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### A Denial of Personhood: Why Hate Crime Legislation is Necessary to Assure Proportionality in Punishment

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## **A DENIAL OF PERSONHOOD: WHY HATE CRIME LEGISLATION IS NECESSARY TO ASSURE PROPORTIONALITY IN PUNISHMENT**

Clare Godfryd\*

*The term “hate crime” entered the mainstream in the United States during the 1980s, when advocates began to track incidents of bias-motivated violence. Since then, hate crimes have continued to garner significant attention. Advocates and legislators have traditionally justified hate crime law under the “expressive theory,” the idea that the purpose of such laws is to condemn prejudice and express messages of tolerance and equality.*

*In this Comment, I offer a distinct justification for hate crime legislation. Specifically, I argue that, when a perpetrator targets a victim because of perceived immutable characteristics, the hate crime offender denies the victim’s agency and, ultimately, the victim’s personhood. This additional wrong—absent in crimes not motivated by bias—necessitates the heightened criminal penalties that current hate crime laws provide.*

*First, this Comment provides a background on the development of hate crime legislation and the difficulties involved in reporting hate crimes. In Part I, I explain the importance of proportionality in assessing criminal culpability and determining appropriate punishments. In Part II, I explain how existing hate crime laws operate. In Part III, I articulate how a hate crime offender denies the agency, and ultimately the personhood, of the victim. In Part IV, I explain why proportionality in punishment requires heightened penalties for hate crime offenders because of their denial of the victim’s agency, and ultimately the denial of the victim’s personhood. Finally, in Part V, I explain why this distinct justification for hate crime*

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*legislation is relevant; in short, it recognizes bias-motivated offenses that a purely expressive approach often overlooks.*

INTRODUCTION .....	64
I. PROPORTIONALITY AND CULPABILITY .....	68
II. THE THREE FEATURES OF HATE CRIME LAWS .....	70
A. Hate Crimes are Two-Tiered .....	71
B. Hate Crimes are Motivated by Hostility Towards a Victim's Actual or Perceived Identity .....	72
C. Hate Crimes Protect Immutable Traits.....	74
III. HOW A HATE CRIME PERPETRATOR DENIES A VICTIM'S AGENCY .....	77
IV. PROPORTIONALITY REQUIRES HEIGHTENED PUNISHMENT.....	81
A. How Hate Crime Offenders Deny the Personhood of Their Victims .....	81
1. Elements of the Human: Autonomy, Reasoned Decision-Making, and Dignity .....	81
2. Non-recognition of Autonomy and Denial of Personhood .....	83
B. Proportionality Requires Greater Punishment for Denying Another's Personhood .....	84
V. THE IMPORTANCE OF A DISTINCT JUSTIFICATION FOR HATE CRIMES .....	88
CONCLUSION .....	92

## INTRODUCTION

Hate crime laws impose increased criminal penalties when a crime is committed against a victim based on the victim's membership in certain protected groups.<sup>1</sup> In addition to a number of federal hate crime laws,<sup>2</sup> forty-

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<sup>1</sup> Beatrice Jin, *Biden Signed a New Hate Crimes Law—But There's a Big Flaw*, POLITICO (May 20, 2021, 2:43 PM), <https://www.politico.com/interactives/2021/state-hate-crime-laws/> [<https://perma.cc/7RS4-Q4YW>] (last accessed Feb. 21, 2024).

<sup>2</sup> PETER G. BERRIS, CONG. RSCH. SERV., R47060, OVERVIEW OF FEDERAL HATE CRIME LAWS 1–3 (2022), <https://crsreports.congress.gov/product/pdf/R/R47060> [<https://perma.cc/69QS-CALQ>].

six states and the District of Columbia have enacted hate crime penalty enhancement laws.<sup>3</sup> While the details of the statutes vary, all cover criminal offenses that are motivated, at least partly, “by an offender’s bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.”<sup>4</sup>

The term “hate crime” entered the mainstream in the United States during the 1980s when advocates first began recording bias-motivated crimes.<sup>5</sup> Following the passage of the Hate Crime Statistics Act in 1990, the Federal Bureau of Investigation (FBI) began processing its own data on the phenomenon; the FBI has since reported multiple increases in the number of recorded hate crimes.<sup>6</sup> Likewise, the Southern Poverty Law Center’s annual reports have indicated a general upward trend of recorded hate crimes since 2000.<sup>7</sup>

Media coverage in recent years illustrates this upward trend.<sup>8</sup> The spike in violent crimes against people perceived to be Asian American in 2020 and 2021, during the COVID-19 pandemic, generated considerable public attention, as did responsive efforts by federal, state, and local governments to address these incidents.<sup>9</sup> Similar media coverage and anti-hate crime initiatives followed the rise in anti-Semitic speech and attacks during 2021 and 2022, as well as the racially-motivated mass shooting in a predominantly Black neighborhood of Buffalo, New York in May 2022.<sup>10</sup>

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<sup>3</sup> Jin, *supra* note 1.

<sup>4</sup> *Hate Crimes*, FBI, <https://www.fbi.gov/investigate/civil-rights/hate-crimes> [<https://perma.cc/ZT4G-QB2B>] (last accessed Feb. 21, 2024) [hereinafter *Hate Crimes*, FBI].

<sup>5</sup> ZACHARY J. WOLFE, HATE CRIMES LAW § 1:2 [The Problem of Hate Crime], Westlaw (database updated Dec. 2023).

<sup>6</sup> FBI data shows that 2020 had the highest recorded number of hate crimes in over a decade. Erin Donaghue, *2020 Saw the Highest Number of Reported Hate Crimes Since 2008, New Data Shows*, CBS NEWS (Aug. 30, 2021, 5:47 PM), <https://www.cbsnews.com/news/hate-crimes-2020-rise-fbi/> [<https://perma.cc/2LAE-2E65>]; *About Hate Crime Statistics*, U.S. DEP’T. OF JUST. FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/hate-crime/2010/resources/hate-crime-2010-about-hate-crime> [<https://perma.cc/87WB-QZED>] (last accessed Feb. 21, 2024); WOLFE, *supra* note 5.

<sup>7</sup> *Hate & Extremism*, S. POVERTY L. CTR., <https://www.splcenter.org/issues/hate-and-extremism> [<https://perma.cc/6BQR-CHVR>] (last accessed Feb. 21, 2024); Donaghue, *supra* note 6.

<sup>8</sup> WOLFE, *supra* note 5, at § 1:2.

<sup>9</sup> *Id.*; BERRIS, *supra* note 2, at 1.

<sup>10</sup> BERRIS, *supra* note 2, at 1; *see, e.g.*, Jonathan Franklin, *After Deadly Mass Shooting, DOJ Launches Anti-Hate Initiative in Buffalo*, OR. PUB. BROADCASTING (Oct. 6, 2022, 9:25

It is likely that even this grim picture of a general upward trend fails to fully capture the number of bias-motivated incidents which actually occur each year.<sup>11</sup> As a 2009 United States House of Representatives Report explains, “. . . it is believed that violent hate crimes are significantly under-reported.”<sup>12</sup> According to Professor Jack McDevitt, the former director of Northeastern University’s Institute on Race and Justice, a key reason for this persistent under-reporting is reluctance on the part of local authorities to identify certain offenses as hate crimes.<sup>13</sup> This reluctance is partially rooted in a fear of “paint[ing] [their] community as hateful, or as harboring hateful people.”<sup>14</sup> For instance, McDevitt explains that local police departments have expressed concerns that labelling offenses as hate crimes might deter new residents from joining the community.<sup>15</sup>

Concerns about community messaging have traditionally justified hate crime legislation,<sup>16</sup> so it is perhaps unsurprising that these same concerns also influence hate crime reporting. Politicians have tended to emphasize that the value of hate crime legislation is its use as a vehicle for expressing messages

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AM), <https://www.opb.org/article/2022/10/06/buffalo-new-york-mass-shooting-anti-hate-initiative/> [<https://perma.cc/F92F-TJJA>] (last accessed Feb. 21, 2024) (discussing the newly created United Against Hate initiative under the U.S. Attorney General’s Office); Jesse McKinley & Glenn Thrush, *Buffalo Shooting Suspect Is Charged With Federal Hate Crimes*, N.Y. TIMES, Jun. 15, 2022, <https://www.nytimes.com/2022/06/15/nyregion/buffalo-shooting-hate-crime-charges.html> [<https://perma.cc/4EZ4-WSQD>] (last accessed Feb. 21, 2024); Kelsey Butler, *Anti-Semitic Speech is Getting Louder, Hate Crimes are Rising*, BLOOMBERG (Oct. 20, 2022, 5:00 AM), <https://www.bloomberg.com/news/newsletters/2022-10-20/anti-semitic-speech-is-getting-louder-hate-crimes-are-rising> [<https://perma.cc/78AD-K4MJ>] (last accessed Feb. 21, 2024); William Brangham, *Antisemitic Incidents Hit a Record High in 2021. What’s Behind the Rise in Hate?*, PBS (Apr. 29, 2022, 6:39 PM), <https://www.pbs.org/newshour/show/antisemitic-incidents-hit-a-record-high-in-2021-whats-behind-the-rise-in-hate> [<https://perma.cc/CP7R-C39C>] (last accessed Feb. 21, 2024).

<sup>11</sup> H.R. REP. NO. 111-86, at 5 (2009).

<sup>12</sup> *Id.*

<sup>13</sup> Tanner Stening, *Why Hate Crimes are Underreported—and What Police Departments Have to Do With It*, NE. GLOB. NEWS (Aug. 23, 2021), <https://news.northeastern.edu/2021/08/23/why-hate-crimes-are-underreported-and-what-police-departments-have-to-do-with-it/> [<https://perma.cc/2F8A-BCS4>] (last accessed Feb. 21, 2024).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 862 (2014) (stating that “drafters of early hate crime legislation focused on addressing . . . manifestations of identity-based hate that risk traumatizing communities and rendering individuals vulnerable based on their group identity . . .”).

of tolerance and equality.<sup>17</sup> For instance, before signing the COVID-19 Hate Crimes Act (a measure intended to address rising incidents of discrimination against Asian Americans and Pacific Islanders)<sup>18</sup> President Joe Biden stated that “[e]very time we’re silent, every time we let hate flourish, we make a lie of who we are as a nation.”<sup>19</sup>

This type of justification for hate crime legislation, known as the “expressive theory,” has been well-documented by scholars.<sup>20</sup> The expressive theory embodies the idea that hate crime laws allow legislators to communicate to society that perpetrators of hate crimes are more culpable than perpetrators unmotivated by bias against particular vulnerable groups.<sup>21</sup> Under the expressive theory, hate crime laws are necessary because “if a perpetrator sends a message of hatred to the victim and the victim’s group, the state in turn should send a message that such hatred is not acceptable in our pluralistic society.”<sup>22</sup> According to the expressive theory, the increased penalties tied to hate crime legislation communicate the state’s denunciation of the hatred harbored by perpetrators, the state’s valuation of victims (along with the identity groups they belong to), and the state’s commitment to tolerance and equality.<sup>23</sup>

Evaluating the merits of the expressive theory’s justification of hate crime legislation is beyond the scope of this Comment. Rather, I seek to articulate an additional function of hate crime legislation. Specifically, I argue that hate crimes harm the victim in a way that otherwise-motivated offenses do not: a hate crime offender denies a victim of their agency, and thus of their personhood. Heightened criminal penalties are needed to address this additional wrong. If, as my Comment suggests, we recognize this additional harm, society can better identify the more insidious instances of hate crimes that a purely expressive accounting may miss.

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<sup>17</sup> *Id.* at 860.

<sup>18</sup> COVID-19 Hate Crimes Act, Pub. L. No. 117–13, 135 Stat. 265 (2021).

<sup>19</sup> Nick Niedzweidek, *Biden Signs Anti-Asian Hate Crimes Legislation*, POLITICO (May 20, 2021, 3:40 PM), <https://www.politico.com/news/2021/05/20/biden-anti-asian-hate-crimes-bill-489936> [<https://perma.cc/3BYH-ETE7>] (last accessed Feb. 21, 2024).

<sup>20</sup> Eisenberg, *supra* note 16, at 860 n.2.

<sup>21</sup> *Id.* at 875 (explaining that retributivist proponents believe enhancement in penalty is justified in part because of “the offenders’ greater culpability due to their hate motives.”).

<sup>22</sup> *Id.* at 879.

<sup>23</sup> *Id.*

### I. PROPORTIONALITY AND CULPABILITY

The basic concept of proportionality is that the severity of a punishment should reflect—or be proportionate with—the level of condemnation associated with the criminal act.<sup>24</sup> This philosophical claim that justice requires proportionality in punishment is not without its opponents, but it is widely accepted.<sup>25</sup> Some scholars believe that this wide-spread acceptance is partially due to the intuitive appeal of proportionality in punishment.<sup>26</sup> Professor Youngjae Lee offers an example of this in his work *Proportionality in Punishment*. There, he discusses society’s view of individuals who view or possess child pornography. Although these individuals are widely condemned in society, Lee finds that it is also “a commonly held belief that sentences of several decades in prison constitute disproportionate punishments for possessing child pornography, especially compared to similar sentences handed down for crimes like murder.”<sup>27</sup> Lee compares this to the backlash following the sentencing of Brock Turner.<sup>28</sup> In the Turner case, former Judge Aaron Persky sentenced Turner to six months in jail for sexually assaulting an unconscious woman.<sup>29</sup> Persky’s decision of such a short sentence sparked a public outcry that ultimately led to California voters demanding Persky’s recall from his position.<sup>30</sup> Lee argues that this reaction stemmed from a popular sentiment that Turner’s sentence “was too lenient, given the gravity of his crime and [the fact] that, generally speaking, rape is a serious crime calling for a serious response in the form of punishment.”<sup>31</sup> In other words, voters likely felt that the Turner sentence was disproportionate to his crime.

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<sup>24</sup> Youngjae Lee, *Proportionality in Punishment*, in THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW 549, 551 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019).

<sup>25</sup> *Id.* at 549 (explaining that “the idea that justice requires proportionality in punishment is familiar and compelling enough to attract a broad consensus.”).

<sup>26</sup> *Id.* at 550.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Jeannie Suk Gersen, *Revisiting the Brock Turner Case*, THE NEW YORKER (March 29, 2023), <https://www.newyorker.com/news/our-columnists/revisiting-the-brock-turner-case> [<https://perma.cc/9DS9-7TNE>] (last accessed Feb. 26, 2024).

<sup>30</sup> Richard Gonzales & Camila Domonoske, *Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner*, NPR (June 5, 2018 1:58 PM ET), <https://www.npr.org/sections/thetwo-way/2018/06/05/617071359/voters-are-deciding-whether-to-recall-aaron-persky-judge-who-sentenced-brock-tur> [<https://perma.cc/H5QR-CJK9>] (last accessed Feb. 26, 2024).

<sup>31</sup> Lee, *supra* note 24, at 554.

The Supreme Court has seemingly embraced the idea that justice demands proportionality in punishment.<sup>32</sup> In *Graham v. Florida*,<sup>33</sup> the Supreme Court held that sentencing a juvenile to life in prison without parole for a crime other than homicide violates the Cruel and Unusual Punishments Clause of the Eighth Amendment.<sup>34</sup> In so holding, the Court reasoned that such a sentence would be disproportionate to the severity of the crime committed.<sup>35</sup> More specifically, the Court found that proportionality is “central to the Eighth Amendment.”<sup>36</sup> The justices interpreted the Constitution’s ban on cruel and unusual punishments as an embodiment of “the precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”<sup>37</sup> Applying this principle, the Court found life without parole to be a disproportionate sentence for juveniles who are convicted of non-homicide offenses; this is because juvenile transgressions are less worthy of condemnation than those by adults.<sup>38</sup>

Proportionality in punishment embodies the idea that wrongdoers deserve punishment that is in proportion to the wrong they committed.<sup>39</sup> A comparison of different crimes is necessary to legitimate proportionality analysis; part of what it means for perpetrators of very serious offenses to receive the punishment they “deserve” is the fact that they are punished more severely than perpetrators of less serious offenses—and vice versa.<sup>40</sup> “[T]reating the equals equally and the unequals unequally” in this manner constrains the state’s ability to punish its citizens unfairly.<sup>41</sup>

This different treatment also helps to ensure that the state maintains its ability to respond appropriately to wrongdoing and its capacity to protect its

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<sup>32</sup> *Id.* at 549.

<sup>33</sup> *Graham v. Florida*, 560 U.S. 48 (2010).

<sup>34</sup> *Id.* at 74.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 68 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion) (“[A juvenile’s] transgression ‘is not as morally reprehensible as that of an adult.’”). The Court’s proportionality analysis was supported by facts that juveniles, compared to adults, are less mature and are more susceptible to outside pressure. *See id.* (citing *Roper v. Simmons*, 543 U.S. 551, 575 (2005)).

<sup>39</sup> VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 26 (2011).

<sup>40</sup> *Id.*

<sup>41</sup> Lee, *supra* note 24, at 554.



citizens.<sup>42</sup> One must compare the culpability of a perpetrator who is motivated by bias toward a particular group with the culpability of a perpetrator acting without such a motivation.<sup>43</sup>

## II. THE THREE FEATURES OF HATE CRIME LAWS

In February 2020, Kalvinn Garcia set fire to the contents of a dumpster located directly behind Queer/Bar, an LGBTQ nightclub in Seattle, Washington.<sup>44</sup> Just minutes after the fire began, law enforcement officials arrested Garcia, who wasted little time making his motivations known.<sup>45</sup> Garcia admitted to officers that he specifically targeted the nightclub because seeing the word “queer” on its sign angered him.<sup>46</sup> Garcia also shared with the officers his opinion that “it’s wrong that we have a bunch of queers in our society.”<sup>47</sup> Several weeks after the incident, Garcia told a stranger that he started the fire with the intent to trap and harm the people inside the nightclub.<sup>48</sup>

Garcia plead guilty to committing a hate crime in May 2022.<sup>49</sup> This was one amongst many recent attacks against LGBTQ nightclubs and event spaces behind which officials suspect a motivation of bias.<sup>50</sup> As explained below, Garcia’s crime is also illustrative of how hate crimes function more broadly.

The FBI defines a hate crime as a “criminal offense against a person or property motivated in whole or in part by an offender’s bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender

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<sup>42</sup> *Id.*

<sup>43</sup> Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 363 (1994) (“In order to compare the culpability attached to [underlying] crimes and [hate] crimes, we must first return to the central relationship between the two.”).

<sup>44</sup> *Washington Man Pleads Guilty to Committing Hate Crime for Arson at Seattle Nightclub*, U.S. DEP’T. OF JUST. (May 26, 2022), <https://www.justice.gov/opa/pr/washington-man-pleads-guilty-committing-hate-crime-arson-seattle-nightclub> [<https://perma.cc/SK2R-47MD>] (last accessed Feb. 26, 2024).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Washington Man Pleads Guilty*, *supra* note 44.

<sup>50</sup> *New FBI Data Shows More Hate Crimes. These Groups Saw The Sharpest Rise.*, THE MARSHALL PROJECT (Mar. 25, 2023), <https://www.themarshallproject.org/2023/03/25/asian-hate-crime-fbi-black-lgbtq> [<https://perma.cc/S4K6-E9UE>] (last accessed Feb. 26, 2024).

identity.”<sup>51</sup> Exactly which groups receive protection and how authorities identify hate crimes varies based on state statutes and across jurisdictions.<sup>52</sup> However, the FBI’s general definition captures three unifying features of hate crime statutes which scholars have identified: (1) hate crimes are two-tiered,<sup>53</sup> (2) hate crimes are motivated by hostility towards a victim’s actual or perceived membership to a particular group,<sup>54</sup> and (3) hate crimes largely protect immutable characteristics.<sup>55</sup>

#### A. HATE CRIMES ARE TWO-TIERED

First, every hate crime contains both an underlying crime against person or property and the perpetrator’s biased motivation for committing the offense; in other words, hate crimes are “two-tiered.”<sup>56</sup> Take for example an assault motivated by bias towards a victim’s identity group. Here, this hate crime contains both the underlying crime of assault and the perpetrator’s biased motivation for committing the assault (the “bias crime.”)<sup>57</sup> In Garcia’s attempt to set fire to Queer/Bar, his hate crime contains both the underlying charge of arson and a bias crime directed against the LGBTQ identity group.<sup>58</sup> It must follow that whatever difference in culpability exists between a hate crime and its underlying crime lies in the bias crime: the additional mens rea of a hate crime. In Garcia’s case, he has greater culpability than an ordinary attempted arsonist; the source of this additional culpability must be the biased motivation underlying his attempt to set fire to Queer/Bar. In other words, it is this motivation that enhances Garcia’s level of culpability above that of an arsonist who is not motivated by hatred or bias.

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<sup>51</sup> *Hate Crimes*, FBI, *supra* note 4.

<sup>52</sup> Jin, *supra* note 1.

<sup>53</sup> Lawrence, *supra* note 43, at 363.

<sup>54</sup> Eisenberg, *supra* note 16, at 871.

<sup>55</sup> Lawrence, *supra* note 43, at 18.

<sup>56</sup> *Id.*; *Hate Crimes*, FBI, *supra* note 4 (defining a hate crime as a “traditional offense like murder, arson, or vandalism with an added element of bias.”).

<sup>57</sup> Lawrence, *supra* note 43, at 363.

<sup>58</sup> DOJ: Man pleads guilty to hate crime in 2020 arson at Capitol Hill’s Queer/Bar, CAPITOL HILL SEATTLE (May 26, 2022, 3:34 PM), <https://www.capitolhillseattle.com/2022/05/doj-man-pleads-guilty-to-hate-crime-in-2020-arson-capitol-hills-queer-bar/> [<https://perma.cc/QF6P-M9W2>] (last accessed Feb. 26, 2024).

**B. HATE CRIMES ARE MOTIVATED BY HOSTILITY TOWARDS A VICTIM'S ACTUAL OR PERCEIVED IDENTITY**

In addition to being two-tiered, hate crimes are motivated by hostility towards the victim's actual or perceived membership to a particular group.<sup>59</sup> In other words, a hate crime offender selects a victim, at least partially, out of hostility towards a group the victim belongs to (or appears to belong to), not the individual themselves.<sup>60</sup> Hate crime offenders thus do not choose their victims at random, and they are not motivated purely by hostility toward the victim as an individual.<sup>61</sup> The biased motivation of the perpetrator's choice of victim is the mens rea of a hate crime which distinguishes it from the underlying crime.<sup>62</sup>

Professor Avlana Eisenberg's account of hate crimes closely examines the bias which characterizes the victim-targeting process of hate crime offenders.<sup>63</sup> Eisenberg identifies the selection of victims as "largely symbolic."<sup>64</sup> According to Eisenberg, this means that a hate crime offender's victim "is interchangeable with, and serves as a representative of, other members of the victim's identity group."<sup>65</sup> A hate crime offender thus targets a victim because of an identity the offender ascribes to them.<sup>66</sup> The victim is not targeted for any action they undertook or for any decision that they personally made.<sup>67</sup>

Hate crime scholar Dr. Barbara Perry's research further underscores the significance of the biased manner in which hate crime perpetrators target victims.<sup>68</sup> Perry characterizes an offender's selection of victim as "a mechanism of power, intended to reaffirm the precarious hierarchies that

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<sup>59</sup> Eisenberg, *supra* note 16, at 860–61.

<sup>60</sup> Christopher Heath Wellman, *A Defense of Stiffer Penalties for Hate Crimes*, 21 HYPATIA 62, 62 (2006) (defining a hate crime as "an offense in which the criminal selects the victim at least in part because of an animus toward members of the group to which the victim belongs.").

<sup>61</sup> *Id.*

<sup>62</sup> Lawrence, *supra* note 43, at 364.

<sup>63</sup> Eisenberg, *supra* note 16, at 860.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Barbara Perry, *What Communities Want: Recognizing the Needs of Hate Crime Targets*, 12 J. HATE STUD. 9, 13 (2014-2015).

<sup>67</sup> *Id.*

<sup>68</sup> See BARBARA PERRY, IN THE NAME OF HATE: UNDERSTANDING HATE CRIMES 10 (2001); see also Lawrence, *supra* note 43, at 365 ("The motivation of the bias crime offender violates the equality principle, one the most deeply held tenets in our legal system and our culture.").

characterize a given social order.”<sup>69</sup> According to Perry, when an offender commits acts of violence or intimidation against a victim because of the victim’s—typically marginalized—group membership, the offender “attempts to recreate simultaneously the threatened (real or imagined) hegemony of the perpetrator’s group and the “appropriate” subordinate identity of the victim’s group.”<sup>70</sup> Notably, spikes in hate crimes against particular groups often correspond to perceived social advances enjoyed by the groups; this pattern strengthens Perry’s perspective.<sup>71</sup>

Perry further explains that the contemporary rise of hate crimes is grounded in the effort of dominant groups to counteract diverse social movements.<sup>72</sup> These movements, committed to equal valuation and treatment of all people, threaten the dominant group’s perceived superiority.<sup>73</sup> In this way, a hate crime offender believes that their victim *deserves* the harm against them because the victim’s group membership makes him or her inferior.<sup>74</sup>

Garcia’s case illustrates this theory. Garcia expressed his belief that the presence of LGBTQ people in society was “wrong,” and attempted to set fire to Queer/Bar because seeing “queer” on the nightclub’s sign angered him.<sup>75</sup> Garcia’s statements regarding his motivations for the attempted arson, taken together, allow one to infer that Garcia targeted the people inside Queer/Bar because of the LGBTQ identity he ascribed to them, and not because of any choice made or action taken by any individual present at the nightclub.

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> WOLFE, *supra* note 5, § 1:3; Jeannine Bell, *There Are No Racists Here: The Rise of Racial Extremism, When No One is Racist*, 20 MICH. J. RACE & L. 349, 370 (2015) (identifying incidents of anti-integrationist violence in every geographic area of the United States); Christine Hauser, *After a Hate Crime Spree on Election Night, an Intense Effort to Make Arrests*, N.Y. TIMES (Jan. 11, 2009), <https://www.nytimes.com/2009/01/12/nyregion/12hate.html> [<https://perma.cc/32R8-7E2D>] (describing a string of violent crimes targeted at Black individuals on the night Barack Obama won the presidency).

<sup>72</sup> PERRY, *supra* note 68, at 135–36.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Washington Man Sentenced for Hate Crime Targeting LGBTQI+ Community at Seattle Nightclub*, U.S. DEP’T JUST. (Oct. 3, 2023), <https://www.justice.gov/opa/pr/washington-man-sentenced-hate-crime-targeting-lgbtqi-community-seattle-nightclub> [<https://perma.cc/Y3KS-WXFE>] (last accessed Feb. 26, 2024).

Garcia's case may also illustrate Perry's theory that hate crime offenders seek to reinforce social hierarchies.<sup>76</sup> Activists and scholars argue that increased violence against LGBTQ individuals is partially a result of greater widespread acceptance of the community in recent decades.<sup>77</sup> According to Professor Gregory M. Herek, an expert on anti-gay violence, as the United States becomes more tolerant of LGBTQ people, individuals strongly opposed to this societal shift "may feel that the way they see the world is threatened, which motivates them to strike out in some way."<sup>78</sup> In Garcia's case, seeing "queer" written on a public sign instigated his attempted attack of Queer/Bar.<sup>79</sup> When added to Garcia's vocalized distaste of "hav[ing] a bunch of queers in our society," it is reasonable to understand him as someone deeply opposed to the increased societal acceptance of LGBTQ identities.<sup>80</sup>

### C. HATE CRIMES PROTECT IMMUTABLE TRAITS

A final common feature of hate crimes is that they protect immutable traits.<sup>81</sup> The concept of immutability as it relates to physical traits is admittedly challenging and has been the subject of some dispute.<sup>82</sup> This Comment embraces "immutability" as a flexible, rather than a strict, concept: the key question is not whether a group membership is physically possible to change, but whether we consider it "abhorrent" to expect an individual to change a particular status in order to avoid discrimination.<sup>83</sup>

The Ninth Circuit explored this concept with some depth in *Watkins v. U.S. Army*.<sup>84</sup> There, the court held that the United States Army could not deny reenlistment to Sgt. Perry J. Watkins solely because of his homosexuality.<sup>85</sup>

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<sup>76</sup> See PERRY, *supra* note 68, at 3.

<sup>77</sup> Haeyoun Park & Iaryna Mykhyalshyn, *L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group*, N.Y. TIMES (Jun. 16, 2016), <https://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html> [<https://perma.cc/T9AU-VN8G>] (last accessed Feb. 26, 2024).

<sup>78</sup> *Id.*

<sup>79</sup> *Washington Man Sentenced*, *supra* note 75.

<sup>80</sup> *Id.*

<sup>81</sup> FREDERICK M. LAWRENCE, *PUNISHING HATE* 62 (1999).

<sup>82</sup> *Id.* at 18 (noting that the debate over the inclusion of sexual orientation in hate crime laws often turns on whether sexuality is an immutable characteristic).

<sup>83</sup> *Id.* at 18–19; *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring).

<sup>84</sup> *Watkins*, 875 F.2d at 726.

<sup>85</sup> *Id.* at 711.

In his concurring opinion, Judge William A. Norris elaborated upon the Court's immutability analysis, which he stated "ha[d] never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class."<sup>86</sup> Rather, Norris explained that "'immutability' may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically."<sup>87</sup>

Norris noted that the United States Supreme Court regularly utilizes this flexible understanding of immutability, albeit implicitly.<sup>88</sup> In *Parham v. Hughes*, the plurality opinion identified national origin, alienage, and illegitimacy as immutable traits.<sup>89</sup> However, none of these protected statuses would pass muster under a strict understanding of immutability.<sup>90</sup> As Norris noted, "[a]liens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names, or their associations."<sup>91</sup> Thus, "[a]t a minimum . . . the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity."<sup>92</sup>

Norris also found support for a flexible understanding of immutability in the constitutional ideal of equal protection.<sup>93</sup> He argued that the aim of the Equal Protection Clause of the Fourteenth Amendment is to protect minority groups from discriminatory treatment.<sup>94</sup> In other words, the purpose of the clause is "not to protect traditional values and practices, but to call into question such values and practices when they operate to burden disadvantaged minorities."<sup>95</sup> Under this reasoning, a flexible immutability is

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<sup>86</sup> *Id.* at 726 (Norris, J., concurring).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (citing *Oyama v. California*, 332 U.S. 633, 636 (1948); *Graham v. Richardson*, 403 U.S. 365 (1971); and *Gomez v. Perez*, 409 U.S. 535, 536 (1973)).

<sup>90</sup> *Watkins*, 875 F.2d at 726 (Norris, J., concurring).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (discussing U.S. CONST. amend. IVX, § 1).

<sup>95</sup> *Id.* at 718.

more faithful to the Equal Protection Clause; a stricter concept of immutability would ignore these identities, further burdening disadvantaged minorities.<sup>96</sup> As Norris explained, “allowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional ideal of equal protection of the laws.”<sup>97</sup>

Furthermore, a flexible understanding of immutability is intuitively appealing. The protection of religion under most hate crime laws nicely illustrates this point.<sup>98</sup> After all, religion is not a strictly immutable identity because—as Professor Frederick Lawrence acknowledges—“[t]he choice not to remain Jewish or Catholic is certainly more real than the choice not to remain black.” However, hate crime laws traditionally protect religion anyways because—as Lawrence puts it—“we deem it unreasonable to suggest that a Jew or Catholic might just choose to avoid discrimination by giving up her religion. Indeed, we deem it outrageous.”<sup>99</sup> This reasoning shows us that hate crime statutes, at minimum, protect individuals whose group membership is a core aspect of their identity.

The LGBTQ individuals whom Kalvinn Garcia hoped to target at Queer/Bar illustrate this flexible understanding of immutability. The question of whether any particular LGBTQ identity can be changed, biologically or socially, is irrelevant for this Comment’s analytical purposes.<sup>100</sup> In a hate crime case, the flexible immutability inquiry asks whether that identity is so central to one’s sense of self that a government

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<sup>96</sup> *Id.* at 726 (Norris, J., concurring).

<sup>97</sup> *Id.*

<sup>98</sup> LAWRENCE *supra* note 81, at 18–19.

<sup>99</sup> *Id.* at 19

<sup>100</sup> Although beyond the scope of this Comment, it is important to note that LGBTQ identities have raised questions in immutability analysis. Some legislators have argued against protecting sexual orientation under hate crime statutes in part because they view sexual orientation as a choice, and not as an immutable characteristic. *See generally* LAWRENCE, *supra* note 81. The Fourth Circuit has found that transgender status is an immutable characteristic, writing that “gender identity is formulated for most people at a very early age, and, as our medical amici explain, being transgender is not a choice.” *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 612 (4th Cir. 2020). However, the court limited its opinion to “the rights of transgender students who ‘consistent, persistently, and insistently’ express a binary gender.” *Id.* at 596. LGBTQ individuals are not a monolith; some make choices about their gender, while others are genderfluid and may regularly identify with different or with multiple genders in ways that are not a “choice.” *See* Silver Flight, *Gender: The Issue of Immutability*, UNIV. CINCINNATI LAW REV. (Nov. 12, 2021), <https://uclawreview.org/2021/11/12/gender-the-issue-of-immutability/> [<https://perma.cc/UB4Y-4FNN>].

penalization for not changing that identity would be abhorrent. Under this view, the *centrality* of a particular identity is more relevant to the constitutional ideal of equal protection than that identity's biological causes or features.<sup>101</sup> A number of courts have explicitly supported this analysis of LGBTQ identities.<sup>102</sup> When Garcia targeted the patrons of Queer/Bar due to their perceived LGBTQ identity, he targeted an immutable trait. His actions are doctrinally defined as a hate crime because LGBTQ identities are ones that the government should not compel individuals to change.

The three characteristics of hate crime statutes—the two-tiered nature of the crime, the offender's motivation against the victim's perceived identity, and the immutability of the victim's identity—allow us to infer that a hate crime offender regards their victims as deserving of the underlying crime. A hate crime perpetrator who regards their victim in this way differs from a perpetrator who commits only an underlying crime.<sup>103</sup> A perpetrator who commits only the underlying crime generally chooses a victim at random, out of personal hatred for the victim, or for a reason completely unrelated to the victim's actual or perceived group identity.<sup>104</sup>

### III. HOW A HATE CRIME PERPETRATOR DENIES A VICTIM'S AGENCY

As outlined above, a hate crime offender is uniquely motivated by a victim's immutable membership to a group.<sup>105</sup> Someone so motivated commits an additional moral wrong to their victim—a wrong that is separate from the underlying offense.

More specifically, the perpetrator of a hate crime fails to fully recognize their victim as an epistemic agent. Professor Jennifer Lackey describes this concept in her work *Criminal Testimonial Injustice*.<sup>106</sup> According to Lackey, the concept of epistemic agency is “grounded in a subject's responsiveness to reasons or evidence”; an epistemic agent “can recognize and respond to the force of reasons.”<sup>107</sup> For instance, if someone is persuaded to adopt a different position after being presented with and appreciating compelling

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<sup>101</sup> See *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring).

<sup>102</sup> Anthony R. Enriquez, *Assuming Responsibility for Who You Are: The Right to Choose “Immutable” Identity Characteristics*, 88 N.Y. UNIV. L. REV. 373, 391–95 (2013).

<sup>103</sup> See LAWRENCE *supra* note 81, at 62.

<sup>104</sup> *Id.*

<sup>105</sup> *Supra* section II.

<sup>106</sup> JENNIFER LACKEY, *CRIMINAL TESTIMONIAL INJUSTICE* 1–2 (2023).

<sup>107</sup> *Id.* at 1.



arguments, they have adopted this position for rational reasons; thus, their epistemic agency is respected.<sup>108</sup>

In other cases, subjects may not enjoy full recognition of their epistemic agency. For instance, if someone adopts a certain position because a hacker overwhelms their social media accounts with propaganda, their epistemic agency is not respected.<sup>109</sup> In this case, the subject has not acted for reasons, but because of causes; as Lackey puts it, this subject is treated “as a puppet whose psychology can be shaped and molded according to [another’s] aims.”<sup>110</sup> In short, an individual exercising epistemic agency must act for reasons—and not merely because of causes.<sup>111</sup>

Lackey explains that “[e]pistemic agency is bypassed, exploited, or subverted when a subject’s ability to be responsible to reasons is circumvented, abused, or undermined.”<sup>112</sup> The individual inundated with online propaganda provides one such example: a hacker has undermined the individual’s ability to come to their own position through rational reasoning. However, it is also possible to deny or extinguish another’s epistemic agency altogether.<sup>113</sup> This is what the perpetrator of a hate crime does: they deny their victim’s epistemic agency by denying that victim’s full capacity for reasoned decision-making. This means that the offender does not recognize the victim’s ability to make choices as an individual; they see the victim only as a member of their identity group. In Garcia’s case, for example, this means that he was unable to see the patrons of Queer/Bar as individuals: his victims had no epistemic agency.

This distinction between treatment of groups and of individuals is vital to understanding hate crimes. For example, when someone personally hates an individual, it is typically because they believe the individual behaves in certain ways or possesses certain character traits which warrant hatred.<sup>114</sup> In contrast, someone’s hatred of an entire identity group is typically not

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<sup>108</sup> *Id.* at 1–2.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 2.

<sup>111</sup> *Id.* at 1–2.

<sup>112</sup> *Id.* at 42.

<sup>113</sup> See Lauren Eichler, *Dehumanization and the Metaphysics of Genocide: A New Theory for Genocide Prevention* (June 2019) (Ph.D. dissertation, University of Oregon) (discussing the epistemological component of dehumanization in genocide, “in which one conceives or believes another to be a subhuman creature”).

<sup>114</sup> See LAWRENCE *supra* note 81, at 62.

motivated by personal hostility for any one member of the group.<sup>115</sup> Instead, a hate crime perpetrator conflates the individual with their identity group: the offender “sees the individual victim as a ‘fungible’ or an ‘interchangeable’ representative of a racial or social group that the perpetrator hates.”<sup>116</sup> Thus, a hate crime perpetrator’s hostility is typically informed by a belief that members of a particular group, by virtue of belonging to that group, have a propensity to behave in certain ways or are more likely to possess certain characteristics. To the hate crime perpetrator, it is this perceived propensity which warrants hatred.

When a hate crime offender acts with this motivation, they fail to fully recognize their victim’s ability to act for reasons; the victim’s supposed propensity is merely the cause of their perceived identity. The offender thereby fails to recognize the victim’s status as someone with epistemic agency.

The March 2020 attempted murder of a Burmese-American family, the Nungs, illustrates this denial of epistemic agency.<sup>117</sup> In this case, Jose Gomez III admitted to stabbing the Nung family because he mistakenly believed they were Chinese.<sup>118</sup> Gomez was subsequently sentenced on hate crime charges.<sup>119</sup> According to Gomez, the Nungs posed a “threat” because they were “from the country who started spreading [COVID-19] around.”<sup>120</sup> In other words, Gomez believed that his victims’ perceived ethnic background made them complicit in the spread of COVID-19. Gomez’s perception of the Nungs resembles Garcia’s perception of the patrons in *Queer/Bar*. Both offenders believed their victims deserved harm merely because of their perceived group identity—not because of any behaviors or traits they exhibited individually.

Gomez denied his victims’ full epistemic agency through a crime of personal bias. It is this denial that distinguishes hate crimes from other

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<sup>115</sup> Lu-in Wang, *The Complexities of “Hate”*, 60 OHIO ST. L.J. 799, 802 (1999).

<sup>116</sup> *Id.*

<sup>117</sup> *Texas Man Sentenced on Hate Crime Charges for Attacking Asian Family*, U.S. DEP’T. OF JUST. (Aug. 4, 2022), <https://www.justice.gov/opa/pr/texas-man-sentenced-hate-crime-charges-attacking-asian-family> [<https://perma.cc/6RBL-Q76T>] (last accessed Feb. 26, 2024); Bryan Ke, *Man Arrested for Stabbing Burmese Man and in His Son in Texas Sam’s Club*, NEXTSHARK, (Mar. 16, 2020), <https://nextshark.com/sams-club-man-arrested-charged> [<https://perma.cc/72PJ-H7YY>] (last accessed Feb. 26, 2024).

<sup>118</sup> *Texas Man Sentenced*, *supra* note 116.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

crimes. A criminal who chooses their victim out of personal bias—for instance, a “crime of passion” when a man murders his spouse out of jealousy over infidelity—certainly targets their victim for acting in a certain way or possessing a certain character trait. However, in a crime of passion, the perpetrator’s hatred arises from the individual identity of the person: “the victim could not be interchanged with someone else.”<sup>121</sup> It is true that some other person could have also been unfaithful to the perpetrator, but the perpetrator is able to recognize their particular victim’s role in what is perhaps an interchangeable action or character trait. Imagine that the murderer places the victim within the identity group of women, believing that “all women are unfaithful.” The murder nevertheless involves the particular relationship between him and his spouse: it is unlikely that a perpetrator motivated by personal bias would regard their victim as nothing more than a symbolic representation of all women.<sup>122</sup>

Compare this case to hate crime offenders like Garcia and Gomez: they had no prior relationship with their victims and no knowledge about them other than their perceived membership to a particular group.<sup>123</sup> In such cases, the victim is nothing more than a symbol for the group. Whereas personal bias offenders have the capacity to recognize their victim’s epistemic agency, offenders like Garcia and Gomez do not.

Like crimes of passion, crimes committed for reasons other than hatred—such as selfishness or greed—also do not deny their victims’ epistemic agency. Crimes such as random muggings are committed without any consideration for the victim’s membership to any particular group. In situations like these, the perpetrator is not concerned with their victim’s moral behavior, nor are they concerned with whether their victim’s behavior is determined by causes or reasons. This is irrelevant to the criminal. Because in these instances the criminal does not *per se* deny their victim’s capacity to act for reasons, the offender is unable to deny the victim’s epistemic agency.

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<sup>121</sup> LAWRENCE *supra* note 81, at 9.

<sup>122</sup> See Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 872–73 (2014) (comparing rape cases involving a particular relationship between two individuals to “the case of a serial rapist who victimizes women in such a way that one woman becomes a mere representation of women”).

<sup>123</sup> See *Washington Man Pleads Guilty*, *supra* note 44; see also *Texas Man Sentenced*, *supra* note 116.

#### IV. PROPORTIONALITY REQUIRES HEIGHTENED PUNISHMENT

Hate crime offenders commit an additional wrong that goes beyond the underlying crime, because targeting a victim for a perceived immutable trait amounts to denying that victim's agency. This denial warrants heightened punishment, which is available through hate crime legislation.

##### A. HOW HATE CRIME OFFENDERS DENY THE PERSONHOOD OF THEIR VICTIMS

###### 1. *Elements of the Human: Autonomy, Reasoned Decision-Making, and Dignity*

Denying another's capacity for reasoned decision-making amounts to an attack on the autonomy, dignity, and ultimately the personhood of that individual. The idea that such a denial makes an offender more culpable relates in part to the relationship between reasoned decision-making and personhood.<sup>124</sup>

Autonomy means controlling, at least in part, the course of one's own life.<sup>125</sup> Although individuals are shaped by outside influences in some form, an autonomous individual is not totally controlled by external factors. Put differently, "[t]o be autonomous . . . is to know that one's decision-making is conditioned, and yet, still, to take one's own reasons for acting as authoritative."<sup>126</sup> Autonomy allows individuals to "critically reflect on their values, desires, and goals, and act for their *own* reasons . . . [to] endorse them *authentically* as their own."<sup>127</sup> These explanations tell us that recognizing another's capacity for reasoned decision-making—acting not merely because of external causes—is a prerequisite to recognizing that individual's autonomy. Reflexively, attacking another's capacity for reasoned decision-making amounts to attacking that person's autonomy. Respect for these linked skills in another human being is a key difference between how one acceptably responds to other human beings and how one acceptably responds to animals or objects.<sup>128</sup> According to Professor Herbert Morris, we treat another human being like a person by both allowing that individual to make

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<sup>124</sup> LACKEY, *supra* note 106, at 1–2.

<sup>125</sup> JOSEPH RAZ, THE MORALITY OF FREEDOM 370–71 (1986).

<sup>126</sup> Daniel Susser, Beate Roessler & Helen Nissenbaum, *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1, 17 n.62 (2019).

<sup>127</sup> *Id.* at 36.

<sup>128</sup> Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475, 490 (1968).

choices, and by responding to that person in a way that respects those choices.<sup>129</sup>

The criminal legal system is meant to function, in part, as a way for society to punish offenders equitably and fairly for their actions.<sup>130</sup> With this important responsibility in mind, the criminal legal system should be particularly concerned with actions that deny the autonomy of others. This is because recognizing autonomy is necessary to hold others accountable for their conduct.<sup>131</sup> For instance, duress is recognized as an affirmative defense to criminal liability in situations where a defendant is coerced to commit a crime.<sup>132</sup> Individuals who lack autonomy cannot endorse their actions as their own and thus cannot and should not be held accountable for them.<sup>133</sup> For the criminal legal system to realize its intended function, criminal law must recognize, respect, and promote autonomy.<sup>134</sup>

Beyond the function of law, recognizing another's autonomy is necessary to recognize and respect that person's dignity.<sup>135</sup> There is a substantial body of literature examining the precise meaning of individual dignity.<sup>136</sup> A general consensus, even among deeply opposed moral theories, is that dignity is "a distinctive worth" possessed by all persons; one "that is grounded in or connected to their rational agency and that entitles them to be treated as equals."<sup>137</sup> We can infer from this understanding that denying one's capacity for rational agency undermines that person's dignity.

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<sup>129</sup> *Id.* at 492.

<sup>130</sup> TADROS, *supra* note 39, at 26.

<sup>131</sup> LACKEY, *supra* note 106, at 189.

<sup>132</sup> George K. Bullen, *Criminal Law-Duress: No Defense to Murder?-Commonwealth v. Vasquez*, 971 N.E.2d 783 (Mass. 2012), 18 SUFFOLK J. TRIAL & APP. ADVOC. 358, 358 (2013).

<sup>133</sup> LACKEY, *supra* note 106, at 188–89.

<sup>134</sup> *See id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* (describing Kant's conception of dignity as "grounded in the capacity of persons for rational agency or autonomy,"; Jeremy Waldron's conception of dignity as a person's "social standing . . . that entitles them to be treated as equals in the ordinary operation of society"; and the assertion of the Universal Declaration of Human Rights that "all human beings are born free and equal in dignity and rights") (quoting JEREMY WALDRON, *THE HARM IN HATE SPEECH* 5 (2012); and G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948)).

<sup>137</sup> *Id.*

## 2. *Non-recognition of Autonomy and Denial of Personhood*

From the literature analyzed above, one can conclude that when an offender denies another's capacity for reasoned decision-making, autonomy, and dignity, they are denying that individual's personhood.<sup>138</sup> We can understand the harm of this denial through Morris's equation of respect for reasoned decision-making and the treatment of others as persons.<sup>139</sup> In parsing out the importance of this relationship, Morris contends that we do not consider the choices of animals or objects when responding to their actions because we consider them "incapable of rational choice."<sup>140</sup> In other words, we believe that animals and objects act because of causes. For instance, when an animal physically harms someone, we usually understand that it does so because of a cause, such as instinct, and not because of any reasoned decision the animal made.<sup>141</sup>

When a human physically harms someone, we tend to attribute a reason to that action. Consider again someone who murders their spouse after learning of infidelity. We can readily understand the infidelity in this example as the reason why the perpetrator is upset enough to cause harm.

When we recognize a person's capacity to act for reasons, we treat that individual as a human, not as an animal who acts only for causes. By failing to recognize a human being's capacity to act for reasons, we treat that individual the way we would an animal or an object. As Robert Noggle puts it, "since a person's rational moral agency is crucial to her personhood, to fail to respect it is [to] degrade her; it is to treat her as less than a person. And for that reason it is wrong."<sup>142</sup> A hate crime perpetrator uniquely erases a victim's personhood. This additional wrong is akin to treating a victim as less than human and makes a hate crime perpetrator more culpable than otherwise motivated offenders.

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<sup>138</sup> LACKEY, *supra* note 105, at 190 ("an attack on epistemic agency is therewith an attack on autonomy . . . and ultimately on personhood.").

<sup>139</sup> Morris, *supra* note 128, at 490.

<sup>140</sup> *Id.*

<sup>141</sup> Eichler, *supra* note 112, at 3 ("[I]n Western traditions . . . it is widely believed that [animals] exhibit no or low levels of self-awareness[,] cannot act with purpose, [and] are amoral.").

<sup>142</sup> Robert Noggle, *Manipulative Actions: A Conceptual and Moral Analysis*, 33 AM. PHIL. Q. 43, 52 (1996).

**B. PROPORTIONALITY REQUIRES GREATER PUNISHMENT FOR  
DENYING ANOTHER'S PERSONHOOD**

Denying another's personhood is degrading and makes the oppressor more culpable. However, not every degrading action necessarily warrants a more stringent punishment.<sup>143</sup> As noted previously, there are important fairness and constitutional reasons to ensure that a punishment is proportionate to the crime.<sup>144</sup>

And what is the scope of the additional wrong embedded in a hate crime? Consider that by denying their victim's epistemic agency, a hate crime perpetrator violates the equality principle, an ideal widely held as a core tenant of our legal system and culture.<sup>145</sup> Professor Girardeau A. Spann describes the equality principle as the idea that justice requires like things to be treated alike.<sup>146</sup> More simply, the equality principle embodies the familiar ideal that "all men are created equal."<sup>147</sup> Serious harms like racism breach this ideal by subjecting individuals of equal status to unequal treatment.<sup>148</sup> By denying that their victims are equal epistemic agents and thereby equal persons, hate crime perpetrators also breach this ideal.<sup>149</sup>

The equality principle is not only an ideal, but a constitutional requirement. The United States Supreme Court has interpreted the Equal Protection Clause to hold certain suspect classifications as inherently suspect and subject to heightened levels of scrutiny.<sup>150</sup> In practice, this means that courts tend to disfavor classifications and other decisions that depend on traits like the affected party's race, ethnic origin, or sex.<sup>151</sup> The concept of immutability is central to determining whether a particular class is suspect

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<sup>143</sup> *Id.* ("[W]hile the fact that an action degrades someone always counts against it, it may not always do so in a decisive way.").

<sup>144</sup> *See* Lee, *supra* note 24, at 549.

<sup>145</sup> *See generally* Lawrence, *supra* note 43; Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 140–41 (1982).

<sup>146</sup> Girardeau A. Spann, *Constitutional Hypocrisy*, 27 CONST. COMMENT. 557, 557 (2011).

<sup>147</sup> Delgado, *supra* note 145, at 140–41 (1982).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (noting that the ideal of egalitarianism embodies the concept that "each person is an equal moral agent.").

<sup>150</sup> *Id.* at 1.

<sup>151</sup> *See* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1, 5 (1976).

and therefore subject to heightened scrutiny.<sup>152</sup> Thus, there is meaningful overlap between suspect classifications and the immutable traits covered by hate crime legislation.<sup>153</sup>

The Court explained in *Frontiero v. Richardson* that heightened scrutiny for these kinds of group memberships is warranted because they “frequently [bear] no relation to ability to perform or contribute to society.”<sup>154</sup> For this reason, these classifications that violate the equality principle “often have the effect of invidiously relegating the entire class . . . to inferior . . . status without regard to the actual capabilities of its individual members.”<sup>155</sup> The equality principle rejects viewing individuals as mere puppets of their particular group memberships, or as people predisposed to certain characteristics by mere cause of those identities. It follows that the equality principle also rejects the dehumanizing process through which hate crime perpetrators deny their victims’ epistemic agency and personhood. The embeddedness of the equality principle in American law supports the premise that proportionality demands greater punishment of hate crimes.

The Supreme Court has itself endorsed the view that proportionality demands heightened punishment for hate crime offenders. In *Wisconsin v. Mitchell*, the Supreme Court upheld a hate crime statute against a First Amendment challenge.<sup>156</sup> In this case, Todd Mitchell received an enhanced sentence for aggravated battery, an offense which ordinarily carried a maximum sentence of two years’ imprisonment.<sup>157</sup> However, because the jury found that Mitchell intentionally targeted his victim because of that person’s race, Mitchell instead received a sentence of seven years under a Wisconsin bias crime provision.<sup>158</sup> That provision enhanced the penalty for a crime when the defendant “[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.”<sup>159</sup> Mitchell challenged the constitutionality of the provision.<sup>160</sup>

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<sup>152</sup> See *Frontiero v. Richardson* 411 U.S. 677, 687–88 (1973); *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring).

<sup>153</sup> *Watkins*, 875 F.2d at 726 (Norris, J., concurring).

<sup>154</sup> *Frontiero*, 411 U.S. at 687–88 (1973).

<sup>155</sup> *Id.* at 687.

<sup>156</sup> *Wisconsin v. Mitchell*, 508 U.S. 476, 476 (1993).

<sup>157</sup> *Id.* at 487.

<sup>158</sup> *Id.*

<sup>159</sup> WIS. STAT. § 939.645 (1989–1990).

<sup>160</sup> *Mitchell*, 508 U.S. at 476.



Proportionality factored importantly in the Court's decision to uphold this piece of hate crime legislation.<sup>161</sup> The opinion explained that "the Wisconsin statute singles out for the enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm."<sup>162</sup> The Court accepted this justification, arguing that it is "reasonable" to more severely punish crimes "which are the most destructive of public safety and happiness."<sup>163</sup> As previously noted, comparing the severity of different crimes in order to determine appropriate punishment embodies the principles of proportionality.<sup>164</sup>

In its holding, the Court stated that hate crimes are more severe than otherwise-motivated offenses because of emotional harm to victims.<sup>165</sup> This was in response to Wisconsin's defense of its statute with evidence that hate crimes are more likely to "inflict distinct emotional harms on their victims."<sup>166</sup> An amicus brief filed by the United States noted that a hate crime "inflicts a distinctive injury on the individual victim by instilling or reinforcing fears that he is exposed to danger simply because of his race, religious affiliation, or other group characteristic."<sup>167</sup> The United States's brief elaborates that hate crimes based on group characteristics seriously threaten the safety and security of both the victim and all members of the victim's group.<sup>168</sup> This is because the group memberships are immutable: thus, "there is nothing [the victim or other members of their group] can do to alter the situation, nor is there anything that they should be expected to change."<sup>169</sup> In short, targeting group members without regard for their individual actions or characteristics subjects them to uniquely serious harm. Specifically, it denies them of epistemic agency.<sup>170</sup>

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* (quoting 4 W. BLACKSTONE, COMMENTARIES \*16).

<sup>164</sup> *See supra* Part I.

<sup>165</sup> *Mitchell*, 508 U.S. at 487.

<sup>166</sup> *Id.*

<sup>167</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 13–14, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), 1993 WL 13010918.

<sup>168</sup> *Id.* at 14.

<sup>169</sup> *Id.* at 14 n.8 (citing FBI, *Training Guide For Hate Crime Data Collection* 1 (1991)); *see also supra* Part II.C.

<sup>170</sup> *See supra* Part IV.A.

The Court found that Wisconsin's evidence provided "an adequate explanation" for the state's hate crime provision.<sup>171</sup> Thus, *Mitchell* shows that there is precedent for considering emotional harm as an additional wrong which justifies heightened punishment for hate crimes. The reasoning supporting this decision suggests that these emotional harms are importantly related to victims' epistemic agency.

The emotional harm that results from hate crimes is particularly damaging because it is stigmatic.<sup>172</sup> As Professor Paul Brest explains, stigmatic harm occurs when "[d]ecisions based on assumptions of intrinsic worth . . . inflict psychological injury by stigmatizing their victims as inferior."<sup>173</sup> A hate crime perpetrator inflicts these stigmatic emotional harms on their victim because they, by definition, target their victim based on an identity which the offender regards as inferior. As outlined above, the offender believes that their victim deserves harm based on assumptions about their actual or perceived identity groups.

According to Brest, recognition of this stigmatic harm was central to the Supreme Court's holding in *Brown v. Board of Education*. *Brown* held that the segregation of public schools violated the Fourteenth Amendment's Equal Protection Clause.<sup>174</sup> Chief Justice Warren observed that separating students in grade and high school "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>175</sup> As legal theorist Charles L. Black explains, it was impossible for the Court to ignore the "plain fact that such treatment is hurtful to human beings."<sup>176</sup> The Court recognized the humiliation and degradation that students endure when they are treated differently because of their race. Enforced segregation could be considered a widespread hate crime with many offenders and many victims. For the students who experience this, their individual choices and qualifications are ignored: they are regarded as inferior by the *cause* of their race without regard for their *reasoned* individual choices. In *Brown*, the Court recognized that

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<sup>171</sup> *Mitchell*, 508 U.S. at 488.

<sup>172</sup> Brest, *supra* note 151, at 8.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*; *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 495 (1954).

<sup>175</sup> *Brown*, 347 U.S. at 494.

<sup>176</sup> Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960).

treating students as less than persons amounted to a denial of equal protection.

## V. THE IMPORTANCE OF A DISTINCT JUSTIFICATION FOR HATE CRIMES

By relying solely on the expressive theory as a justification for hate crime statutes and penalties, we tend to only associate “hate crimes” with only the most heinous hate crimes. A justification such as the one I offer—denying individuals their agency—more fully captures the reality of hate crimes. Recall that the expressive theory justifies hate crime legislation as a means of communicating messages of tolerance and equality in response to offenses motivated by bias.<sup>177</sup> I propose an autonomy-centered, or agency-centered, approach adds to the expressivist dialogue by framing hate crimes as a means of addressing what is often obscured in hate crime literature.

Commenters have noted that the expressive messaging of hate crime legislation tends to obscure how hate crimes typically function.<sup>178</sup> Professor Jeannine Bell articulates this in her work *There Are No Racists Here: The Rise of Racial Extremism, When No One is Racist*. There, she describes the “obscuring effects” of the term “hate crime” itself.<sup>179</sup> Bell writes that the term “hate crime” is “violent and splashy, teeming with animus.”<sup>180</sup> She further observes that “to fully satisfy what we expect from . . . [a] ‘hate crime’ we are unconsciously looking for a crime that fits the profile of . . . a violent, dramatic murder committed by white supremacists.”<sup>181</sup>

The “violence” and “splashiness” observed by Bell also extends to how leaders and lawmakers talk about hate crimes. For instance, recall President Biden’s statement before signing the COVID-19 Hate Crimes Act that, “[e]very time we’re silent, every time we let hate flourish, we make a lie of who we are as a nation.”<sup>182</sup> President Biden’s appeal to the lofty ideal of “who we are as a nation” exemplifies the dramatic language Bell critiques. Under Bell’s analysis, those who hear statements like Biden’s may seek to prosecute only the most violent hate crimes which can live up to this dramatic ideal.

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<sup>177</sup> Eisenberg, *supra* note 16, at 860 n.2.

<sup>178</sup> See, e.g., *id.*

<sup>179</sup> Jeannine Bell, *There Are No Racists Here: The Rise of Racial Extremism, When No One is Racist*, 20 MICH. J. OF RACE AND L. 349, 368 (2015).

<sup>180</sup> *Id.* at 369.

<sup>181</sup> *Id.*

<sup>182</sup> Niedzweidek, *supra* note 19.

Representative Jan Schakowsky adopted a similar tone in 1999 when she described the Hate Crimes Prevention Act as “an opportunity to send a clear and powerful message that the safety of all people is a priority and anyone who threatens that safety will face the consequences.”<sup>183</sup> This focus on threats and safety may lead a listener to believe that all hate crimes are extreme, violent, “front page” stories like the tragic incidents perpetrated by Garcia and Gomez.

There is thus, according to Bell, a focus on showy, violent, and dramatic hate crime incidents. The result is that lawmakers, local officials, and society at large are less inclined to focus on lower profile hate crimes.<sup>184</sup> While these less violent hate crimes may not make news headlines, they are extremely pervasive.<sup>185</sup> As Bell puts it, the term hate crime creates a situation where society “tends not to see what is happening right underneath our noses.”<sup>186</sup>

This Comment’s analysis of the complex harm inflicted by hate crime perpetrators on their victims can help to identify a wider range of bias-motivated crimes. Not every hate crime is a mass shooting or a deadly attack by a neighbor. Anytime someone is motivated by bias to cause harm, that offender is denying the victim’s epistemic agency. This is, as explained above, a violation of that victim’s personhood. Adopting a definition centered on epistemic agency allows for a justification which is more nuanced than that of expressive theory. As Bell explains, the expressive theory alone risks focusing only on obviously abhorrent behavior. An approach focused, instead, on denial of agency could help to identify biased precursors to more violent hate crimes before they occur, rather than simply condemning such incidents after the fact.

Rhetoric spread by hate groups against LGBTQ individuals presents a salient example of when society fails “to see what is happening right underneath our noses.”<sup>187</sup> A chilling example is a trend noted by recent commentators regarding a growing and dangerous misbelief that LGBTQ individuals, by virtue of their immutable group identity, are predisposed to

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<sup>183</sup> 145 CONG. REC. H9961 (daily ed. Oct. 13, 1999) (statement of Rep. Jan Schakowsky) (“The Hate Crimes Prevention Act is . . . an opportunity to send a clear and powerful message that the safety of all people is a priority and anyone who threatens that safety will face the consequences.”)

<sup>184</sup> Bell, *supra* note 179, at 369–70.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 369.

<sup>187</sup> *Id.*

sexual assault against children.<sup>188</sup> This rhetoric has gained traction in recent years, including in the form of hoaxes that originated on social media.<sup>189</sup> Beginning in April 2021, the Twitter account “Libs of TikTok” gained notoriety for leaning into this narrative.<sup>190</sup> Through videos on the platform, the account “exposed” individual school teachers for coming out to their students and for teaching children about LGBTQ identities.<sup>191</sup> The account claimed that adults who teach children about LGBTQ identities are “abusive”; described being gender-nonconforming or an ally to the LGBTQ community as a “mental illness”; and called for teachers who came out to their students to be “fired on the spot.”<sup>192</sup> As of February 2024, the account has garnered over 2.8 million followers and been featured on multiple platforms including frequent news packages highlighted on Fox News.<sup>193</sup> This messaging clearly denies the epistemic agency of LGBTQ people. Under this disgusting theory, the identity of an LGBTQ individual is intrinsically linked to a propensity for harming children. Online movements like this have real consequences. In 2022, the president of LGBTQ media advocacy organization GLADD (formerly known as the Gay and Lesbian Alliance Against Defamation) stated that one “can draw a straight line” from

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<sup>188</sup> See, e.g., Marge Baker, *Judicial Nominee Allison Jones Rushing Is Part of the Far-Right Takeover of Our Nation's Courts*, PEOPLE FOR THE AMERICAN WAY (Oct. 16, 2018), <https://www.pfaw.org/blog-posts/judicial-nominee-allison-jones-rushing-is-part-of-the-far-right-takeover-of-our-nations-courts/> [<https://perma.cc/BR37-9SCS>] (last accessed Feb. 26, 2024); Hatewatch Staff, *Alliance Defending Freedom Through the Years*, SOUTHERN POVERTY L. CTR. (Jul. 24, 2017), <https://www.splcenter.org/hatewatch/2017/07/24/alliance-defending-freedom-through-years> [<https://perma.cc/ET6A-BJLP>] (last accessed Feb. 26, 2024).

<sup>189</sup> Ari Drennen, *Save the Children (Again): The Absurd, Intensifying Right-wing Panic That LGBTQ People are “Grooming” Minors*, MEDIA MATTERS (Mar. 31, 2022 at 12:57 PM), <https://www.mediamatters.org/fox-news/save-children-again-absurd-intensifying-right-wing-panic-lgbtq-people-are-grooming-minors> [<https://perma.cc/3AB3-8RWC>] (last accessed Feb. 26, 2024).

<sup>190</sup> Reina Sultan, *How Libs of TikTok Became an Anti-LGBTQ+ Hate Machine*, THEM (Sep. 30, 2022), <https://www.them.us/story/lib-libs-of-tiktok-twitter-facebook-instagram-explained-childrens-hospitals-grooming> [<https://perma.cc/A56E-H4Z2>] (last visited Feb. 26, 2024).

<sup>191</sup> *Id.*

<sup>192</sup> Taylor Lorenz, *Meet the Woman Behind Libs of TikTok, Secretly Fueling the Right's Outrage Machine*, WASH. POST (Apr. 19, 2022, 6:00 AM), <https://www.washingtonpost.com/technology/2022/04/19/lib-libs-of-tiktok-right-wing-media/> [<https://perma.cc/99RB-YJWC>] (last accessed Feb. 26, 2024).

<sup>193</sup> *Id.*

this rhetoric to bias-motivated attacks against the LGBTQ community during 2022, including a mass shooting at Club Q in Colorado Springs.<sup>194</sup>

This rhetoric and the bias-motivated attacks like Garcia's attempted arson similarly seek to deny the epistemic agency of LGBTQ individuals. However, the danger of the former is more easily concealed by a purported concern for the children's safety. To some observers, a seemingly well-intentioned concern may obscure the dangerous and dehumanizing effects of this rhetoric, especially against the backdrop of more obviously-abhorrent physical harm caused by extremist attacks against LGBTQ individuals.

An erasure of agency by regarding another's group as inherently predatory is by no means limited to attacks against LGBTQ individuals. Professor Phoebe Godfrey offers a particularly salient example of the phenomenon in her analysis of the desegregation of Little Rock's Central High in 1957.<sup>195</sup> Godfrey explains that segregationists opposed the proposal to integrate Central High based partly based on their belief in the uncontrollable sexual desires of the Black male students.<sup>196</sup> As Godfrey notes, these white supremacist fears of the uncontrollable sexual desire of "the black beast rapist" for white women had been expressed since Reconstruction and beyond.<sup>197</sup> To segregationists, the integration of Central High inevitably meant the sexual violation of white female students because the Black male students, by virtue of their race, were sexual predators.<sup>198</sup> In the same manner as Libs of Tiktok, offenders of that era weaponized the wellbeing of white female students as a seemingly non-discriminatory reason to deny the epistemic agency of Black male students.

Neither homophobia hiding behind a concern for children's safety nor racism masked as concern for sexual assault are hate crimes themselves. The

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<sup>194</sup> GLAAD Responds to Tragic Mass Shooting at Colorado Springs LGBTQ Nightclub, GLAAD (Nov. 20, 2022), <https://glaad.org/releases/glaad-responds-tragic-mass-shooting-colorado-springs-lgbtq-nightclub/> [<https://perma.cc/9GB3-9M5J>] (last accessed Feb. 26, 2024).

<sup>195</sup> Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock's Central High*, 62 ARK. HIST. Q. 42, 52 (2003).

<sup>196</sup> *Id.* at 42–44; see also LACKEY, *supra* note 105, at 147–48 (quoting DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 10–11 (1997) and noting that Black women have also been historically viewed as de facto sexual predators, originating from the Biblical character Jezebel who "was a purely lascivious creature . . . governed by her erotic desires").

<sup>197</sup> Godfrey, *supra* note 195, at 52.

<sup>198</sup> *Id.* at 45 (discussing the "understanding of integration as violation.").

messaging, however, dangerously suggests to others that LGBTQ and Black individuals are compelled to behave not for reasons, but because of causes: their mere group membership. An accounting of hate crimes that acknowledges the insidious nature of these underlying biases can identify and address crimes which may be overlooked by a purely expressive approach.

### CONCLUSION

Hate crime legislation applies increased penalties for bias-motivated crimes. This Comment argues that these enhancements are necessary to preserve the important principle of proportionality in punishment. Unlike perpetrators of underlying or base crimes, hate crime offenders commit an additional harm when they target their victims because of a perceived immutable trait. This targeting amounts to a denial of a victim's agency and, ultimately, their personhood. The U.S. legal system, through the equality principle and the recognition of stigmatic harm, supports the notion that attacks on another's personhood warrant heightened punishment.

Justifying hate crime enhancement under this theory has many benefits. This theory may help to address the problem of under-reporting hate crimes by providing a wider umbrella under which one can recognize a hate crime. This would improve upon the expressive theory for hate crimes, which tends to focus on responding to clearly abhorrent behavior like the crimes committed by Kalvinn Garcia and Jose Gomez III. The expressive theory thus can tend to ignore offenses that, while less violent or offensive on their face, nevertheless inflict stigmatic harm. The foundation of these occurrences, front page news or not, is a non-recognition of the victim's personhood. Legislation that recognizes less obvious, but similarly insidious, hate crime occurrences can help to more readily address issues that tend to precede such tragedies.