredited. See, e.g., BARBARA PERRY, *IN THE NAME OF HATE: UNDERSTANDING HATE CRIMES* 33 (2001) (arguing that it is distorting to assume that hate crime emerges from a subculture of hate); AMERICAN PSYCHIATRIC ASSOCIATION, *HATE CRIMES TODAY: AN AGE-OLD FOE IN MODERN DRESS* (1998), <http://www.apa.org/pubinfo/hate/> (stating that researchers believe hate crimes are not “random, uncontrollable or inevitable occurrences”); cf. Lu-in Wang, *Unwarranted Assumptions in the Prosecution and Defense of Hate Crimes*, 17 *CRIM. JUST.* 4, 8 (2002) (explaining that hate crimes are often both rational and opportunistic, “exploiting a societal view that members of the target group are ‘suitable’ or acceptable targets for violence”).

25. Hurd & Moore, *supra* note 5, at 1121.

Finally, Hurd and Moore argue that when bad motives do count and are required, they are about future plans or expectations. Take, as an example, burglary's specific intent—the intent to commit a felony within the dwelling of another. The specific intent of burglary is most naturally read to capture the greater culpability of the offender.<sup>26</sup> A person who breaks and enters with a motive to commit some other felony, say theft, is more blameworthy than a person who breaks and enters without such thought.<sup>27</sup> Here, too, Hurd and Moore discover an arguably significant distinction. The specific intent to commit theft is a rational calculation regarding a goal or perceived good, which relates to a particular sort of desire. This is unlike the hate motive which Hurd and Moore describe as emotional or dispositional, relating to passions or standing beliefs held by the offender when committing the crime.<sup>28</sup> In the latter, there is no rational calculation or goal; the hate motive is a “felt emotional state[ ] rather than ends to which actions are means.”<sup>29</sup> Since the hate motive resembles none one of these established exceptions to the standard mens rea states, Hurd and Moore conclude that it is alien to the criminal law.

Hurd and Moore convincingly demonstrate that there are differences between the hate motive and other mental states that ground culpability. They are not as persuasive, however, when arguing that these differences constitute a significant doctrinal departure, and I find it difficult to pin down why Hurd and Moore think they do. On the surface, it is plain that the hate motive does not resemble any of the standard mental states nor any of the exceptions. But then again, every mental state is unique; purpose is different from knowledge, which is different from recklessness, negligence, the specific intent to

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26. *But see* OLIVER WENDELL HOLMES, *THE COMMON LAW* 61 (Mark DeWolfe Howe ed., 1963) (suggesting that the specific intent of burglary is actually “an index to the probability of certain future acts [e.g., robbery and murder] which the law seeks to prevent”).

27. Although the definition of burglary uses the term “intent” rather than “motive,” they are substantially identical; it appears that the distinction is based on “superficial linguistic convention” rather than on a genuine difference of meaning or referent. Jeffrie G. Murphy, *Bias Crimes: What Do Haters Deserve?*, 11 *CRIM. JUST. ETHICS* 20, 21 (1992).

28. Hurd and Moore remark that passions and dispositions may also have to be treated separately because they are distinct from each other as well. The distinction appears to be one of experience—felt emotions versus being disposed to make false assumptions about others—but they do not explain what the legal or moral difference might be, other than the potential application of the heat-of-passion defense to the former. Hurd & Moore, *supra* note 5, at 1126.

29. *Id.* at 1122; *but cf.* Eric Shimamoto, Note, *Rethinking Hate Crime in the Age of Terror*, 72 *UMKC L. REV.* 829, 829 (2004) (arguing that hate crimes are intended by their perpetrators to “change the world”). To those who claim that hate criminals in fact desire such future state of affairs, Hurd and Moore reply that their argument “grossly overintellectualizes” hate and bias. Hurd & Moore, *supra* note 5, at 1125–26.

commit a felony, premeditation, the motive behind self-defense, and so on. These differences are intended and significant because they define greater and lesser degrees of culpability. The hate motive seems to do no more than perform this very ordinary function.

It cannot be for such simplistic and superficial reasons that Hurd and Moore identify a doctrinal departure. Perhaps their complaint is that the hate motive requires special justification because it is not one of the mental states that they have deemed to be standard. If this is their argument, however, more is required to make and defend their claim. How are existing exceptions justified? In what way do proponents of hate crime law fail to make a similar and equally compelling case that the hate motive affects the proportionality of punishment? Concluding that the hate motive is alien even to the exceptions of the law presupposes that there is some unifying or common principle that synthesizes the extant exceptions; in other words, if all exceptions are different from one another, the uniqueness of the hate motive would in fact be quite commonplace. Simply describing the exceptions without reference to such principle provides very little information about how motives may or may not be accounted for in criminal law. And if we are without governing principles for making exceptions (and one might observe, such is usually the nature of the enterprise), identifying a precedent among such exceptions is of little value to critical analysis.

Paul Robinson has remarked that “[s]ome motives alter our judgments of blameworthiness, others do not; distinguishing between the two is the challenge put to criminal code drafters.”<sup>30</sup> In light of the apparently ad hoc nature of exceptional mental states, the question cannot be reduced to whether some prior exception can serve as precedent for hate crime law. It seems to me that the underlying question is whether there are limiting principles that restrain criminal code drafters when they identify *any* mental state that affects culpability.<sup>31</sup> Hurd and Moore suggest one potential limiting principle: that we do not punish a person for her character. If I have framed their concern correctly, the problem with hate crime law is not that it requires an inquiry into motive, but that there is something problematic about the nature of the hate motive itself.

## B. Punishing Bad Character

The argument that hate crime law is a departure because it punishes character assumes that (i) the hate motive is tantamount to an

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30. Paul H. Robinson, *Hate Crimes: Crimes of Motive, Character, or Group Terror?*, 1992/93 ANN. SURV. AM. L. 605, 608.

31. Cf. Binder, *supra* note 23, at 4 (“Once legislatures have undertaken to define offenses, the important questions become what offense definitions legislatures should supply and how courts should apply them.”).

unpunishable character trait, and (ii) neither the standard mental states nor the exceptional ones target character.<sup>32</sup> For this argument to be persuasive, much depends on how well Hurd and Moore defend their description of the hate motive as a character trait. They offer the following reasons to support their claim. First, Hurd and Moore suggest that race hatred or bias is probably the product of “years of . . . unfortunate parenting, schooling, peer pressures, and life experiences.”<sup>33</sup> Beliefs nurtured in this way tend to become a more or less permanent part of an individual’s personality. For this reason, race hatred or bias is likely to be a “standing” disposition rather than an “occurrent” mental state.<sup>34</sup> Unlike, for example, the specific intent to steal, which a person could form and abandon from one moment to the next, the hate motive is not a temporary state of mind. A person who has the hate motive simply is disposed to believe in certain groups’ inferiority and to act to oppress them, just as a greedy person may be disposed to accumulate excessive wealth. As much as greed is a character trait, so is racism.

There are at least two possible readings of Hurd and Moore’s character argument, both of which find support in the above explanation of the hate motive. The first is that hate crime law punishes only racists because only a racist can commit a hate crime. This is because anyone who harbors the hate motive is, by definition, a racist.<sup>35</sup> Viewed in this light, it may be said that the hate motive singles out racists for harsher punishment by virtue of their racist characters.

I do not disagree with the notion that hate crime law punishes racists, but this critique sweeps too broadly. As an abstract proposition, it seems more or less correct to say that a person’s character is a composite of the beliefs she holds about herself and the world around her, as well as the acts she commits, perhaps motivated by such beliefs. Accordingly, we can say that homicide law punishes murderers and the various laws against fraud are designed to punish liars. I suspect that most of us do not walk around with a serious intent to kill, and if some do, we might be inclined to describe them as homicidal or at least sociopathic characters. Similarly, it is not irrational to posit that only liars commit fraud and that liars are people who are disposed to

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32. This portion of Hurd and Moore’s analysis strongly resonates with another well-established maxim: that the criminal law does not punish thought or character. This maxim, however, is most often employed to explain the act requirement, and a hate crime clearly presupposes an act. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 82–83 (3d ed. 2001).

33. Hurd & Moore, *supra* note 5, at 1127.

34. *Id.* at 1128.

35. This argument, in turn, may be subdivided into a disparate impact claim—that hate crime law happens to disproportionately punish racists—and a discriminatory intent claim—that hate crime law is a sneaky way of punishing a person for being racist. Either way, the point is that racists are punished for being racist.

make intentional misrepresentations. The criminal law routinely proscribes certain acts accompanied by particular thoughts, many of which we might attribute to an offender's character. Under this reading, hate crime law does no more or less than what the rest of the law does; this version of the character argument fails as a coherent limiting principle against inculcation.

The second possible reading is stronger. Under this reading, hate crime law punishes character because the dispositional aspect of the hate motive indicates that it is not controllable. For Hurd and Moore, the hate motive is a character trait but not because they believe people do not choose to become racists. What is important for them is that an offender cannot autonomously choose to not be a racist—to will away her hatred or prejudice—when she acts.<sup>36</sup> It is this lack of control, or choice, that makes the hate motive a character trait.

Choice is a key moral concept in the criminal law and I will return to its significance below. For now, it suffices to raise the following questions. First, does the probability that the hate motive is long-standing truly imply a lack of choice at the moment of criminal conduct? Quite clearly, it does not have to: a long-standing belief may as often as not be the logical result of choice, the choice not to abandon the belief. Moreover, there is always the possibility of transformation, even of long-standing beliefs. To be sure, what we ordinarily think of as character traits are those that are less susceptible to change. But this assumes what needs to be proved. An individual's beliefs may be short-lived or long-standing, but it seems that none are inherently so. We regularly change our minds and alter our beliefs; how and when we do is probably dependent on our knowledge and experience, both of which are in constant flux. This process seems to me to be awfully contingent—too contingent to be meaningful in determining which beliefs define a person's character and which do not.<sup>37</sup>

My second question is this: assuming that an individual cannot choose to abandon the hate motive when she chooses to act, does this constitute a limiting principle that would delegitimize hate crime law?

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36. Hurd & Moore, *supra* note 5, at 1129.

37. In addition, many long-standing beliefs are not ordinarily attributed to a person's character or personality. For example, my belief in the theory of evolution, which I have held from the earliest time that I can recollect of having contemplated the origin of the human species, is not something that I would describe as a character trait, except in a most attenuated way. Some may describe my faith in Darwin as the result of "unfortunate parenting, schooling, peer pressures, and life experiences," but that hardly transforms my belief into my character.

Yet, there is undoubtedly a great deal of intuitive appeal to Hurd and Moore's explanation. I suspect that this is due in large part to a normative assumption commonly made that racism is irrational. Of course, irrational thoughts, by definition, defy reason and thereby undermine choice. In Part IV, I argue that this assumption is incorrect and that individual racism is perfectly rational (or, at least, not perfectly irrational).

Again, I have my doubts. For Hurd and Moore, choice is salient when available at the moment of action. Thus the relevant choice in a hate crime comes down to whether a racist can will away the hate motive when she chooses to kill.<sup>38</sup> Confining the relevance of choice in this way may be a reasonable, even preferable, way to limit the reach of the criminal law. But as a matter of description, it appears that the law is not so confined; many other crimes would fail to pass muster under Hurd and Moore's limiting principle, despite their reliance on established (standard and exceptional) mental states to find culpability.

Consider the following examples. *X* receives property even though she knows that it is stolen, thereby making her guilty of the specific intent crime of intentionally receiving stolen property, with knowledge that it is stolen. At the time she chose to engage in her transaction, could she have abandoned that knowledge? *Y*, a legally sane man, has recurrent thoughts about killing his wife and then proceeds to do it. Can we say that his premeditation could have been willed away when he chose to kill? *Z* flagrantly violates the speed limit and runs over a pedestrian. Can *Z* choose to not be unaware of the risks of her decision to speed?<sup>39</sup>

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38. Hurd and Moore describe the case of a person who throws a rock at a neighbor's window. They argue that the law punishes her because she could have chosen to do many other, non-harmful things, but it should not punish her for the hatred she harbors against the neighbor at the time because she could not have willed it away. Hurd & Moore, *supra* note 5, at 1130; cf. Samuel H. Pillsbury, *Evil and the Law of Murder*, 24 U.C. DAVIS L. REV. 437, 457 (1990) ("The general trend of modern American criminal law has been toward a close examination of the immediate criminal decision.").

39. Note once again the difficulty of distinguishing between occurrent and standing states. We can say that these actors were unscrupulous, sadistic, or recklessly indifferent at the time they acted, making these mens rea states seem more occurrent and less standing. But perhaps we can also decide that these actors' personalities are defined by unscrupulousness, sadism, and reckless indifference, respectively, because only a person without scruples would transact in stolen property, only a sadistic man would kill his wife, and only an individual disposed to be reckless would drive in great excess of the speed limit. It strikes me that a single criminal act, or even a series of acts, usually gives little information as to whether the offender's mental state can be attributed to a character flaw or a culpable decision.

As Joel Feinberg observed, the formation of any mental state, including intent, may be a matter of luck since personal character as well as external intervening events may contribute to its coming into being. Joel Feinberg, *Problematic Responsibility in Law and Morals*, in *DOING AND DESERVING* 25, 34-35 (1970). One writer has suggested that in the absence of certainty, it would be preferable for the law to attribute a criminal act to a decision. See generally Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019 (2004) (arguing that viewing criminal acts as character-driven lends logic to overharsh, incapacitative sentencing such as three-strikes laws, as well as disenfranchisement and denial of social benefits to felons).

We may be able to say that each of these actors had the “raw choice” not to intend to transact, kill, and speed because we generally infer that people intend to do what they actually do.<sup>40</sup> But the mental state with respect to one’s actions is not the only factor that the law considers in deciding culpability. The crimes I described above require knowledge as to an attendant circumstance, a certain amount of prior deliberation, and a reasonable effort to attend to the risk of harm, respectively. In short, they inquire into the actor’s understanding of the context of her act that reveals whether her choice to act was a culpable one, either because she was at least aware of the circumstances involved that made her conduct wrongful, or because she was culpably negligent in her failure to be so aware.<sup>41</sup> It seems to me that it is much harder to talk about these mens rea states as a matter of free choice or will as Hurd and Moore would have it.<sup>42</sup> Are these crimes equally suspect? When we try to rescue Hurd and Moore’s argument and say that, for example, X could have chosen not to receive what she knew was stolen property, we lose its limiting aspect because we can just as easily argue that the hate offender could have chosen not to kill out of race hatred. It seems to me that it is implausible to assert that the criminal law ascribes culpability only to those who could have consciously abandoned their relevant thoughts, beliefs, and feelings at the moment of acting. Some crimes do, but many others do not.

In fact, I agree that choice should matter in inculcation, but the way it is applied by Hurd and Moore fails to explain current doctrines.<sup>43</sup> Temporal distinctions between so-called standing and occurrent states also appear inadequate to draw the line between legitimate and illegitimate bases for culpability. Hate crime law arguably may be exceptional and unprincipled, but it does not appear to be a doctrinal departure. And if hate crime law is illegitimate, it is probably no more so than a host of other, well-established crimes. The

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40. See Hurd & Moore, *supra* note 5, at 1129–30.

41. The *Model Penal Code*, for example, applies an elemental analysis of mens rea as it correlates with each of the actus reus elements of the crime. MODEL PENAL CODE § 2.02(1) (1962); see also Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 953 (2000) (“Criminal culpability is always a function of what the actor believes regarding the nature and consequences of his conduct and what the actor’s reasons are for acting as he does in light of those beliefs.”). Alexander would reject negligence, however, as a culpable mental state. *Id.* at 932.

42. Indeed, the fact that criminal culpability does not depend on Hurd and Moore’s temporally-limited understanding of free choice is demonstrated by the treatment of premeditation, which is impossible to abandon at the time of the criminal act since it occurs, by definition, prior to such act.

43. To be clear, I do not necessarily disagree that the relevant choice should be confined in the way Hurd and Moore suggest. My point is that their criteria for doctrinal validity appears more prescriptive than descriptive.

trouble with Hurd and Moore's discussion is that the boundaries they draw around the doctrines of culpability imply that the criminal law went out of bounds long ago and repeatedly. This is why their arguments seem to lack traction: their analysis makes for a perfectly coherent critique, but it is one that is more sensibly addressed to the criminal law in general, not to hate crime law in particular. Their criteria for culpability make it hard to see the distinctions among what is standard, exceptional, and novel, and to explain why a given mental state must be classified one way rather than another. I suspect that the reason for this is not flawed logic, but a flawed premise. In the next Part, I consider a competing description of the criminal law—one that I think gives a better accounting of our inculpatory doctrines.

### III. THE EVALUATIVE CONCEPTION AND GREATER CULPABILITY

Hurd and Moore declare that hate crime law “breaks whole new ground in the development of criminal law doctrine.”<sup>44</sup> As I have discussed above, this is a claim that obviously relies on its ability to describe accurately what the criminal law is—after all, one cannot recognize the new without knowing what came before. It also reveals the extent to which Hurd and Moore believe that a larger question hangs in the balance of the hate crime debate. The passion with which critics denounce hate crime law strongly indicates that many believe it “raise[s] profound questions for moral and legal theory.”<sup>45</sup>

In the previous Part, I have tried to demonstrate that if hate crime law is groundbreaking, it is not for the reasons that Hurd and Moore have given. If I am right, what is it about hate crime law that elicits such passionate condemnation from so many scholars of the criminal law? Recently, Carol Steiker has suggested that the real issue in the hate crime debate is not criminal law doctrine but politics or political strategy.<sup>46</sup> Indeed, after all is said and done, Hurd and Moore end with a condemnation of hate crime law as an illiberal strategy aimed at deterring racism and cultivating virtue.<sup>47</sup>

My own view is that there is more to the anti-hate crime law position than political disagreement. However, there is no denying that critics very often do resort to the argument that what is objectionable

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44. Hurd & Moore, *supra* note 5, at 1119. In an earlier article on hate crime law, Hurd similarly argued that it works “important changes in both our criminal law doctrine and our political presuppositions.” Hurd, *supra* note 4, at 232.

45. Dillof, *supra* note 16, at 1080.

46. Steiker, *supra* note 4, at 1861.

47. Hurd & Moore, *supra* note 5, at 1135–37. For a brief but insightful response to the charge of illiberalism and a discussion of the limits of value-neutrality, see Binder, *supra* note 23, at 62–64.



about hate crime law is that it enhances punishment only for certain disfavored thoughts. For Hurd and Moore, embracing this so-called illiberal position would mean a radical revision of existing criminal law to take into account all of the varied and innumerable bad motives that prompt people to do harm.<sup>48</sup> The “new ground” broken by hate crime law is its judgment upon the values or ends pursued by offenders.<sup>49</sup>

This, too, presupposes something important about the state of the criminal law—namely, that it is value-neutral or, at the very least, moving toward neutrality. Critics of hate crime law argue that the criminal law does not make moral judgments about people’s values or beliefs. Anthony Dillof writes:

Intentional acts, for example, may be based on a wide variety of values or ends. Likewise, if merely told that an individual acted recklessly, one would not know anything about the specific content of the individual’s beliefs or values. In contrast, the mental element required for bias crimes is defined in terms of beliefs or values concerning such specific matters as race, color and religion. . . . Thus, the puzzle of bias crimes is this: the overt act is already punished; the underlying thought, to the extent biased, appears irrelevant to punishment.<sup>50</sup>

As several scholars of criminal law theory have suggested, however, this is a questionable presupposition. These evaluativists argue that the criminal law has, explicitly and implicitly, made moral judgments all along, and that many doctrines of the criminal law cannot be effectively understood, described, or criticized without acknowledging this basic fact. Below, I consider whether the evaluative conception of the criminal law offers better limiting principles that will allow us to analyze the legitimacy (and wisdom) of hate crime law.

### A. The Contours of the Evaluative Conception

According to the evaluative conception, the criminal law is profoundly engaged in the assessment of an offender’s character. The word “character,” as used by evaluativists, refers to the values held dear by the individual as well as the quality of her moral judgment. The law punishes those who behave unreasonably, either because they value the wrong things or value the right things but in the wrong amount or even at the wrong time.<sup>51</sup> This view of the criminal law posits that the law recognizes and distinguishes between good and bad

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48. Hurd & Moore, *supra* note 5, at 1135.

49. *See, e.g.*, Dillof, *supra* note 16, at 1017–18 (“Because of its content specificity, the mental element required for bias crimes appears different in kind from those traditionally relevant.”).

50. *Id.* at 1017; *see also* Hurd & Moore, *supra* note 5, at 1118 (“The standard method of grading culpability in criminal law has long been indifferent (except evidentially) to considerations of motivation.”).

51. *See* Kahan & Nussbaum, *supra* note 10, at 287; Dan M. Kahan, *Two Liberal Fallacies in the Hate Crimes Debate*, 20 *LAW & PHIL.* 175, 178–79 (2001).

values, that individuals are expected to be reasonable when choosing to act according to such values, and that an unreasonable choice forms the basis of inculcation.

An individual's values are socially constructed in two senses. First, they are derived from societal conventions about what is good or bad, what must be respected or may be disregarded.<sup>52</sup> Thus, the values that the criminal law is concerned with are not like the absolute mores of a specified religious or cultural institution, but evolving norms widely shared by a given community. Second, law and morality demand that the individual exercise her "practical wisdom" to make appropriate choices among competing values in the formation of her own character.<sup>53</sup> In this way, the evaluative conception of the criminal law assumes that an individual is responsible for her character and that she may be held accountable for defects therein. This notion of responsibility originates in Aristotelian philosophy.<sup>54</sup>

An evaluative criminal law emphasizes three familiar concepts in criminal law theory. The first is the voluntary act. The evaluative conception, despite being character-oriented, is not incompatible with the act requirement and, in fact, considers acts to be significantly expressive of the offender's values.<sup>55</sup> Even if we were to decide that punishing people solely for their character were appropriate, an act would be necessary in the usual case to determine who has a bad character and what it is that makes her character bad.<sup>56</sup> At the same time, the voluntary act requirement limits the scope of the law's interest in an individual's character because it is concerned only with those character defects that the act reveals.<sup>57</sup> This limitation is consonant with

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52. Kahan & Nussbaum, *supra* note 10, at 296, 347.

53. *See id.* at 287–88; *see also* Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1425 (1995) ("The criminal law [promotes the greater good of humanity] by promoting virtue; that is, by inquiring into the quality of practical judgment displayed by the accused in his actions.") (footnote omitted).

54. *See* Huigens, *supra* note 53, at 1425; Kahan & Nussbaum, *supra* note 10, at 289–90.

55. Kahan & Nussbaum, *supra* note 10, at 339.

56. *See infra* text accompanying notes 73–74. Admittedly, this is a weak act requirement since it is possible that an act may not be necessary to identify and differentiate bad character. But once we get into that debate I think the question becomes one of what we want the criminal law to do and not do, not what it actually does now. The narrow point being made is that focusing on the values of an individual is not incompatible with, and is often dependent on, the existing doctrinal requirement of a voluntary act.

57. *See* Kahan & Nussbaum, *supra* note 10, at 339 ("[T]he evaluative view does not require that the criminal law or any other body of law take a . . . thoroughgoing interest in the state of citizens' characters."). Of course, that the evaluative conception does not require a more regulatory approach to character does not necessarily mean that it would prohibit it either. For a surer limit against regulating character, Paul Robinson suggests that we look to the law's focus on motive. Of course, motive presupposes an act. *See* Robinson, *supra* note 30, at 605 ("By

existing law relating to the type of character evidence relevant to sentencing.<sup>58</sup>

The second concept is motive. The evaluative conception recognizes that the reasons behind an individual's criminal act are highly material to culpability.<sup>59</sup> People may be motivated to act by a variety of reasons, and the doctrine of culpability reflects the law's assessment of the quality of such reasons.<sup>60</sup> We can see this, for example, in the greater culpability explicit in committing some specific intent crimes: it is worse to break and enter with an intent to steal, and it is worse to assault with an intent to rape, because stealing and raping are bad reasons independent of the bad acts already culpably committed. The law goes so far as to criminalize otherwise innocent acts—say, buying rope—if accompanied by bad motives—say, to steal or to rape using the rope. For many crimes, the intent to do an act and the act itself provide only partial answers to the culpability puzzle; motive is a key factor to consider in determining whether a more serious crime, or no crime at all, has occurred.

Highlighting motive rather than a set of four specified mental states destabilizes the distinction Hurd and Moore make between standard and exceptional states; since both contain underlying motives, both can give rise to culpability. Indeed, motives underlie almost all human action; people generally act with purpose, with a certain end or ends, in mind.<sup>61</sup> Even acts spurred by emotions and

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keeping the law's focus only upon the character attributes relevant to the conduct constituting the offense, motive in fact serves a useful role in reducing the temptation of liability inquiries to stray towards punishing general character.”)

58. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476, 486 (1993) (stating that although “abstract beliefs” may not be considered in enhancing punishment, beliefs that are related to the underlying crime or to otherwise valid aggravating factors are relevant to sentencing).
59. *See Kahan & Nussbaum, supra* note 10, at 315; *see also* Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 324 (1996) (“Aiming at evil in one’s particular choices makes one more culpable.”). In this Article, I use “reason for action” and “motive” interchangeably. Joseph Boyle has noted, however, that motive is one of two elements of a reason for action, the other being the cognitive element of believing that one’s action will bring about a desired result. Joseph Boyle, *Reasons for Action: Evaluative Cognitions that Underlie Motivations*, 46 AM. J. JURIS. 177, 177 (2001). For purposes of this Article, maintaining this distinction would be cumbersome and unnecessary since the focus of the hate crime debate is on bad motive and not the rationality of action vis-a-vis one’s motive. As will become clear below, however, evaluativists ultimately consider both the cognitive and the motive elements to be relevant to culpability. Moreover, motives are also dependent on cognition, *see id.* at 178, which is why they may be morally evaluated. *See infra* text accompanying notes 65–70.
60. Kyron Huigens phrases this a little differently. He states that the criminal law makes assessments about the offender’s “scheme of ends and her conception of the good.” Huigens, *supra* note 53, at 1437.
61. *See Robinson, supra* note 30, at 607.

dispositions do not negate the presence of motive.<sup>62</sup> When an offender claims that she acted emotionally—for example, in a fit of jealous anger—she is probably not trying to explain her actions by way of giving reasons for them, but that does not mean that there are no reasons, no thoughts or beliefs, behind her anger or jealousy. Dispositions, too, contain thoughts and beliefs: racists, for example, are disposed to act in certain ways because they entertain false beliefs about members of other races.<sup>63</sup>

Thoughts and beliefs are open to evaluation because they are “usually seen as things we actively make or do”—that is, they are things that we exercise control over.<sup>64</sup> By conceiving of emotion as embodying thought, evaluativists retain a place of honor for choice, albeit with a different temporal perspective from that of Hurd and Moore.<sup>65</sup> Rather than looking only to the moment of the act to find a willed or chosen mental state, evaluativists consider the choices that are implicit in arriving at motive. Kyron Huigens frames the culpability question this way:

What is at issue in the trial is the pattern of individual choices that led to the act and hence to the harm. The factfinder, in deciding the case, will accept or reject the decision the actor made in the circumstances she faced; and in doing so, will pass judgment, ultimately, on the practical reasoning of that actor. The jurors will accept or reject the particular conception of the good and the scheme of ends that led the actor . . . to the resulting harm.<sup>66</sup>

It is clear that evaluativists consider a wide array of choices to be relevant to criminal culpability. The choice to act is crucial to the inquiry, but they additionally hold that a person’s “deepest preferences and priorities”—which ground emotion and disposition as well as thought and reason—are also the outgrowth of choices about what is valuable and what is not.<sup>67</sup>

Because even emotions and dispositions are fundamentally based on choices made by the individual, evaluativists argue that we are not precluded from considering, and even passing judgment upon, their appropriateness. In fact, they imply that we routinely can and do make assessments about a person even when she acts from her emotions or disposition. More importantly, evaluativists claim that the

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62. See Kahan & Nussbaum, *supra* note 10, at 297.

63. See Hurd & Moore, *supra* note 5, at 1123.

64. Kahan & Nussbaum, *supra* note 10, at 280.

65. Evaluativists explain, for example, that an individual experiencing grief must believe that she has suffered a great loss. Without such belief, the emotion she feels cannot be defined as grief versus anger or merely a case of indigestion. Thus, the sufferer’s emotion cannot be separated from her cognitive belief if we are to recognize her experience. The cognitive belief is a constituent part of emotion. *Id.* at 293.

66. Huigens, *supra* note 53, at 1439.

67. *Id.*

criminal law tracks our social habit of judging people in this way.<sup>68</sup> If they are right, then emotions and dispositions are not *categorically* exempt from evaluation by the law as unpunishable character traits. Indeed, Kahan and Nussbaum's central thesis is that they are presumptively subject to the same process of evaluation as any other mental state.<sup>69</sup>

Reasonableness is the third fundamental concept in the evaluative conception. It constitutes the standard against which the law judges the individual accused. The inquiry into reasonableness may focus on three different aspects of motive. First, we might ask whether the individual was factually correct in forming her motive. If she were wrong and could be blamed for her error, then her mental state may be characterized as unreasonable. The example Kahan and Nussbaum use is the individual who fears a Black man walking toward her on the street because of her incorrect factual belief that he constitutes a threat of rape. It is probable, they argue, that we will want to hold her accountable for this incorrect (read "unreasonable") belief.<sup>70</sup>

Second, we evaluate the offender's appraisals in forming her motive, even if she is right about the facts of her situation. If it appears that she favored the wrong values, or the right values overmuch, she may be blamed.<sup>71</sup> To use examples provided by Kahan and Nussbaum again, if a man becomes enraged because someone has forgotten his name, we are likely to decide that his anger is inappropriate because his emotional reaction appears to be excessive against a relatively trivial slight, even though we might think it understandable that he was insulted. On the other hand, a parent enraged at the murder of

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68. See Kahan & Nussbaum, *supra* note 10, at 320; cf. Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 673 (2005) ("Consideration of motive is necessary to avoid the criminal law from becoming 'a sterile exercise' . . . [and] to ensure greater adherence to the rule of law." (quoting Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 742 (1993))); Murphy, *supra* note 27, at 21 ("The criminal law would probably lose our respect if it did not track, at least in an approximate way, our moral intuitions about desert.").

69. Their proposal that mercy should be a formal part of sentencing indicates that any defense relating to social conditions that may limit a person's ability to choose freely should not overcome the presumption that a choice, though limited, was made and the offender culpable. However, Kahan and Nussbaum suggest that mercy in sentencing would do greater justice to the individual by showing sympathy for her unique circumstances. Kahan & Nussbaum, *supra* note 10, at 370–71.

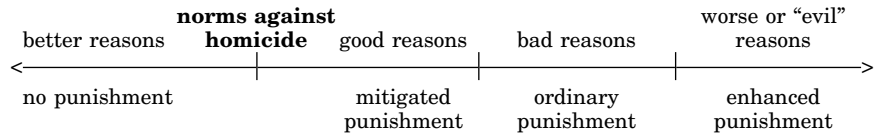
70. *Id.* at 287.

71. See *id.* at 299 ("Partisans of the evaluative conception . . . hold that individuals should in general be held responsible for their character, including its emotional elements, because in general it is up to individuals to shape their own evaluations of people and things in accordance with good norms.").

her child will probably not be criticized because her anger appears to be an appropriate emotion under the circumstances.<sup>72</sup>

The third aspect of the inquiry has to do with the relationship between motive and conduct. Evaluativists recognize that even appropriate emotions may beget unreasonable acts.<sup>73</sup> If the angry parent in the above example kills the murderer of her child, she has made additional appraisals—that her reasons for killing trump countervailing values (e.g., respect for human life, the norm against private violence) that militate against doing harm. The so-called standard mens rea states contribute to this aspect of the reasonableness inquiry because an intent to kill evinces a greater commitment to her own motives and to a disregard of other good values than does a reckless killing.<sup>74</sup> In such cases, evaluativists explain that the law judges the reasonableness of her actions against the reasonableness of her motives, including the degree of commitment shown, to decide whether to punish in full or to mitigate punishment.

In short, evaluativists see that when determining culpability, the criminal law judges whether the individual’s motives reasonably support her action.<sup>75</sup> To understand the evaluative conception of culpability, one might take Samuel Pillsbury’s suggestion of visualizing a moral continuum:<sup>76</sup>



Using homicide as an example, at one end would be justified and excused homicides, where the reasons for killing are normatively better than the norms that constitute reasons not to kill. At the other end would be the aggravated murders, which express “evil” motives—that is, motives whose content indicates the purest disregard for human

72. *Id.* at 287. Kahan and Nussbaum suggest that sometimes the intensity of a person’s emotion may reveal to her how committed she was to her appraisals of value. A person who experiences grief over the death of a friend may be informed by her own emotion as to how important the friend was to her life. *Id.* at 285. Despite the fact that this type of situation presents an appraisal by the person that is not quite conscious, Kahan and Nussbaum do not indicate that it prohibits evaluation. In any case, it should not have any effect on determining the cognitive content of the emotion.

73. *Id.* at 288.

74. See Pillsbury, *supra* note 38, at 445.

75. *Cf.* Alexander, *supra* note 41, at 934 (noting that “the level of risk that one may permissibly impose on others is dependent on the reasons one has for imposing that risk”).

76. Pillsbury, *supra* note 38, at 473–74.

life by the absence of any morally cognizable explanation for the action. In between are ordinary murders, where the reasons for killing are morally inappropriate but basically recognizable, and voluntary manslaughter, where the reasons to kill may be morally understandable yet still do not outweigh the norms against homicide. The amount of deserved punishment would also range along this continuum, from no punishment where the accused's motive reflects "better" norms to enhanced punishment where her motive reflects "worse" or "evil" norms.

Before going any further, it is important to note that my analysis of the evaluative view is culled from the works of many criminal law theorists, who may or may not identify or agree with one another and each of whom may have differing aims in their scholarship. For example, Kahan and Nussbaum indicate that their intentions are modest: they argue that it is impossible to understand the criminal law without recognizing its evaluations, while acknowledging that no single theory will explain all doctrines.<sup>77</sup> Huigens, on the other hand, presents a more ambitious thesis in contending that the evaluative conception is the moral sub-text underlying all conditions of criminal culpability.<sup>78</sup> I have opted to give a more or less "grand" account of the evaluative view here because hate crime law stands not at the center of the continuum, where the case for inculcation and punishment is more easily made, but at an extreme, where the greater punishment imposed requires a more compelling justification.<sup>79</sup>

It should also be noted that as ambitious or radical as the theory may seem, and notwithstanding my own reservations about the normative superiority of the evaluative approach, the main principles identified by the evaluative conception are substantially consistent with conventional accounts of the criminal law. It preserves the voluntary act requirement, acknowledges the moral significance of choice in its consideration of motive, and maintains the reasonableness standard as the test by which individuals are judged culpable. What is strikingly different, however, is the frank acknowledgment by evaluative theorists that the reasonableness standard is value-laden: it presupposes not only choice, but also a particular normative context that enables moral judgment. As a descriptive matter, I think it is hard to deny that such evaluation is taking place in the criminal law.

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77. Kahan & Nussbaum, *supra* note 10, at 373–74. Their normative claim—that the doctrines informed by the evaluative conception are superior—is secondary. *See id.* at 274.

78. *See* Huigens, *supra* note 53, at 1427; *see also* Duff, *supra* note 10, at 179 (calling Huigens' theorizing "the most ambitious of recent Aristotelian account of criminal liability").

79. *Cf.* Duff, *supra* note 10, at 148 (questioning the possibility of a unitary theory of culpability that is also descriptively accurate).

## B. Inculcation Under the Evaluative Conception

In section III.A, I attempted to explain the broad principles and outlines of culpability under the evaluative conception. In order to examine the legitimacy of hate crime law, however, a more precise understanding of inculcation is needed. Concrete examples of inculcation are harder to come by as evaluativists typically look to defenses to demonstrate the criminal law's moral judgment. They point out that a person's intent to kill, for example, does not by itself give us enough information to decide whether she deserves blame because we would want to consider also her motives for killing. The law exonerates the person who kills in order to save her own life or the life of a family member. The law mitigates the punishment of a man who intentionally kills his unfaithful wife in "righteous anger" if she is caught in flagrante delicto.<sup>80</sup> In these cases, fear and anger are not exculpatory because they overwhelm a person's decision to kill or not kill; otherwise, all sorts of fears (e.g., the fear of the Black man on the street) and anger (e.g., the insult of a forgotten name), however inappropriate, would be considered exculpatory by the law and they surely are not. The evaluative view posits that the law circumscribes the set of motives that reasonably support the killing of another human being to only those that are considered to be both good reasons valued in the right amount and at the right times. In the context of defenses, the reasonableness of motives makes a world of difference to the fate of the offender.<sup>81</sup>

The fact that defenses provide the clearest support for the evaluativists' claims does not necessarily mean that their analysis is limited to exculpatory doctrines. It is equally likely that the defenses merely draw the line between those motives that are sufficient to exculpate and those that are not: in other words, any other motive for killing, no matter how good the offender thinks it is, is a bad motive.<sup>82</sup> After all,

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80. See Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1341 (1997).

81. My sense is that evaluativists largely do away with the distinction between justification and excuse because they argue that both focus on motive and, ultimately, character. See e.g., Huigens, *supra* note 53, at 1440; Kahan & Nussbaum, *supra* note 10, at 320. The only defense that does deserve special mention is insanity, which is less about the quality of the defendant's motive and more about her incapacity to evaluate, thereby breaking the link between choice and character. See *id.* at 344 (describing the overt and covert evaluation that occurs under the *M'Naghten* test and the irresistible impulse test, respectively). The significance of this link is not to establish causation, but moral responsibility. See Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431, 442 (1998).

82. See Kahan & Nussbaum, *supra* note 10, at 315 (observing that common law authorities justified the heat-of-passion defense by explaining that "killing without appropriate emotion necessarily reflects 'wickedness of heart or cruelty'" (quoting *Maier v. The People*, 10 Mich. 212, 220 (1862))); Robinson, *supra* note 30, at 607 ("Every intentional killing may have a motivational cause, and most are to be



it is sensible to specify the few motives that exculpate than the many that inculpate. Thus, evaluativists argue that the consideration of motives may be clearest in the defenses but that it is in fact implicit in every criminal case.<sup>83</sup>

Indeed, one of the great strengths of the evaluative conception is its ability to integrate exculpatory and inculpatory mental states under the rubric of moral judgment. Although Hurd and Moore summarily dismiss the law's recognition of exculpatory motives as support for hate crime law, it is not obvious why they should do so. If good motives exculpate, it makes sense that bad motives inculpate. It seems to me that there is a greater demand for an explanation under a theory that does not follow this simple piece of logic than under a theory that does if the law is to avoid the charge of arbitrariness.<sup>84</sup> Moreover, the evaluative account obviates the need for the creation of categories of potentially unprincipled, yet legitimate, exceptions that appear resistant to ordinary analysis in order to explain many of the established doctrines of the law. Instead, culpable mental states that do not satisfy the same basic requirements of the evaluative process would arguably be eliminated, not tolerated as instances of accepted but arbitrary doctrine-making. Of course, the criminal law may well be simply arbitrary. That is as plausible an account of the law as any, except where other, plausible and coherent explanations are offered. By accepting that the quality or content of an actor's motive counts, evaluativists provide one such explanation.<sup>85</sup>

Another difficulty in Hurd and Moore's analysis that is better understood from the evaluative point of view is the concept of choice embedded in culpability. Confining the visible scene to the moment of an offender's act fails to depict the asserted real-life relationship between choice and the mens rea states. A killing in cold-blood may be said to involve a mental state that can be altered or abandoned by raw choice

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condemned."). Recognizing that there may be many more motives that exculpate in the context of less serious harms than homicide, the law allows for a broader and more flexible consideration of motives in the necessity and duress defenses.

83. See Huigens, *supra* note 53, at 1437.

84. Huigens boldly declares that exculpation and inculpation are "conceptually inseparable." *Id.* at 1428.

85. See, e.g., *id.* at 1456 ("We use [criminal law] to examine, assess, and, where proper, condemn the choices individuals make in forming and pursuing their particular visions of the good."); Kahan and Nussbaum, *supra* note 10, at 304 ("Quite often, criminal law doctrines are structured to assess not the effect of emotion on volition, or the contribution of emotional dispositions to desired states of affairs, but rather the moral quality of the values that a person's emotions express."); Steiker, *supra* note 4, at 1862 (observing that the law "frequently makes the definition of criminal offenses and sentencing options turn on some qualitative evaluation of the offender's reasons for acting"); cf. *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) (noting that "[t]raditionally . . . [t]he defendant's motive for committing the offense is one important factor [in sentencing]").

at the moment of acting, but that scenario describes only a narrow slice of all intentional murders; many, perhaps most, intentional, and even premeditated, murders involve emotion at the time of killing,<sup>86</sup> which Hurd and Moore suggest is not so responsive to the individual's will.<sup>87</sup> Taking a longer and broader view of choice pursuant to the evaluative conception provides a more plausible explanation of how the law's prescribed culpable states do in fact respect the choice prerequisite.

To be sure, the evaluative conception of the criminal law still may not predicate culpability on Hurd and Moore's robust version of "raw choice" in all or most cases. It can hardly be doubted that unfortunate social conditions can affect the quality of a person's choices, which in turn affect character, and that such conditions are likely to be beyond her control.<sup>88</sup> But even as evaluativists acknowledge this sad fact of life, they maintain that "[p]eople are not just the passive pawns either of their parents or of the societies into which they are born; they are capable of critical assessment and reflection, and thus remain obliged to be good even when those around them are not."<sup>89</sup> Accordingly, they posit that an individual's character usually involves sufficient active participation such that evaluation by the law is morally defensible.<sup>90</sup> This may be a weaker version of choice, but it is one that evaluativists can apply more broadly and consistently in the criminal law.

Those who argue that the criminal law is value-neutral may still insist that as among bad motives, at least, offenders are treated the same. They suggest that the standard mens rea states appear to be too broad to be expressive of the law's moral preferences or evaluation. But these critics seem to be looking at only a part of the criminal law, and ignore the fact that alongside the specified good motives (i.e., along the moral continuum, the "better" and "good" reasons) for doing harm, the law has also identified particularly bad motives (i.e., "worse" reasons) as well. There are many specific intent crimes as well as an increasing number of motive- and character-related sen-

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86. See, e.g., Pillsbury, *supra* note 38, at 472 ("The majority of purposive murders [are committed] in an essentially spontaneous response to a dispute with the victim. . . . The average murderer acts while impassioned[.]"); cf. Victoria Nourse, *Hearts and Minds: Understanding the New Culpability*, 6 BUFF. CRIM. L. REV. 361, 362 (2002) (observing that crime is "impulsive, fraught with emotion, full of strange meaning and exertions of power").

87. Hurd & Moore, *supra* note 5, at 1130.

88. See Kahan & Nussbaum, *supra* note 10, at 339.

89. *Id.* at 301; see also CLAUDIA CARD, *THE UNNATURAL LOTTERY: CHARACTER AND MORAL LUCK*, at x (Temple Univ. Press 1996) ("I find luck influential but not ordinarily determining."); Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 724-25 (1992) (stating that although human choices are caused, and thus determined, they can simultaneously be free and rational).

90. See Huigens, *supra* note 53, at 1471-72.

tencing factors that enhance an offender's culpability. Murder for pecuniary gain, for example, is a common aggravating factor in sentencing.<sup>91</sup> Intent to defile a victim and killing a witness to prevent testimony in a criminal trial are also judged to be worse reasons for committing murder.<sup>92</sup> In certain states, committing a felony "for the benefit of a gang" increases the gravity of a crime much as hate crime law does.<sup>93</sup> Given the proliferation of inculpatory motives identified in the criminal law, it is surprising to hear scholars insist that these elements are still to be considered exceptional.

Perhaps the insistence on neutrality comes from the notion that crimes, especially homicide, are so very human and yet so particular. Most people who commit crimes probably believe that they do so for good and personal reasons.<sup>94</sup> It is easy to imagine that most who kill believe they were justified, and in many such cases, we are able to relate on some level—we can see how a person can be insulted if his name is forgotten, and we can see how a parent can become so intensely angry at the murder of her child that she believes the murderer deserves to die—even if we believe that neither reason justifies taking a life. None of this casts doubt, however, on the fact that we believe there are some unequivocally bad motives for killing as well. Killing for money, killing for sadistic or sexual pleasure, and killing out of race hatred are but some of the reasons that we condemn especially, not only because killing with such motives is wrong but additionally because the motives themselves are so extreme in their immorality that we, as moral beings, cannot (and should not) relate to them.<sup>95</sup>

Critics may also argue that notwithstanding the comparative advantages of the evaluative conception in explaining existing law, the law is trending away from judging values and defining the good. A value-neutral conception of the law is a younger theory, and may indicate that even if values have not yet been purged from the law, all this

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91. See *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993); MODEL PENAL CODE § 210.6(3)(g) (2004).

92. See, e.g., OHIO REV. CODE ANN. § 2929.04(8) (LexisNexis 2004) (making it a capital offense to kill a witness to prevent testimony); VA. CODE ANN. § 18.2-31(1) (2000) (making it a capital offense if death results from an abduction committed with the intent to defile the victim); see also Elizabeth Rapaport, *Some Questions about Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 557-58 (1990) (surveying some common motives that trigger the death penalty).

93. See CAL. PENAL CODE § 186.22 (West 2004); MINN. STAT. ANN. § 609.229(3)(a) (West 2003); see also Jeffrie G. Murphy, *The State's Interest in Retribution*, 1994 J. CONTEMP. LEGAL ISSUES 283, 285 (1994) (reciting the many instances where a defendant's "inner wickedness" becomes relevant in criminal law).

94. See Huigens, *supra* note 53, at 1424.

95. Samuel Pillsbury observes that we call such motives "senseless," not because they have no logic of their own but because they seem "foreign to our own lives." Pillsbury, *supra* note 38, at 449.

demonstrates is that they are merely vestiges of an older, outdated way of thinking.<sup>96</sup> Indeed, the *Model Penal Code*'s reform of the provocation doctrine into an unspecified, de-valued defense based on extreme emotional disturbance may be interpreted as a move away from the content-specific common law categories of adequate provocation. As Kahan and Nussbaum have observed, however, this formulation of the old provocation defense has not been widely adopted.<sup>97</sup> They also note that excising the common law categories from the law does not necessarily eliminate the normative nature of the legal inquiry. The *Model Penal Code* requires a "reasonable explanation or excuse" and contemplates that juries will decide the reasonableness question based on their sympathies toward the defendant.<sup>98</sup> Additionally, when seen side by side with the myriad inculpatory, content-specific aggravating factors of the law, the trend is less obvious. Sentencing guidelines have recently reduced to writing some of the inculpatory factors that have historically been used by judges to determine sentences.<sup>99</sup> Moreover, the guidelines have continued to expand, identifying a growing number of culpability elements that are content-specific.<sup>100</sup>

Ironically, it is content-specificity that makes the evaluative conception of the criminal law so compelling. First, it resonates with a certain intuition that this is what the criminal law ought to be doing. It may be supposed that the purpose of the law is to identify and punish individuals because their actions exhibit a disregard of others.<sup>101</sup>

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96. See, e.g., Gardner, *supra* note 68, at 724 (calling the law's focus on "evil motive" an "ancient notion"). Even if critics are right, however, hate crime law would be more retrograde than renegade.

97. Kahan & Nussbaum, *supra* note 10, at 323.

98. See *id.* at 322 (citing MODEL PENAL CODE § 210.3(1)(b) (1962); *id.* cmt. 5(a) at 63).

99. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, 10–11, 14 (commentary) (2004) (describing the process of collecting, rationalizing and incorporating data from pre-guidelines sentencing practice); see also Chiu, *supra* note 68, at 676 (stating that good and bad motives have traditionally figured into the sentencing decisions of judges).

100. Some aggravating factors in both state and federal guidelines include relationship of trust or status between offender and victim, the vulnerability or age of the victim, pecuniary gain, cruel treatment, predatory conduct, and intent to engage in prohibited sexual conduct. Cf. Kahan, *supra* note 51, at 178 (arguing that an offender's motive can transform an ordinary murder into an "outrageously or wantonly vile, horrible or inhuman" murder that renders her death-eligible); Pillsbury, *supra* note 38, at 460 (stating that capital sentencing schemes consider pecuniary gain, sexual motivation, racial motivation, and enjoyment of the victim's suffering); Steiker, *supra* note 4, at 1867 (suggesting that the "especially heinous, cruel or depraved" aggravator designates a worse reason for killing). Guidelines also typically allow mitigation of punishment for acceptance of responsibility.

101. See, e.g., Alexander, *supra* note 41, at 935 (arguing that all forms of criminal mens rea, except negligence, are about the "central moral vice of insufficient concern"); Huigens, *supra* note 53, at 1424 ("We blame and punish, ultimately, be-

In doing so, the law can be seen as an instrument for establishing and reinforcing the moral norms or values of society.<sup>102</sup> Indeed, even where the language of the law appears to be content-neutral, decisionmakers make consistent normative evaluations. For example, Victoria Nourse has demonstrated that even under the neutral language of the *Model Penal Code*'s extreme emotional or mental disturbance defense, judges continue to enforce traditional norms governing intimate relationships. Her research examining fifteen years' worth of reported passion murder cases reveals that adultery and its modern variations (i.e., departures of a spouse or significant-other) remain central, informing the judge's decision to instruct the jury on the defense.<sup>103</sup> The stubbornness of values in the face of an apparently value-free law attests to the vitality of the evaluative conception. The public reaction to legal decisions—whether it be outrage or rejoicing—signals that the law is a battleground of contested values.

But one need not look to public opinion and morality to find the connection between the evaluative conception and the purposes of the criminal law. The evaluative perspective on culpability is powerful because it offers a better fit with a more traditional purpose of the criminal law: to punish the deserving.<sup>104</sup> As William Stuntz has re-

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cause each of us reasonably demands that each of the others pursue his chosen ends with a due regard for us . . . ."); Murphy, *supra* note 27, at 22 (stating that a message of contempt is a part of the harm of all crimes); Pillsbury, *supra* note 38, at 438 (declaring that disregard is the central moral principle behind the law of homicide). *But see* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001) ("American criminal law's historical development has borne no relation to any plausible normative theory—unless 'more' counts as a normative theory.").

102. *See, e.g.*, Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 812 (2002) ("Overcriminalization may be the distorted, misguided, but fundamentally legitimate expression of an expectation that the aims of the criminal law will parallel the aims of ordinary morality."); Kahan & Nussbaum, *supra* note 10, at 348 (stating that evolving norms have affected legal doctrine explicitly and implicitly); Stephen J. Morse, *Reasons, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 368 (2004) (stating that "[m]oral and legal rules . . . provide an agent with good moral or prudential reasons for forbearance or action"); Pillsbury, *supra* note 38, at 440 (arguing that "punishment is fundamentally a way of making public morality real").
103. Nourse, *supra* note 80, at 1376–78. Nourse's discovery should serve as a caution against taking the law at face value if we are to consider critically how the law ascribes and apportions blame. *Cf.* Pillsbury, *supra* note 38, at 482–83 (observing that popular moral views of homicide often subvert the formal rules of murder doctrine). Moreover, we should not overlook other spaces in the criminal law—purposely allocated—where informal normative evaluations come into play: the discretion of the prosecutor. *See, e.g.*, U.S. DEPT. OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION, § 9-27.230(A)(4) & cmt. (July, 2004) (instructing attorneys to give weight to a person's culpability, including the worthiness of her motive, when deciding to decline prosecution).
104. In their article, Kahan and Nussbaum argue that the evaluative conception also better reflects the expressive and deterrent purposes of the law. Kahan & Nuss-

marked (in a different but not unrelated context), criminal punishment drives the criminal law.<sup>105</sup> The justifying theories of punishment provide the conceptual foundation upon which the substantive law is constructed, and the latter's logic and legitimacy depend on its coherence with the former.<sup>106</sup> Rejecting the effort to assess culpability using values would sever this essential connection if individual desert is to be the moral justification for punishment.

It seems too plain for discussion that determining a person's desert is an act of moral judgment. Simply put, we believe that a person deserves something good—say, praise—when she does something good, and we say that a person deserves something bad—say, a reprimand—when she does something bad. What a person deserves is rarely, if ever, a neutral statement about the state of the world, where not all occurrences are determined by the choices we make. We do not say that a lottery winner deserved to win, or that a patient deserved to be ill, unless perhaps in a karmic sense. Desert is intimately associated with a weighing of values whose end goal is justice—i.e., when all is right in the world.<sup>107</sup> Accordingly, when praise is given to someone who does something bad, or when a reprimand is given to someone who does good, we sense that an injustice has been done and both the giver and receiver of the praise or reprimand may become the object of our scorn or sympathy.<sup>108</sup>

Thus, if standard mental states, together with voluntary acts, were to furnish the only bases for criminal liability, we should find them less than adequate so long as punishment is justified by desert. The intentional killing of another human being, when viewed through the prism of moral desert, tells us very little about the punishment de-

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baum, *supra* note 10, at 351–57. I limit the discussion to desert-based theory here because it is the one that Hurd and Moore use to refute the morality of punishing hate crime offenders.

105. Stuntz, *supra* note 101, at 506.

106. Cf. Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between the Moral Limits of the Criminal Law and the Expressive Function of Punishment*, 5 *BUFF. CRIM. L. REV.* 145, 154–56 (2001) (referring to Jules Coleman's argument that the moral limits of the criminal law should derive from the justifying theories of punishment, not vice versa); *but see* Michael Davis, *Harm and Retribution*, in *PUNISHMENT* 188, 200–01 (A. John Simmons et. al. eds., 1995) (arguing that it would be better to separate the theories of legislation from the theories of punishment).

107. *See* Feinberg, *supra* note 39, at 55.

108. My brief description of desert and justice may be simplistic, but it seems to me basically correct. Certainly, complications arise once a detailed examination of these concepts is undertaken, the most fundamental being the definition of, or the methodology for defining, "good" and "bad." I do not think that the evaluativists' resort to social norms resolves this question since norms may be either and we face a substantial risk of poor judgment. On the level of generality at which I am approaching these concepts for now, however, these complications need not be resolved.

served. This is because an intentional killing is not inevitably deplored; soldiers, executioners, and spies kill purposely and deliberately but we do not punish them in the usual case. It is the motive that makes the difference in our moral and legal obligations—if these individuals killed out of hatred, greed, or jealousy, they would be judged differently than if they killed motivated by the call of duty, public safety, or national defense.<sup>109</sup> Without knowledge of the motives from which people act (that is, the values that impel them to make their choices), we could make only preliminary, and “morally obtuse,” judgments about just deserts.<sup>110</sup> It is hard to fathom what desert and blame could mean without reference to values.

Hurd and Moore seem to acknowledge this problem when they note that “our theory of moral culpability clearly departs from our doctrines of legal culpability by weighting an actor’s motivations for action far more heavily than the intentionality of his actions.”<sup>111</sup> They do not explore this insight any further, yet it is a significant tension within their argument unless their definition of “desert” is tied to strictly legal, not moral, considerations.<sup>112</sup> But if we are to take the concept of desert seriously, and in its ordinary sense, it seems that an evaluation of motives must be at the heart of the inquiry.<sup>113</sup> This, of course, is exactly what the evaluative conception describes.

The point is this: it is implausible to argue that hate crime law is doctrinally novel or exceptional because there are simply too many doctrines, both inculpatory and exculpatory, that mirror the type of character assessment being made by hate crime law.<sup>114</sup> Evaluativists

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109. Consider, for example, the case of the soldier who was recently filmed shooting an unarmed Iraqi man in a mosque in Fallujah. The circumstances of the killing raise doubts as to his motivation and, therefore, the justifiability of his act as one of self-defense. See ABC News, <http://abcnews.go.com/US/wireStory?id=256732> (last visited March 8, 2005). This incident, together with the killing of Margaret Hassan reported on the same day, prompted the International Committee of the Red Cross to condemn the Iraq conflict as a demonstration of “utter contempt for humanity.” See *Red Cross Fury Over Iraq*, SUNDAY MIRROR (UK), Nov. 21, 2004.

110. Kahan & Nussbaum, *supra* note 10, at 315.

111. Hurd & Moore, *supra* note 5, at 1131.

112. If this is indeed how Hurd and Moore would resolve the tension, they do not tell us. In any case, if purely legal considerations are what counts, it is not clear why choice and responsibility must be serious concerns.

113. See Murphy, *supra* note 27, at 21.

114. As a matter of structure, the reason for the conceptual divide between exculpatory and inculpatory motives, if it exists, is undertheorized. A possible exception is Martin Gardner, who argues that the exclusion of exculpatory motives from offense definition is a positive development in the law largely because of due process concerns. Gardner, *supra* note 68, at 685–88. Gardner’s focus, however, is on offense definition as the basis of prima facie criminal liability, not the relationship between culpability and punishment, which implicates not only offense definition but also, at a minimum, defenses and sentencing. With respect to the latter two issues, he acknowledges that motive and character considerations are relevant. *Id.* at 748.

persuasively demonstrate that motive has long been central to culpability, even when it is mediated through a person's emotions. She may not be able to will away her thoughts or beliefs at a given moment, but evaluativists explain that our ascriptions of blame do not depend on this. Instead, the law hypothesizes the existence of choices that have been made in the past and that have brought the offender to form her motive to commit the criminal act. Hate crime law, then, does not pose the doctrinal challenge supposed by Hurd and Moore, nor is it the harbinger of moral values.

Hate crime law, however, is not out of the woods yet. Even if the evaluative conception lends hate crime law doctrinal legitimacy, there is still the question of whether it is morally legitimate to enhance the punishment of a hate crime offender under evaluative principles of culpability. To answer this question, we would have to find out whether the law's hypothesis regarding past choices made is applicable in the particular case of the hate crime offender, as well as decide whether the hate motive is truly an evil motive that justifies enhanced punishment. In the next Part, I consider these issues, as well as the political wisdom of legislating against hate crimes.

#### IV. THE HATE MOTIVE AND GREATER CULPABILITY

It is remarkable that in the end, Hurd and Moore ask a question intriguingly similar to one that Kahan identifies as the central question of the hate crime debate: Is the hate motive worse than most other bad motives that drive a person to kill?<sup>115</sup> I suspect, however, that it is something of a trick question from both sides.

From Hurd and Moore's perspective, it is fairly obvious that this question cannot be answered to any tolerable degree of certainty. Although they chide proponents of hate crime law who refuse to attempt an answer,<sup>116</sup> they also comment that motives tend to

resist cardinal classifications and even ordinal rankings [because] they are highly fact sensitive. . . . [I]t appears difficult to say that particular motivations, say, racial bias or religious hatred, are *per se worse* than other motivations: As between some persons they probably are; as between others they probably are not.<sup>117</sup>

Given this view, it is hard to see what kind or amount of evidence may be adduced to change their minds, and proponents would do well to refrain from spinning their wheels.

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115. See Hurd & Moore, *supra* note 5, at 1131; Kahan, *supra* note 51, at 176. I say "most" other, because as I have attempted to show in the prior section, the criminal law has singled out other bad motives such as greed and sadism for purposes of enhancing punishment. See *supra* text accompanying notes 91–93.

116. See Hurd & Moore, *supra* note 5, at 1131–32.

117. *Id.* at 1132–33 (emphasis added).



But even if proponents of hate crime law do manage a definitive answer, what difference could it make in light of Hurd and Moore's doctrinal analysis? Whether it is worse or not, the fact that Hurd and Moore believe the hate motive, because it is an emotion or disposition, cannot be the basis of enhanced punishment could not be overcome simply by proving its worse-ness. Indeed, Hurd and Moore agree that "little could be more important than breaking down the barriers of racism[.]"<sup>118</sup> The problem is, that is not the point. It seems that the answer to the question posed is not the Holy Grail but a red herring.

Kahan's version of the question is also a little suspicious, but for a very different reason. In contrast to Hurd and Moore, who suggest that the question is unanswerable, I suspect Kahan believes that the question will be (has been?) answered in a resounding affirmative. According to Kahan and Nussbaum, one of the most positive aspects of the evaluative conception is that it uncovers the hidden, and thereby entrenched and rationalized, values of the criminal law. They argue that when decisionmakers must assess openly the values of the offender, they are less likely to endorse the ones that reflect a "bad" morality. In other words, decisionmakers are likely to be ashamed of aligning themselves with the racist killer, despite what they may feel in private.<sup>119</sup> Shame, of course, implies that there is already a norm against racism.

It is easy to see why Kahan would expect an affirmative answer: the weight of public discourse on race heavily favors it. Critics and proponents of hate crime law equally deplore racial prejudice. Many, I imagine, would agree that the presence of the hate motive demonstrates a morally worse state of mind than the highest standard *mens rea* state of intent, or are at least willing to assume as much.<sup>120</sup> When we speak about examples of discrimination—whether in the civil or criminal context—it is often accompanied by a heightened sense of public outrage and urgency.<sup>121</sup> We have civil laws that prohibit racial

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118. *Id.* at 1146.

119. See Kahan & Nussbaum, *supra* note 10, at 363–64; cf. Kahan, *supra* note 51, at 192 (describing the norms behind hate crime law as both "nontraditional and contested").

120. See, e.g., Dillof, *supra* note 16, at 1017 (noting that there is "a necessary moral connection between thought and punishment"); Hurd, *supra* note 4, at 226 ("I am in fact quite sympathetic to the view that moral culpability is largely a function of character—of the beliefs that guide us and the emotions that attend our actions . . .").

121. The brutal murders of James Byrd, Matthew Shepherd, and Vincent Chin; the Los Angeles riots of 1992; the employment discrimination suit against Abercrombie & Fitch; and the racist aspects of the self-defense claim of Bernhard Goetz are just some of the racially-charged incidents that continue to generate attention in scholarly and popular literature, film, and mass media. See F. LAWRENCE, *supra* note 2, at 1 ("Crimes that are motivated by racial hatred have a special and compelling call on our conscience."); Marc Fleisher, *Down the Passage Which We*

discrimination in employment and housing, enacted long before hate crime law came into vogue.<sup>122</sup> And as proponents of hate crime law point out, the special distinction accorded the hate motive seems appropriate in light of the history of this nation, where equality (as we know it today) was never a ready insight and racial prejudice is a particularly long-standing and intractable problem.<sup>123</sup> Evaluativists easily accept that the hate motive can and should enhance punishment.<sup>124</sup>

Nonetheless, I think there are reasons to move forward with caution and that the issues are more complicated than Kahan presents, even under the evaluative conception. First, the evaluative conception presumes that people exercise choice in shaping their own characters and thus it is morally justified to punish for bad motives. That presumption may be less defensible than supposed in the case of racism given prevailing theories about race. Second, evaluativists use a reasonable person standard that is premised on societal norms. To the extent that they believe an openly normative discourse on hate crime law will favor progressive and egalitarian norms, their trust in the power of shame may be misplaced. Racially hierarchical social structures and the cover provided by what Kahan calls the “de-moralized liberal tropes”<sup>125</sup> of political discourse may well explain why that discourse appears to be so one-sided. For this reason, the strength of the norm against racism has not been seriously tested and may prove to be weaker than evaluativists anticipate. Finally, a largely normative standard of reasonableness may exacerbate inequality. Criminal law has been no friend to racial minorities; rather than protecting them, it is possible that a normative reasonableness standard may have the perverse effect of further punishing and subordinating them. Below I elaborate on each of these ideas in turn.

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*Should Not Take: The Folly of Hate Crime Legislation*, 2 J.L. & POL'Y 1 (1994) (observing that hate crimes “create particularly intense political pressure” due to “heightened media attention”); Hurd & Moore, *supra* note 5, at 1146 (suggesting that the eradication of racism is a social priority).

122. Earlier forms of “hate crime law” were mostly limited to prohibitions on hood- or mask-wearing in public and cross-burning. F. LAWRENCE, *supra* note 2, at 20.
123. See Susan B. Gellman & Frederick M. Lawrence, *Agreeing to Agree: A Proponent and Opponent of Hate Crime Laws Reach for Common Ground*, 41 HARV. J. ON LEGIS. 421, 424–25; cf. JACOBS & POTTER, *supra* note 2, at 3 (referring to historical “campaigns” fueled by bigotry); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 1 (2d ed. 1994) (“The hallmark of [American] history has been racism . . . . The U.S. has confronted each racially defined minority with a unique form of despotism and degradation. The examples are familiar: Native Americans faced genocide, blacks were subjected to racial slavery, Mexicans were invaded and colonized, and Asians faced exclusion.”).
124. See, e.g., Pillsbury, *supra* note 38, at 480–81 (including race hatred as an element of a proposed model statute for the crime of “aggravated murder”).
125. Kahan, *supra* note 51, at 191.

### A. Choice, Race, and Racism

To reiterate, evaluativists posit that a person is responsible for her character; this notion confers on her thoughts, beliefs, emotions, and disposition “moral status.”<sup>126</sup> This view, as I have explained above, does not present as radical a departure from the law’s traditions as it might first appear: choice remains, as always, a moral prerequisite to blame. But because it turns out that the criminal law has not been too demanding about when that choice has to be made, or about how free it must be, it may condemn both the harmful means an individual chooses in her attempt to achieve her ends (the intentional criminal act), and her choice of ends itself (her motive). The latter may form the basis of enhanced punishment if her motives are morally wrong since bad motives enhance culpability.

That the quality of motives generally are and may be evaluated by the law does not fully answer whether the hate motive may and should be. The salient moral question for proponents of hate crime law, from the evaluative point of view, is whether an individual has sufficiently contributed to her own racism as to be held accountable for it. A person’s responsibility for her racism may be based upon the choices she might have made in the first instance when she became racist, or her choice not to rid herself of such beliefs over time.<sup>127</sup> For the most part, the law presumes that such choices are available and have been made in some fashion. Accordingly, it goes about the business of evaluating the offender’s actions and motives without stopping to first determine how she might have become the person she is—that is, a person who would take such actions and form such motives.<sup>128</sup> But unless the presumption is reduced to a legal fiction, which would throw the criminal law into a moral quandary, it must be supported by theory, if not experience. Evaluativists turn to Aristotle’s *Ethics* to find the theoretical support for the law’s evaluations. Do the *Ethics* provide the same support for the evaluation of the hate motive?

The answer would probably be yes, except that in the case of race and racism the dominant theories seem to undermine the availability of choice. People may not be born racist in the way they are born with

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126. See Kahan & Nussbaum, *supra* note 10, at 304.

127. See *id.* at 358. Kahan and Nussbaum argue that this position is consistent with desert-based theories, but acknowledge also that it relies on a somewhat unrealistic assumption about the plasticity of a person’s character.

128. Oddly enough, by making the offender’s character the object of judgment, the evaluativists end up de-emphasizing the relevance of an offender’s particular background, which they concede helps shape her character. Thus, usually neither offense definition nor sentencing guidelines take into consideration factors such as race, sex, economic or employment situation, or social factors such as education or marital status to depart from presumptive sentences. See, e.g., MINN. SENTENCING GUIDELINES § II.D. cmt. II.D.01 (2004), available at <http://www.msgc.state.mn.us/>.

blond hair and brown eyes, but I do not think that this way of describing racism is unfair. This is because we are all born with a racial identity. We are born with it, precisely because we are born with hair, eyes, nose, mouth, and skin of particular colors, textures, and shapes, and these are the features that mark us as members of discrete racial groups.<sup>129</sup> Immediately, our birth certificates indicate our membership; we are sorted.

Of course, race and racism are not identical concepts, but they are closely related. To understand the connection between racial identity and racism, we must consider the nature of race. In the past several decades, many theorists have exposed the “constructedness” of race, undermining the notion that there is anything stable or essential about the concept while recognizing the materiality of the racial experience. Despite its evident appeal to the morphology of different human bodies, there is nothing natural about racial categorization, although the sheer visibility of its grouping criteria probably helps to mask its hollowness and fix it in our common sense notions about ourselves and others.<sup>130</sup> At the same time, race is not an illusion to be ignored: it is a very real part of our experience. As critical race theorists have long pointed out, social and legal institutions in the United States systematically and systemically assign and reinforce who is in and who is out on the basis of race. Racial categories matter because they are first and foremost mechanisms of inclusion and exclusion, privilege and disadvantage. If race no longer performed this sorting function, there is no reason to think that the concept of race would continue to matter: adapting an old adage, race is as race does.<sup>131</sup> Race in the United States is, therefore, fundamentally premised on hierarchy and even competition; the racial identity we are born with locates us among the haves or the have-nots, in the struggle to main-

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129. See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3 (1994).

130. See, e.g., IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 113 (1996) (arguing that law constructs race, “influenc[ing] what we look like, the meanings ascribed to our looks, and the material reality that confirms the meanings of our appearances”); OMI & WINANT, *supra* note 123, at 55 (defining race as “a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies”) (emphasis omitted).

131. Cf. PERRY, *supra* note 24, at 48 (stating that Catharine MacKinnon’s observation that “gender is not difference, gender is hierarchy” applies equally to distinctions grounded in race). Some may object that race has a positive function as well because it often serves as the organizing principle behind political or professional associations. I agree that Black lawyers or Asian politicians, for example, may have common concerns or experiences that make mobilizing sensible and productive. Without the sorting function of race, however, I am skeptical that common ground based on race will persist. At that point, I would imagine that individuals would organize around other socio-cultural markers that sort and affect group and individual experience and interest.

tain what we have, and to get more if we can.<sup>132</sup> Both dominant and oppressed groups have a stake in “racial signification” if they are to engage effectively and meaningfully in this struggle.<sup>133</sup>

The social construction of race and its inscribed hierarchy are topics that seem most appropriate for a discussion on social structures, a macro-level analysis of institutional and group dynamics. But it must, at some level, tell us something about our personal experiences or be doomed to irrelevance. If race theorists are right, and we all have personal and group identities that are defined by designedly antagonistic social relationships, it follows that racism—a disposition to racial hatred or bias—may be not only endemic to American society but intrinsic to our very selves. Barbara Perry has already articulated the link between racialized social stratification and the hate motive:

Given this conceptualization of identity, one is forced to choose “a side.” In some contexts, the choice is given, since differences in race or gender, for example, are assumed to be innate, biological, that is, “natural.” . . . Consequently, identity formation is often concerned with “drawing boundaries, engaging in boundedness, configuring rings around” the categories of difference. The task of difference, then, is to police the borders around categories.<sup>134</sup>

These categories, moreover, have normative content. They assume particular traits and abilities that belong to members of each group—traits and abilities that are identified in “negative relational terms.”<sup>135</sup> Committing hate crimes, according to Perry, is simply one way of “doing difference.”<sup>136</sup>

This understanding of race and racism should give evaluativists pause as to the moral legitimacy of hate crime law because racism may be significantly different from other motives that are commonly the objects of evaluation by the criminal law. Greed, jealousy, anger, sadism, etc. are often described as emotions or dispositions that can

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132. This description sounds selfish and even mercenary, but it need not be. Getting “more” could mean grabbing more than one’s fair share, but it could also mean striving for an equal share.

133. OMI & WINANT, *supra* note 123, at 60.

134. PERRY, *supra* note 24, at 47 (citation omitted); *see also* OMI & WINANT, *supra* note 123, at 60 (“Everybody learns some combination, some version, of the rules of racial classification, and of her own racial identity, often without obvious teaching or conscious inculcation. Thus are we inserted in a comprehensively racialized social structure.”); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 337 (1987) [hereinafter C. Lawrence] (“The content of the social categories to which people are assigned is generated over a long period of time within a culture and transmitted to individual members of society by a process cognitivists call ‘assimilation.’ Assimilation entails learning and internalizing preferences and evaluations.”).

135. PERRY, *supra* note 24, at 47; *see also* Haney López, *supra* note 129, at 7 (describing the concept of race as a set of social meanings that connect physical features, race, and personal qualities).

136. PERRY, *supra* note 24, at 53.

characterize individuals, but we usually perceive them to be the result of some combination of choice and a rotten social background—a perfectly acceptable basis for ascribing moral blame according to evaluative theory.<sup>137</sup> It is also plausible to say that for the most part, a person who has had the misfortune to be born in a morally wayward milieu is still expected to take responsibility for her character. After all, she remains a part of a wider society that has established basic norms of good conduct and judgment, and such norms are hypothesized as received by even those who grow up in the most dysfunctional of settings. As Huigens writes:

My choices are indeed determined by the circumstances in which I begin, but at some point the connection between my origins and my present self is so attenuated that my starting point falls into the background. . . . My arrival at a point at which my character and circumstances are such that I commit a criminal act is not a random occurrence, is not beyond my control, and is not an arbitrary basis of responsibility.<sup>138</sup>

A rotten social background makes choosing good harder and choosing bad predictable, but evaluativists believe, at least in theory, that there is still a choice.

Racism, on the other hand, may be (again, at least theoretically) contained in the very identity that an individual is born with. It is hard to conceive of racial difference that does not assume antagonism among groups marked by such difference. It is not surprising, given how race functions and is experienced in society, that Perry discovers that among minorities, “what emerges is not a shared commitment to racial . . . justice, but instead shared antagonisms and hostilities directed toward one another.”<sup>139</sup> And it makes little sense to say that an individual has chosen to go against the better norms of wider society, because racial hierarchy pervades social and political institutions as well as group and individual relationships.<sup>140</sup> It would appear, then, that racism is not just predictable; it may be inevitable.<sup>141</sup> When asking whether there is sufficient exercise of choice by the indi-

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137. *But see* J.G. Murphy, *Marxism and Retribution*, in *A READER ON PUNISHMENT* 46, 61–62 (R.A. Duff & David Garland eds., 1994) (arguing that it is morally problematic to punish a person for acting upon greed in a capitalist society).

138. Huigens, *supra* note 53, at 1471–72.

139. PERRY, *supra* note 24, at 121; *see also* OMI & WINANT, *supra* note 123, at 69 (“[P]rejudice was an almost unavoidable outcome of patterns of socialization which were ‘bred in the bone,’ affecting not only whites but even minorities themselves.”). This is consistent with statistics that show that a significant percentage of hate crimes are committed by members of racial minorities. *See* UNIFORM CRIME REPORTING PROGRAM, FBI, HATE CRIME STATISTICS 2003, at 11 (2004), available at <http://www.fbi.gov/ucr/03hc.pdf>.

140. *See, e.g.*, C. Lawrence, *supra* note 134, at 323 (explaining that because racism is integral to our society, racist ideas are reinforced through culture).

141. *See id.* at 326; *cf.* Haney López, *supra* note 129, at 48–50 (discussing the possibilities and limitations of choosing one’s racial identity).

vidual to ascribe blame, the difference between predictable and inevitable dispositions should matter a lot.

In questioning the possibility of a choice to become or remain racist, I am not saying that individuals have no control at all over their racial prejudice. I am confident that some people attempt to suppress it and others choose to indulge it. But this appears to be a difference in degree, not kind. The intensity of a person's racism is accounted for in the decision to act, since it is likely that only a very strong prejudice will motivate a person to kill in contravention of the strong social norms against killing. In fact, it appears that this is the case with any motive (good or bad) that drives a person to kill culpably: unless one's motives are better than the norms against killing, the decision to kill always reflects a reason that has been overvalued. This justifies punishment for the killing (the means). To further punish for the moral quality of the motive (the ends), however, the motive itself must be grounded in choice. In light of our current theories about race, I am skeptical that racism will satisfy this inquiry without doing violence to the theories themselves.<sup>142</sup>

Lest the reader think that a lack of choice to be a racist means that perpetrators of hate crimes cannot be punished at all, I must return briefly to how the evaluative criminal law would treat hate crimes if I am right. The evaluative conception posits that the criminal law does not justify or excuse an offender's intentionally harmful conduct unless either (i) the values she gave preference to are both qualitatively good and properly weighed, or (ii) the individual lacked the minimum capacity to assess her beliefs and actions.<sup>143</sup> Racism may be inevitable, but it cannot be considered righteous, and it cannot trump the values that have been underrated when an offender kills. This eliminates the possibility of mitigation of punishment as well. Nor does racism itself signal a lack of capacity in the individual to make assessments. As irrational as racism may appear to some, it is in fact quite the opposite. As I have suggested above, race theory forcefully argues that it is perfectly coherent and self-interested to be racist in our racialized society.

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142. Those unfriendly to the notion that race is constructed may welcome this tension. Critical race theory, for example, has been criticized as pessimistic and unhelpful to political activism precisely because it attains a level of abstraction where everyone and no one is responsible for racism. Harold A. McDougall, *For Critical Race Practitioners: Race, Racism and American Law (4th Ed.)* By Derrick A. Bell, Jr., 46 How. L.J. 1, 3 (2002); cf. Haney López, *supra* note 129, at 53 (arguing that "no individual bears full responsibility" for structural racism and that all bear responsibility "in the maintenance of racial mythologies").

143. See Kahan & Nussbaum, *supra* note 10, at 343–44.

## B. The Strength of the Norm Against Racism

If I am wrong about the impact of the dominant race theories on the presumption of choice, evaluativists must next answer whether there is a shared norm against racism that would support greater culpability and thereby enhanced punishment. If there is not, then the offender may not be punished for that choice because she does not deserve it.

It is difficult to find in the mainstream anyone who defends racism. No critic of hate crime law argues that an offender should not receive enhanced punishment because the hate motive is actually good.<sup>144</sup> Conservatives do not decry affirmative action by suggesting that racial minorities are actually inferior. Most agree that combating racial prejudice is a social priority. But if this is taken to be evidence of the social norm against racism, I think we must admit that the evidence is flimsy. Racism, nowadays, is rarely so overt and hateful; indeed, it need not be.

One reason why racism can exist and be perpetuated covertly is suggested by Kahan and Nussbaum. They argue that when we deny evaluation a place in public reason, we provide cover for bad morality by arming decisionmakers with language and doctrines that disguise their bad values.<sup>145</sup> That critique is often leveled against those who use the concept of color-blindness to oppose race-conscious public programs such as affirmative action: the content-neutral rhetoric of equal protection permits them to perpetuate racial subordination even as they seemingly embrace racial justice.<sup>146</sup> Even marginalized hate groups do not necessarily use the explicit language of hate and oppression; many rely on the idea of self- or cultural-defense to promote and legitimize their ideology.<sup>147</sup>

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144. Suggestions are made, however, about racism that could support an excuse defense. See, e.g., Hurd & Moore, *supra* note 5, at 1120 (observing that the criterion that mitigates punishment under the heat-of-passion defense would apply to hate crime law); Alvin F. Poussaint, *They Hate. They Kill. Are They Insane?*, N.Y. TIMES, Aug. 26, 1999, at A17 (arguing that “extreme racism” is a mental illness).

145. Kahan & Nussbaum, *supra* note 10, at 363–64; see also Nourse, *supra* note 86, at 364 (“Norms (and particularly bad ones) are upwardly mobile; they will find a way to defeat our best positivist aspirations; they will hide in the most apparently factual and objective of places, in ideas of time and place and passion, and most assuredly in ideas of mind.”).

146. See, e.g., OMI & WINANT, *supra* note 123, at 130 (arguing that such neoconservative rhetoric is not just about fairness but also “the maintenance of existing social positions”); cf. Cass R. Sunstein, *Did Brown Matter?*, THE NEW YORKER, May 3, 2004, at 106 (stating that it is preferable for the *Brown v. Board* decision to be interpreted as a decision calling for an end to the subordination of blacks, but noting that it also does not rule out an interpretation embracing the color-blindness principle).

147. The impulse to justify racist violence as a form of self-defense has a long history according to Lisa Cardyn, who explains that reconstruction-era klansmen re-



The real problem is not the malleability of rhetoric; it is the status quo. As Michael Omi and Howard Winant have argued, “[race] is a pre-eminently *social* phenomenon, something which suffuses each individual identity, each family and community, yet equally penetrates state institutions and market relationships.”<sup>148</sup> In other words, the normal state of affairs in public and private life in the United States is a *racist* state of affairs: “Discrimination, far from manifesting itself only (or even principally) through individual actions or conscious policies, [is] a structural feature of U.S. society, the product of centuries of systematic exclusion, exploitation, and disregard of racially defined minorities.”<sup>149</sup> In light of the racial hierarchy already deeply inscribed in our society, it is unnecessary to purposefully discriminate; silence, inattention, and inaction are enough to maintain racial inequality.

This is the point so forcefully made by Charles Lawrence nearly two decades ago in his exploration of unconscious racism. Lawrence argues that racism is so totally embedded and integrated into our history and culture that most of us are not aware of it: “Racism’s universality renders it normal.”<sup>150</sup> Is it likely that in a society like ours, we can find a shared norm against racism? Perry thinks not: “While hate crime offenders can be said to be violating the criminal code, it is not so apparent that they are violating normative standards in the United States. . . . In the case of hate crimes, it is the internalization of norms that encourages criminal activity.”<sup>151</sup> Consider also the apparently contradictory hypotheses of norms and character expounded by Kahan and Nussbaum, on the one hand, and Lawrence, on the other. Kahan and Nussbaum argue that when social norms conflict with personal character, individuals avoid the dissonance created by the conflict by internalizing conforming dispositions, outlooks, and tastes.<sup>152</sup> This expectation about the individual process of character-building is a key assumption in the evaluative conception. Lawrence, on the other

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garded themselves as “defenders of a defeated social order.” Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 679 (2002); see also PERRY, *supra* note 24, at 54–55 (arguing that hate crime is an effort to repress the threat posed by subordinate groups to the dominant group’s hegemony).

148. OMI & WINANT, *supra* note 123, at 96.

149. *Id.* at 69.

150. C. Lawrence, *supra* note 134, at 330. Lawrence has observed that “we are all racists.” *Id.* at 322; see also Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 368 (1996) (stating that the designers of the Museum of Tolerance in Los Angeles “had the right idea” when they placed two doors—one marked “Prejudiced” and the other “Not Prejudiced”—and allowed patrons to pass through only the “Prejudiced” door).

151. PERRY, *supra* note 24, at 34–35.

152. Kahan & Nussbaum, *supra* note 10, at 356.

hand, theorizes that when individuals are confronted with a conflict between the non-racist “ideal” and her own racist ideas, “the mind excludes [her] racism from consciousness.”<sup>153</sup> The result is not transformative conformity, but denial and rationalization.<sup>154</sup> One need not take Perry’s cynical view of social norms in the United States to wonder at what point the normative and the normal meet when we speak of racism.

Consequently, I see two serious obstacles in the search for the norm against racism. The first is the status quo, which casts doubt on the reliability of public discourse on race. Nonetheless, we may decide that the very reluctance to take openly racist positions proves the existence of the norm. But if we are honest about it, I think we have to admit that we really have no idea what such a norm looks like or how strong it is, especially in light of the reaction to the norm suggested by Lawrence. Looking to the nature of race and the history of the fight against racism, I am pessimistic that the norm is anything but narrow and incipient. Despite the hopeful accomplishments of the civil rights movement of the 1950s and 60s, its triumph was ambiguous and largely undone in the ensuing years.<sup>155</sup> New paradigms of race, such as the model minority myth, continue to develop, working to deny the problem of racism and ground inequality in the “genuine” inferiority of certain races. In neither law<sup>156</sup> nor society<sup>157</sup> is there a strong commitment to antisubordination. Indeed, a recent survey of American

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153. C. Lawrence, *supra* note 134, at 323.

154. I realize that the juxtaposition I am making may not be entirely fair; it is not obvious that these scholars are using the same terms or mode of analysis that would lead to an *actual* contradiction. However, I think that considering the possibility of contradiction can help us to understand where the social norms that are relevant to race theory and to criminal law theory overlap and diverge.

155. OMI & WINANT, *supra* note 123, at 97.

156. *See, e.g.*, Haney López, *supra* note 129, at 5 (“Rehnquist-Court Justices . . . speak[] disingenuously of the peril posed by racial remediation to ‘a society where race is irrelevant,’ while nevertheless failing to offer an account of race that would bear the weight of their cynical assertions.”); Sunstein, *supra* note 146, at 106 (noting that the Rehnquist Court has chosen the color-blindness principle over antisubordination).

157. *See, e.g.*, PERRY, *supra* note 24, at 121–22 (citing to studies that show oppressed groups have deeply negative opinions of one another). Perry concludes that everyone is “susceptible to dominant viewpoints”:

Perhaps we should not have expected solidarity after all. Subordinate groups are not immune to the power of hegemonic ideologies. They too are a crucial part of the audience, having listened to, observed, and lived within the structures of inequality . . . . The struggle for economic, political and cultural empowerment becomes a struggle to disempower “the competition,” through violence if necessary.

*Id.* at 122.

college students indicates that the struggle against racism may be in danger of fading from the social and political agenda.<sup>158</sup>

The second obstacle is the problem of locating the norm along the continuum of moral culpability. Both good and bad motives for doing harm can trigger criminal punishment; enhanced punishment is reserved for the “worst” or “evil” motives, those that exhibit a complete rejection of moral principle.<sup>159</sup> Does the hate motive constitute an evil motive? Probably not if we use Pillsbury’s definition of evil motives as those that are seemingly “foreign to our own lives.”<sup>160</sup> In theory at least, the hate motive should be quite familiar to us if indeed we are all, consciously or unconsciously, racist. As I have elaborated above (and contrary to what I suspect Kahan and other evaluativists believe), we are not likely to come to a more or less certain answer by reference to social norms or public discourse.

### C. The Tyranny of the Reasonable Person

Of course, it has been said that criminal law is pathologically political.<sup>161</sup> We may not need to come to any sort of certainty if proponents are loud enough or strong enough in numbers, and they can raise a plausible argument for the worse-ness of the hate motive. Evaluativists tend to argue that this is as it should be: it is right and legitimate that the criminal law satisfies the community’s need to morally condemn.<sup>162</sup> And if the community shamelessly chooses to punish on the basis of what progressives might believe are morally irrelevant criteria, or withhold punishment despite relevant ones, they can oppose it and try to change the law. At least, they console, the evaluative conception gives everyone a clear target. The popular adoption of hate crime law appears to be emblematic of this political process, for good or ill.

Under the evaluative view, the criminal law is a site of socio-legal discourse on morality: the community responds to the inappropriate values preferred by the offender; the law responds to the demands of the community; and the offender, it is hoped, will respond to the pun-

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158. *See Racial Issues Lose Urgency, Study Finds*, LOS ANGELES TIMES, Jan. 31, 2005, at B3.

159. Pillsbury, *supra* note 38, at 458.

160. *Id.* at 449.

161. William Stuntz argues that both popular politics and institutional politics drive us toward more and more criminalization. Stuntz, *supra* note 101, at 510.

162. *See, e.g.*, Huigens, *supra* note 102, at 815 (stating that “[t]he broad and deep criminal law that Stuntz describes may be the product of an expectation on the part of the public that the criminal law will be broad and deep in these ways. But if this is what lies behind overcriminalization and the accretion of power to prosecutors, then the trends toward overcriminalization are essentially benign. The public’s expectation that the criminal law will provide a moral condemnation of wrongdoing . . . is a legitimate expectation.”).

ishment in a positive way (i.e., be morally educated by the experience). In this way, law and morality inform one another. Law evolves with changing norms; norms, in turn, are reinforced by legal decisions. At the center of this dialectic stands the criminal law's "reasonable person," the minimum standard against which the offender is judged.

In a way, the two concerns I have raised above are questions about the content of the reasonable person standard. The first concern about choice and blame can be re-phrased as the following question: Can the reasonable person be non-racist? The second concern, regarding the strength of the norm against racism, asks: Is the reasonable person non-racist? If proponents of hate crime law argue that the reasonable person can be and is non-racist, they are probably applying an objective standard: such reasonable person would be one who is devoid of racial identity, living outside a racialized society.<sup>163</sup> Moreover, the standard would be fairly high. It would be a person who refuses to accept the status quo, embraces antisubordination, and "does difference" in an iconoclastic fashion. In short, the reasonable person would be something of a moral ideal.<sup>164</sup>

Maybe there is nothing wrong with that. As an English court commented long ago, "[w]e are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy."<sup>165</sup> In the case of racism, the urgency and vastness of the problem, as well as the untold harm it has caused and still causes, may be considered sufficient to justify a reasonable person standard that incorporates a norm that is, unfortunately, only slowly emerging.<sup>166</sup> Why should not the criminal law compel us to be our "best" selves?<sup>167</sup>

There are two reasons why I hesitate to embrace the obvious power of criminal law to do good. The first is that it has not always done so, and the same power that can do so much good also presents a risk of doing significant harm. Many have noted that historically punish-

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163. Such a standard, in any case, cannot plausibly be a subjective standard, since no real person can be described in that way. For a discussion of the objective versus subjective reasonable person standards, see Lee, *supra* note 150, at 381-91.

164. See Kahan & Nussbaum, *supra* note 10, at 287-88 (describing an ideal reasonable person "who has a well-formed character and who embodies the 'reputable views' of the community at their best").

165. Regina v. Dudley and Stephens, 14 Q.B.D. 273, 288 (Q.B. 1884).

166. Cf. Wisconsin v. Mitchell, 508 U.S. 476, 488 (1993) (acknowledging that hate crimes "are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest"); see also Mari J. Matsuda, *Crime and Affirmative Action*, 1 J. GENDER RACE & JUST. 309, 320-21 (1998) (suggesting that other types of discriminatory actions, such as racist employment decisions, should be made criminal based on their harms).

167. See Huigens, *supra* note 53, at 1479-80; Kahan & Nussbaum, *supra* note 10, at 287-88.

ment has been used by the powerful as a tool for social control.<sup>168</sup> The criminal law is a creature of its social context and has, perhaps more than any other area of law, reflected the sometimes heroic and other times misguided beliefs and judgments of society over time. We have seen racial prejudice formally enshrined in the criminal law—e.g., anti-miscegenation and other racial segregation laws—and informally enforced—e.g., the unequal application of the death penalty, the racial disproportion within the prison population, and the crack-cocaine sentencing differential. It is no wonder that the relationship between race and the criminal law has long been marked by mutual suspicion.<sup>169</sup> This is reason enough, I should think, to make us wary of using punishment as an instrument of social reform.<sup>170</sup>

If we want to commit ourselves to the idea that those who kill out of race hatred are the worst among us, and that they are more blameworthy because of the intensity of their racism and their set purpose to do greater harm, we also ought to pause and consider who that person might be. Will it be a member of the dominant racial group, for whom racial hierarchy is the natural and right order of things, whose norms are the norms of the law, who is free to ignore race?<sup>171</sup> Or will it be a member of the subjugated racial group, for whom the racial hierarchy works an everyday oppression, whose norms are deemed to be deviant, who experiences pain and resentment associated with her racial identity?<sup>172</sup> If the purpose of hate crime law is to protect subju-

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168. CARD, *supra* note 89, at 23; Nourse, *supra* note 86, at 388. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977) (describing the evolution of punishment in Western society in form and in purpose).

169. See Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 988 (2004); Erik Luna, *Race, Crime, and Institutional Design*, 66 LAW & CONTEMP. PROBS. 183, 185–86 (2003); Matsuda, *supra* note 166, at 312.

170. Some evaluativists, especially those who espouse the expressive theory of criminal law, argue that the criminal law is uniquely suited to the promotion of better social norms and that *not* enhancing punishment for hate crimes may be immoral because it conveys that the community is not committed to fighting racism. See, e.g., Kahan, *supra* note 7, at 1653 (describing hate crime law as a “counter-regime of disgust” directed at offenders). This reasoning may be backward if we also require blame, since questions of blame are always retrospective. Herbert Packer has also suggested that such use of punishment is not prudent—it may lead to disobedience and delegitimization of the law, it is false to suppose that the criminal law is the best way to deal with all immoral conduct, and in any case the “criminal sanction works best when preceded by other forms of conditioning.” PACKER, *supra* note 18, at 263.

171. See CARD, *supra* note 89, at 171; Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, in CRITICAL RACE THEORY: THE CUTTING EDGE 657, 658 (Richard Delgado & Jean Stefancic eds., 2d. ed. 2000); C. Lawrence, *supra* note 134, at 326.

172. See, e.g., CORNEL WEST, RACE MATTERS 28 (2d ed. 2001) (“The accumulated effect of the black wounds and scars suffered in a white-dominated society is a deep-seated anger, a boiling sense of rage, and a passionate pessimism regarding America’s will to justice.”); Haney López, *supra* note 129, at 55 (describing the

gated racial groups, we are confronted by statistics that tell us a perverse story: a significant and disproportionate percentage of violent hate crimes are being committed by members of racial minorities.<sup>173</sup> It may be that these statistics can be explained by discriminatory reporting and enforcement practices of the police, but how surprising would it be to discover that the offenders most aware of race and motivated by *conscious* racial antagonism are those who find themselves at the bottom of the racial hierarchy? Either way, hate crime law has done a disservice to minority communities: it has put more people of color in prison for longer periods, and given proof to the lie that racism is now becoming largely a problem within communities of color.<sup>174</sup>

The second reason for my hesitation is that an aspirational standard of the reasonable person—one that gives insufficient weight to existing practices and norms—is one that many, if not most, of us cannot live by. We are usually reluctant to use words like “good” and “virtuous” to describe the reasonable person not only because they smack of antiquated dogma, but also because they imply a too-high standard of conduct and we are all flawed creatures.<sup>175</sup>

Criminal culpability has been interpreted to mean that the criminal law does not punish reasonable people. This generalization is somewhat misleading, because it is actually underinclusive: the criminal law does not always punish unreasonable people either. The unreasonable person in the criminal law, unlike the unreasonable person in tort, is one that is, in fact, *extra* unreasonable. One is not criminally negligent for failing to “take[ ] precautions against harms when

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racial odyssey of Piri Thomas, whose sense of belonging to the Black community stems from the “the myriad racist slights and indignities suffered” as a dark skinned Puerto Rican).

173. See Christopher Chorba, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crime Prevention Act*, 87 VA. L. REV. 319, 360 (2001). Chorba observes that in 1999, Black offenders committed 20.5% “of the interracial hate crimes for which the race of the perpetrator is known,” while Blacks constituted 12.8% of the total population. *Id.* at 363. Black offenders continue to commit a disproportionate amount of interracial hate crimes (nineteen percent, while making up approximately thirteen percent of the total population) as of the 2003 Hate Crime Report prepared by the Federal Bureau of Investigation. See UNIFORM CRIME REPORTING PROGRAM, FBI, *supra* note 139, at 14; U.S. CENSUS BUREAU, TABLE 3: ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES: APRIL 1, 2000 TO JULY 1, 2003 (2004), available at <http://www.census.gov/popest/national/asrh/NC-EST2003/NC-EST2003-03.pdf>. With respect to crimes against persons involving personal injury (murder, nonnegligent manslaughter, forcible rape, aggravated assault, and simple assault), Black offenders made up over twenty-two percent of the total, excluding offenses committed by unknown offenders and offenders of unknown race. See UNIFORM CRIME REPORTING PROGRAM, FBI, *supra* note 139, at 11.
174. See EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 1 (2003).
175. See Huigens, *supra* note 81, at 439–40.

doing so costs less than the discounted value of the harms risked.”<sup>176</sup> Criminal negligence, in the words of the *Model Penal Code*, requires inattention to “substantial and unjustifiable risk[s]” that is tantamount to “a gross deviation from the standard of care” expected from the reasonable person,<sup>177</sup> and even this is controversial as a mental state deserving of criminal punishment.<sup>178</sup>

What the definition of criminal negligence indicates is that the reasonable person standard is and ought to be fairly easy to abide by, whatever the outcome of the controversy. As Joshua Dressler has observed, American criminal law traditionally has set minimalist goals.<sup>179</sup> The province of the criminal law is located at the margins of society, dealing with only those whose conduct betrays them to be deviant in some significantly harmful way.<sup>180</sup> This is consistent with the evaluative conception of the criminal law so long as it accepts the norms of reasonableness (criminal law-style) as “only those values that emerge from the overall agreement of the community where they will be enforced.”<sup>181</sup> Minimalism arguably would also take into account “the gap between what we say and what we do.”<sup>182</sup>

The border between the mainstream and the margin is defined both statistically and normatively: “the actual moral norm implicit in the reasonable man test is that blame is reserved for persons who fail to overcome character flaws that they can fairly be expected to surmount for the sake of important social interests.”<sup>183</sup> It is clear that a

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176. Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 250 (1996).

177. MODEL PENAL CODE § 2.02(2)(d) (1962) (emphasis added).

178. See MODEL PENAL CODE § 2.02(3) cmt. 5 (calling negligence an “exceptional basis of liability”); Huigens, *supra* note 102, at 816 (noting that the *Model Penal Code*’s failure to deal with unreasonable mistakes is the reason for the rejection of section 2.02(3)).

179. Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About “Bad Samaritan” Laws*, 40 SANTA CLARA L. REV. 971, 987 (2000).

180. Pillsbury argues that punishment must be an “exceptional event” not only for doctrinal and moral reasons, but also for political reasons: “In a democratic system no aspect of criminal law will be effective which requires punishment of a majority, or even a significant minority, of the population.” Pillsbury, *supra* note 38, at 465.

181. Kathleen M. Ridolfi, *Law, Ethics, and the Good Samaritan: Should There Be a Duty to Rescue?*, 40 SANTA CLARA L. REV. 957, 962 (2000); see also PACKER, *supra* note 18, at 264 (urging that punishment should be “limited to conduct that is viewed, without significant social dissent, as immoral”). Robert Weisberg has noted the elusiveness of the definition of “the community,” whose rhetorical value can work to obscure the differences and disagreements of its presumed members. Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 UTAH L. REV. 343, 348 (2003); cf. Haney López, *supra* note 129, at 55 (“Racial fabrication changes communities by emphasizing and even creating commonalities while eroding previously relevant differences.”).

182. PACKER, *supra* note 18, at 265.

183. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 789 (1994).

person who kills with the hate motive is unreasonable because in pursuing her ends, she has failed to accord adequate weight to an essential norm or social interest of the community—the regard for human life. It is also clear that a person who kills and claims self-defense based on her racist beliefs about the threat posed by the victim is unreasonable for the same reason. But can we say that these defendants are more culpable because their motive to kill stemmed from their racial prejudice? Is racial prejudice marginal?

One might object to my posing these questions at all because once a person has proved herself to be unreasonable by her culpable actions, we need not ask whether her aggravating motive independently meets the reasonableness standard. That may be true; I am not certain that the criminal law has thus far made this inquiry, or that the evaluative conception would require it. But I think an inquiry of this sort is at least consistent with the spirit of the evaluative conception, and perhaps even demanded by the moral limits of inculcation and punishment. When we are faced with the task of judging the quality of a person's motive for purposes of blaming, we are called to decide whether the motives are chosen or not chosen, good or bad, understandable or foreign. This is what evaluativists have explained we do in our ordinary social interactions, and they argue that this is a morally legitimate and justified activity. But when the law judges the quality of an offender's motive, it does so with the purpose of blaming *and* imposing additional punishment. A justification must be made for the additional punishment as well, and the principle of proportionality behooves us to weigh the harshness of our conventional forms of criminal punishment against the grounds for blame. In other words, our moral capacity to blame people for their bad characters does not itself justify criminal punishment; at a minimum, there has to be a floor below which we can blame but may not punish, given what punishment is today. This floor does not have to be the negligence standard used to judge the culpable actions of an offender, but our law has already established that criminal culpability cannot be determined by a standard that is any lower.<sup>184</sup>

As I have argued above, our theories of race and racism suggest that the norm against racism is likely to be weak and overcoming prejudice may not be a "fair" expectation. If this is true, then the hate motive cannot justify the enhanced punishment that the law calls for without, finally, radically altering criminal law doctrine. For some, this may seem like a bitterly ironic conclusion given my account of the power of the evaluative description of criminal culpability as well as the widespread virulence of racism. But nothing I have said precludes civil legislation or constitutional litigation aimed at achieving racial

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184. Strict liability, of course, is not about individualized culpability at all.



equality, or the effort to nurture the development of a comprehensive and universal social norm against racism. This Article also does not challenge the insights brought to criminal law theory by the evaluativists. The question I have sought to explore in this Part is to what extent the conditions of criminal culpability are satisfied by hate crime law to justify its implicit claim of proportional punishment. In light of the complexities and conflicts in the interplay of the theories of criminal law and race, I have serious reservations that those conditions have been met.

## V. CONCLUSION

As I noted in the introduction to this Article, there are a number of rationales that may justify the greater punishment imposed by hate crime law. Of those, I find the greater wrongdoing thesis most compelling, although empirical disputes about the special harms of hate crimes persist.<sup>185</sup> For this reason, the greater culpability thesis becomes even more tempting;<sup>186</sup> because culpability is driven largely by normative considerations, it appears less susceptible to being mired in such disputes. Put another way, culpability is something we can agree on, but do not necessarily have to prove.

Unfortunately, there is plenty of evidence indicating that we are not in agreement. If hate crime law is justified by the greater culpability of the offender, it rests on the implausible notion that there is a shared norm against racism in American society today. This notion is over-optimistic and, worse, counterproductive. It is over-optimistic because despite significant progress since the early days of American history, racism in myriad forms continues to plague our society on a wide scale and race theory persuasively suggests that this state of affairs may be an inevitable product of socialization. Moreover, it is counterproductive because it is important to recognize and confront the continuing importance of race and racism not only in its most obvious manifestations—race-motivated violence—but also in its everyday hidden expressions. To declare the existence of a shared norm against racism today elevates the former at the expense of obscuring the latter; this is a costly move for any theory of race that seeks to draw a connection between the racism of the present with the past.

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185. See JACOBS & POTTER, *supra* note 2, at 81–89 (disputing claims of greater harm made by proponents of hate crime law); see also Gellman & Lawrence, *supra* note 123, at 432 (“It is quite an assumption that one could adequately prove that bias crimes always (or even likely) cause greater harm than crimes motivated by other motives such as greed, personal hatred, and political terrorism.”).

186. The greater culpability thesis is tempting for a variety of reasons, not least because the hate motive, as a mental state, appears more at home within the framework of culpability.

On the other hand, an acknowledgment that a shared norm against racism does not exist would mean that the law is not justified in blaming and punishing for the hate motive on the basis of greater culpability. For my part, I do not believe that this result is a serious setback for the cause of equal rights or racial justice. The relationship between race, racism, and crime is so fraught with complications and historical baggage that I doubt resort to the criminal law to achieve *social* justice goals will ever be an optimal solution. Nor should it be if the criminal law is to remain true to its minimalist tradition and inflict its violence only on those who are culpable enough to deserve it and only so much as they deserve.