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Passions We Like... and Those We Don't: Anti-Gay Hate Crime Laws and the Discursive Construction of Sex, Gender, and the Body

Yvonne Zylan
Hamilton College

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I. Introduction

In recent years, many jurisdictions have enacted legislation specifically addressing crimes committed out of “bias” or “hatred” toward members of identifiable social groups. So called “hate crime” statutes typically include enhanced criminal sanctions or enforcement...
mechanisms, and are justified by legislatures on the grounds that:
(a) such crimes pose a unique social problem, and/or (b) such crimes pose a greater social danger than similar crimes perpetrated in the absence of group-specific motivations.

Serious questions exist about whether these claims—particularly as they are pursued on behalf of laws designed to punish anti-gay hate crimes—are supportable on retributivist, utilitarian, or expressivist grounds. Moreover, the arguments advanced in favor of legislation designed to detect and punish crimes motivated by anti-gay animus cohabit uneasily with existing discursive constructions of gayness as a source of social identity. These tensions are brought into sharp relief by the so-called "homosexual panic" defense, which is frequently raised to counter allegations of anti-gay criminal conduct. The homosexual panic defense plays on the unsettled nature of the claims leveraged by gay men and lesbians on behalf of recognizing gayness as a distinct and honorable source of identity and thus uncovers a fundamental inconsistency in the justificatory framework that has been developed on behalf of hate crime legislation. More importantly, it points toward an even deeper problem embedded within the mechanism of bias crime punishment: the reinscription of the very social dynamics that may create the impetus for such crimes in the first place.

The interrogation of anti-gay hate crime discourse helps illustrate a fundamental quality of law; namely, its power to constitute social reality. More specifically, I contend that law helps to constitute a *predictive matrix of sex, gender, and the body* that limits and constrains social expressions of sexual desire and experience. The dominant narrative of sexuality as it is expressed in law conceives of gender, sex, and the body as categorical status descriptors that exist in determinate relationship to one another. The resulting framework is constituted along three dimensions: (a) the body is deemed divisible into two sexes (male and female); (b) we recognize as real only two polar genders (masculine and feminine); and (c) we understand there to be two categorical sexual

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2. See, e.g., In re M.S., 896 P.2d 1365, 1369 n.1 (Cal. 1995).
6. See Zylan, supra note 5, chs. 1–3.
orientations (heterosexual and homosexual). Those binaries thus established, the matrix further establishes that if one is able to locate a relevant subject or object at the intersection of two of the categories, one will be able to locate his or her placement in the third category. The categories are discreet, dichotomous, and rigidly relational.

As a result of their institutional mandates and practices, courts engage in the sort of predictive work enabled by the binary matrix as a matter of course. Consequently, I will argue, anti-gay hate crime laws result in the production of specific discursive objects (doctrine and argument) within a specific set of institutional practices that legitimate these limiting narratives in part by establishing the targets of the law's intervention as (to use Jurgen Habermas's term) the "authors" of their own normative constraints. We desire the law's discipline and the law does not disappoint us.

How, precisely, do we signal our desire for law's discipline? Certainly there are cases of individual actors who, through bad luck or happenstance, find themselves in the position of making a claim upon the juridical state and thus invoking its power to define and create narratives of sexuality and identity. More frequently, however, such claims are pressed via the strategic interventions of lesbian, gay, and bisexual (LGB) social movement organizations (SMOs). It is indisputable that there has been a distinct turn toward legalism among such organizations, and few would contest the claim that such SMOs are acting intentionally, tactically, and strategically with respect to their deployment of legal doctrine and argument. Consequently, I think it

8. Social movement organizations are relatively formalized collective actors contesting social, legal, and/or political norms. There is a rich literature of long standing within political sociology that examines social movements as organizational entities. See generally, e.g., COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS (Doug McAdam et al. eds., 1996); SOCIAL MOVEMENTS AND ORGANIZATION THEORY (Gerald Davis et al. eds., 2005); MAYER ZALD & JOHN MCCARTHY, SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY: COLLECTED ESSAYS (1987).
9. See generally, e.g., LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet E. Halley eds., 2002). Nor should one feel compelled to contest it. Legal "wings" of SMOs are organized for precisely such purposes: to change formal legal institutions and doctrine to advance the aims of their foundational organizations and (more importantly) those organizations' social and political constituencies. What follows is not a critique of what such legal arms of SMOs do, nor an attack on how they do it. Indeed, such entities use the tools at their disposal in skillful and thoughtful ways, and they frequently achieve their stated objectives in spite of great resistance and limited resources. In fact, I would argue that they are quite good at what they do. My critique is pitched at
important to examine which legal interventions have been pursued by LGB activists and what, precisely, constitutes the discursive terrain that has been produced as a function of this pursuit. In this Article, I seek to explore questions such as: how does law take up claims made by these collective actors and transform these claims in ways that may be both empowering and limiting? What sorts of justificatory narratives and claims about sexuality, the body, and desire are “put into discourse” as a result of the claims advanced by LGB activists? How do the claims and arguments offered in response by countermovement organizations divert, contextualize, and/or transform these discursive objects? In short, how does this set of processes produce a specific regime of sexual truth?

The inquiry is made somewhat less complex by the fact that there appears to be a high degree of consistency across the agendas of most national- and state-level LGB community and movement organizations. A review of the websites of the Human Rights Campaign, the National Gay and Lesbian Task Force, the ACLU’s Lesbian, Gay, Bisexual, and Transgender Project, the National Center for Lesbian Rights, and Lambda Legal, for example, demonstrates that each is working on most or all of the same issues: same-sex marriage, hate crime legislation, workplace discrimination, healthcare and/or HIV treatment and prevention, transgender rights, parenting, protection of LGB youth and elders, immigration, and the status of LGB people serving in the military.10

While most of these issues reside primarily in civil law, one—hate crime legislation—directly and notably implicates the criminal justice

a broader level of analysis. As should become clear, I question the wisdom of pursuing legalistic strategies in the first place—particularly where the objectives are primarily expressive in nature. And I do so through an examination of the unintended (and often unmarked) discursive effects that flow inevitably from law as a set of specific institutional practices.

system. As such, it is contested on a different juridical field—one marked by a specific set of jurisprudential rules and a more demanding set of justificatory burdens than the field of civil litigation. These features render the pursuit of anti-hate crime legislation more than just a particularly important part of the LGB legislative agenda; they also serve to produce particularly vexing discursive effects with respect to the predictive binary matrix of sex, gender, and the body. In positing a conception of desire that depends discursively upon its "inverse" (animus), and which must be proven through an evidentiary inquiry that begins and ends with categorical identity distinctions, anti-gay hate crime legislation is an especially troubling socio-legal construct. It thus warrants particularly close scrutiny.

This Article proceeds as follows. In Part II, I catalog the history of anti-gay hate crime laws in the United States, describing the rapid spread of state-level laws extending race- and religion-based hate crime laws to LGB people. I also provide an overview of federal legislation addressing anti-gay hate crime. In Part III, I examine the policy environment within which anti-gay hate crime laws have been, and continue to be, considered. Specifically, I analyze the jurisprudential frameworks that shape, define, and constrain discourses of equality, rights, and social identity. I argue that the policy environment of anti-gay hate crime law has created a set of intractable discursive problems for advocates of anti-gay hate crime laws. Such laws' emphasis upon status categories in defining the harm, and the causation scheme implicated by hate crime tracking mechanisms and sentence enhancements, serves to undermine LGB discourses of equality and sexual freedom, and reinscribes binary conceptions of sex, gender, and embodied desire. In Part IV, I unpack the justificatory discourses embedded within the drive to enact and extend anti-gay hate crime laws. I demonstrate that utilitarian, expressivist, and retributivist discourses circulate in troubling ways throughout the anti-gay hate crime debate. Such justificatory narratives betray a fundamental ambivalence about the nature of sexuality, identity, and desire and, as a result, open the door to juridical investigations into, and evaluations of, different manifestations of passion. I argue in Part V

11. Of course, the fight to repeal sodomy laws—the criminalization of gayness per se—was, until very recently, at the top of many of these organizations' agendas. With the issuance of the U.S. Supreme Court's opinion in Lawrence v. Texas, 539 U.S. 558 (2003), however, that battle has (at least for now) been won.

12. A policy environment consists of the discourses, actors, and institutional processes that emerge from preexisting social and legal policies and which constitute the terrain upon which subsequent policies may be considered and acted upon. See generally Yvonne Zylan, Maternalism Redefined: Gender, the State, and the Politics of Day Care, 1945–62, 14 Gender & Soc'y 608 (2000).
that sexual progressives ought to be suspicious of such investigations in part because they create the discursive space within which anti-gay discourses—such as that which authorizes the so-called "homosexual panic defense"—flourish. I conclude the Article in Part VI by considering the implications of my analysis of anti-gay hate crime laws for LGB advocacy generally.

Before proceeding to the substance of my argument, I should explain my use of the phrase LGB in lieu of the more common LGBT throughout this Article. My exclusion of transgendered people from this discussion is neither accidental nor meant as a political slight. The political dimensions of transgendered identity are, to my mind, distinguishable from those associated with gay and lesbian identity in at least one sense important for my argument. That is, the asserted relationship between biological imperatives and social strictures operates in an almost perfectly inverse fashion for each group: whereas many transgendered people claim they are engaged in a struggle to bring their external, material selves into conformity with their internally fixed genders, the dominant narrative of gay and lesbian identity contends that gayness evinces an unmooring of sexual attraction from the strictures of gender determinism.\(^\text{13}\) Desire, in the gay/lesbian identity narrative, rebels against the rules set out by a gender dimorphic culture.\(^\text{14}\) In the transgendered identity narrative, desire operates with studied reference to such rules. This difference is consequential, for reasons that will become clear as I proceed.

II. THE SHORT (BUT BUSY) HISTORY OF ANTI-GAY HATE CRIME LEGISLATION

Hate crime legislation is a legal instrument of relatively recent vintage, and it is only since the early 1990s that state and federal jurisdictions have enacted laws that specifically target crimes committed

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14. Zylan, supra note 5, ch. 3. See generally Judith Butler, Gender Trouble: Feminism and the Subversion of Identity (1st ed. 1990) (articulating a performative theory of sex, gender and the body and de-naturalizing the connections between them); cf. Leo Bersani, Homos 3–7, 55–64 (1995) (critiquing post-identitarian claims such as Butler's as insufficiently attentive to sexuality and the body, but embracing a notion of a specifically gay desire that is a "cultural achievement").
out of “bias” or “hatred” toward gay, lesbian, and bisexual people.\footnote{15} However, once it began, the pace of adoption of anti-gay hate crime legislation was impressive; currently 31 states and the District of Columbia have some sort of anti-gay hate crime statute on the books.\footnote{17}

\begin{itemize}
\item \textbf{15.} James B. Jacobs & Kimberly Potter, Hate Crimes: Criminal Law and Identity Politics 29–44 (2000); Valerie Jenness & Ryken Grattet, Making Hate a Crime: From Social Movement to Law Enforcement 20–32 (2004). The specific language of these statutes varies considerably. Some emphasize victim selection on the basis of sexual orientation, while others refer explicitly to commission of the crime "because of" the victim's sexual orientation. Several scholars have attempted to develop meaningful conceptual schemes to help make sense of these variations. See generally Hate Crimes: Confronting Violence Against Lesbians and Gay Men (Gregory M. Herek & Keven T. Berrill eds.) (1992) [hereinafter Hate Crimes: Confronting Violence]; Jacobs & Potter, supra note 15; Valerie Jenness & Kendal Broad, Hate Crimes: New Social Movements and the Politics of Violence 36–46 (1997). While these differences are important in many respects, it is also true that, regardless of whether the emphasis is on the motivation behind victim selection or the motivation behind the underlying crime itself, all such statutes invite an inquiry into what I will refer to broadly as “causation.” I have elsewhere addressed the “discriminatory selection” variant of causation requirement, finding that similar dynamics prevail. Yvonne Zylan, Finding the Sex in Sexual Harassment: How Title VII and Tort Schemes Miss the Point of Same-Sex Hostile Environment Harassment, 39 Mich. J. L. Reform 391, 404–12 (2006).
\item \textbf{16.} The phrasing here is grammatically awkward. “Anti-gay hate crime law” could mean a hate crime law that is anti-gay, or a law that prohibits anti-gay hate crimes. I mean the latter when I use the phrase here, echoing the usage that has become conventional among scholars and activists.
\item \textbf{17.} Nat’l Gay & Lesbian Task Force, Hate Crime Laws in the United States (July 2008), http://www.thetaskforce.org/downloads/reports/issue_maps/hate_crimes_7_08_color.pdf. How, why, and when states enact anti-gay hate crime laws is an important and intriguing research question in itself. See, for example, Jenness & Grattet, supra note 15, who argue that the process results from social movement activism responding to the increased, or perceived increase, in incidents of anti-gay hate crime and that hate crime laws diffuse mimetically—that is, that the enactment of hate crime laws follows a pattern of isomorphic diffusion across spatially proximate jurisdictions. Diffusion does appear to be at work in accelerating the passage of anti-gay hate crime laws during the 1990s. However, in their analysis of the enactment of all forms of criminal hate crime laws (not just those including sexual orientation as a protected classification), Soule and Earl find evidence of a more complex, heteromorphic process of diffusion, and identify several intrastate factors of importance as well (including partisanship, per capita income, and a jurisdiction’s overall innovativeness). See Sarah A. Soule & Jennifer Earl, The Enactment of State-Level Hate Crime Law in the United States: Intrastate and Interstate Factors, 44 Soc. Persp. 281, 297–300 (2001). Soule and Earl contend that criminal hate crime laws—while diffusing rapidly—nonetheless demonstrate a complex pattern of adoption, where states in the same region may actually be less likely to adopt criminal hate crime laws where a region-mate has already done so. Id. Indeed, there is evidence that the relative publicity associated with passage of hate crime laws may have led some jurisdictions to resist adopting criminal hate crime laws—particularly where they had already adopted civil hate crime laws or tracking laws. Id.
\end{itemize}
Such laws vary considerably across jurisdictions, but those which modify the criminal law typically do one or more of the following things: (a) create tracking mechanisms designed to collect data on incidents of anti-gay hate crime; (b) create special enforcement mechanisms, such as vesting jurisdiction over anti-gay hate crimes in federal law enforcement authorities; and/or (c) mandate enhanced criminal sanctions beyond those which would be imposed for similar crimes committed without the attendant bias or hatred. These different mechanisms require different kinds and levels of state intervention into social and institutional relationships, as well as different levels of resources expended in the effort to combat anti-gay crime. Tracking mechanisms, for example, require little institutional innovation. Federal law enforcement is simply directed to collect data from local law enforcement, and the federal government expends few resources in assisting local authorities in improving their own data collection efforts. The FBI provides some guidance to local law enforcement in how to determine whether crimes ought to be characterized as hate-motivated or not, but its guidelines are broad, non-specific, and necessarily delegate the lion's share of discretionary judgment to the officers on the street.

Sentence enhancements, on the other hand, intervene deeply in local law enforcement institutions. Particularly where enhancements are mandatory and of general application (i.e., where they require additional

18. There are civil laws authorizing suits for damages against perpetrators of hate crimes in many jurisdictions, as well. Soule & Earl, supra note 17, at 283-84.
20. This is what the most recent legislation—known as the Matthew Shepard Act—would have done. See, e.g., Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. (2007); CONG. REC. S 1105 (daily ed. Apr. 12, 2007), S4437 (introduced); CONG. REC. H2743 (daily ed. March 20, 2007) (introduced). The bill was passed as a stand-alone measure by the House in 2007, and was passed as an amendment to a defense spending bill later that same year. Resistance was organized to the amendment however, and it was ultimately stripped from the spending bill. See Anne Flaherty, Congress Drops Legislation to Cover Gays in Hate Crimes, ASSOCIATED PRESS, as reprinted in CHI. TRIB., Dec. 7, 2007, at 14; Human Rights Campaign, The Local Law Enforcement Hate Crimes Prevention Act / Matthew Shepard Act, http://www.hrc.org/laws_and_elections/5660.htm (last visited Feb. 19, 2009).
penalties upon a finding of hate/bias crime liability for *any* crime),\(^24\) the enactment of hate crime sentencing laws can dramatically alter the practices of police officers, prosecutors, defense attorneys, and courts.\(^25\) Needless to say, the introduction of such laws is also likely to have a dramatic impact on victims and defendants.

Because it might lead to prosecution of some alleged anti-gay hate crimes that would otherwise be ignored by local law enforcement, the extension of federal jurisdiction over hate crime investigation and prosecution probably occupies a middle ground: more interventionist than tracking mechanisms, but less interventionist than sentence enhancements. The most recent congressional bill proposing such a measure—the Local Law Enforcement Hate Crime Prevention Act (the “Matthew Shepard Act”)\(^26\)—would have allowed the Justice Department to assist local law enforcement in investigating and/or prosecuting an alleged hate crime, but would not have required it.\(^27\) The bill also promised some amount of resource distribution to local law enforcement for training and/or investigation,\(^28\) although it would likely not have been enough to dramatically alter the existing practices of local authorities.

Despite these differences in levels of interventionism, however, each of these approaches raises significant political, jurisprudential, and normative questions. This is because anti-gay hate crime laws, in invoking the power of the criminal justice system, require a particularly sturdy defense. Application of the criminal law to punish wrongdoing must be well justified because such punishment involves the deployment of the coercive, and often violent, power of the state against its citizens.\(^29\) In a Habermasian sense, the application of the criminal law raises particularly

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25. See Kevin T. Berrill & Gregory M. Herek, *Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy*, in *Hate Crimes: Confronting Violence*, *supra* note 15, at 289, 289–99. As Jenness and Grattet demonstrate, there is wide variation among hate crime statutes with respect to how sentence enhancements are determined and applied, as well as to which crimes they may attach. *See Jenness & Grattet, supra* note 15, at 73–101.
27. I do not wish to understate the significance of the proposed legislation. Because criminal law is understood to be one of the core areas reserved to the jurisdiction of the states, any effort to modify jurisdiction in this way represents a significant departure.
challenging legitimation problems for the state because it signals an especially traumatic and violent incursion into the life-world.30

Because sentence enhancements pose particularly vexing questions of legitimacy, they have been the focus of much of the extensive scholarly and political work undertaken in support of hate crimes legislation.31 As a result, such arguments constitute the heart of the discursive field produced in and around the legal definition of anti-gay hatred. If we examine closely the arguments advanced by scholars, cause lawyers,32 and SMOs in seeking to justify the institutional commitment to tracking and meting out enhanced punishment for anti-gay hate crimes, however, we see that the justifications proffered in support of anti-gay hate crime sentence enhancements intersect in troubling ways with existing discourses of sexuality, identity, and equality.

The perilous contours of anti-gay hate crime discourse result, in part, from the mixed quality of most criminal law discourse in the United States—taking, as it does, an approach that pulls together elements of retributivism, utilitarianism, and expressivism (with just a hint of rehabilitationism).33 But they are also the product of the bracketing functions produced by the doctrinal environment within which identity claims are processed by American law—in particular the environment constructed by Fourteenth Amendment jurisprudence. As a consequence, claims made about the nature of anti-gay hate crime cohabit uneasily with existing discursive constructions of gayness as a source of social identity. These tensions are brought into sharp relief by the so-called “homosexual panic” defense, which is frequently raised to counter allegations of anti-gay criminal conduct.34 As I describe below, the homosexual panic defense plays on the unsettled nature of the claims leveraged by LGB advocates on behalf of recognizing gayness as a distinct and honorable source of identity. In so doing, it points toward a

30. See Habermas, supra note 7, at 25–27.
32. See generally Cause Lawyering: Political Commitments and Professional Responsibilities (Austin Sarat & Stuart A. Scheingold eds., 1998).
33. For retributivist, expressivist, and utilitarian justifications for criminal punishment, see generally Foundations of Criminal Law (Leo Katz et al. eds., 1999).
34. See In re M.S., 896 P.2d 1365, 1369 n.1 (Cal. 1995).
worrying consequence of the mechanism of hate crime punishment: in defining "hatred" in a legally meaningful fashion, hate crime laws may serve to reinscribe the very social dynamics that create the impetus for such crimes in the first place.

III. The Policy Environment of Anti-Gay Hate Crime Legislation

As Valerie Jenness and Ryken Grattet have persuasively demonstrated, the history of anti-gay hate crime legislation is best characterized as a story of the political and legal construction of a social problem.\(^3\) That is, while there is evidence that LGB people have been the objects of violence and intimidation for at least as long as recorded LGB history, it is only very recently that the law and public policy have identified something one could call "anti-gay violence." According to Jenness and Grattet, it was the confluence of the civil rights, victims' rights, and LGB rights movements in the 1960s–80s that created the discursive and cultural conditions within which anti-gay hate crime could be identified as such, and a movement to combat anti-gay hate crime could emerge and seek policy changes at the state and federal level.\(^3\) By 1990, these efforts had achieved what most scholars and activists count as a significant victory: inclusion of LGB people as a protected group under the newly enacted Hate Crime Statistics Act.\(^3\)

The inclusion of gay people did not come without a fight, however, and the content of that legislative battle begins to suggest how the justificatory claims advanced in support of anti-gay hate crime legislation have created certain discursive formations that should be disconcerting to advocates of LGB equality. Conservatives in both houses of Congress hotly contested the inclusion of "sexual orientation" in the pending Hate Crime Statistics Bill.\(^3\) Some argued that requiring the tracking of anti-gay violence would increase the cost of the measure.\(^3\) Others, however, had jurisprudence (of a sort) on their minds. According to Jenness and Grattet, "the primary objection to the inclusion of sexual orientation in the [Hate Crimes Statistics Act (HCSA)] was that the federal government should not provide gays and lesbians with 'special rights'
and that to do so would render violence against gays and lesbians equivalent to violence against racial, ethnic, and religious minorities.\(^40\)

The invocation of the phrase "special rights" is significant here, as are two key amendments of the bill: one which replaced the phrase "sexual orientation" with the phrase "homosexuality or heterosexuality" and a second which created a new section of the bill designed to expressly preclude an interpretation of the HCSA that would extend antidiscrimination protection to LGB people.\(^41\) A third amendment—which added a conspicuous and graceless provision reinforcing the Congress' belief that "the [sic] American family life is the foundation of American society" and, "[n]othing in this Act shall be construed . . . to promote or encourage homosexuality"\(^42\)—presaged efforts to proactively limit the extension of the state's recognition of LGB people from becoming its recognition of LGB relationships.\(^43\)

On the surface, one might view these amendments and rhetorical strategies as simply the tried and true methods of cultural conservatives seeking to derail any legislation designed to advance the status of LGB people, or as incidental measures that left the key component of the bill—its application to anti-gay hate crime—intact.\(^44\) Certainly, one Congressman's complaint that the phrase "sexual orientation" was an "ambiguous" protected classification that might require the FBI to track

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40. Id.
41. Various statutory construction provisions were added to the bill along the way, beginning with "Nothing in this Act creates a right for an individual to bring an action complaining of discrimination based on homosexuality." H.R. 1048, 101st Cong. § 2(b) (1989) (as passed by House, June 27, 1989), 135 Cong. Rec. 13,541 (1989). The provision ultimately took the following form:

> Nothing in this section creates a cause of action or a right to bring an action, including an action based on discrimination due to sexual orientation. As used in this section, the term ‘sexual orientation’ means consensual homosexuality or heterosexuality. This subsection does not limit any existing cause of action or right to bring an action, including any action under the Administrative Procedure Act or the All Writs Act.

43. It is worth noting here the seemingly ubiquitous tethering of all things gay to the specter of same-sex marriage in contemporary sexual politics.
44. Jenness and Grattet appear to adhere to this latter interpretation, stating, "In the end, discursive moves that expand the domain of the law in ways that are fundamentally consistent with the qualities and characteristics of previously recognized legal subjects or previously legitimated and institutionalized legal terrain proved successful, in both the immediate and subsequent legislative efforts." Jenness & Grattet, supra note 15, at 62.
hate crimes perpetrated against "child molesters" was grounded not in any reasonable theory of statutory interpretation but, rather, in a familiar kind of old school anti-gay rhetoric. Yet approaching the issue in this way precludes an examination of why this particular strategy was deployed and why it was at least partly successful. The two statutory amendments, as well as the legislative record—while leaving LGB people in the catalog of those against whom hate crimes would be recognized and tracked via the HCSA—signaled the emergence of several discursive inconsistencies and difficulties.

A. The Discursive Environment of Anti-gay Hate Crime Laws: Equal Protection Analysis, Title VII, and "Special Rights"

To understand why this is so, it is necessary to take a brief detour through the Fourteenth Amendment's Equal Protection Clause and the Civil Rights Act of 1964—two provisions that were frequently invoked and conflated by opponents of the inclusion of "sexual orientation" in the HCSA and which, in any event, make up the crucial dimensions of the discursive and institutional environment within which LGB legal activism was operating in the 1990s.

The Fourteenth Amendment—which guarantees protection of the "privileges and immunities" of citizenship, and mandates the "equal protection of the laws" and "due process of law"—is one of three constitutional amendments that was passed in the immediate aftermath of the Civil War. Along with the Thirteenth Amendment (which abolished slavery) and the Fifteenth Amendment (which guaranteed voting rights to all Americans, regardless of race), the Fourteenth Amendment was enacted to rectify the most expressly racist dimensions of the Constitution—those that authorized slavery, identified black Americans as not fully human, and restricted the right to vote to white Americans. Yet the language of the Amendments—particularly the Fourteenth—is

46. The rhetorical equation of gay sexuality and bestiality appears, thankfully, to be on the decline. Indeed, in a 2004 interview, Reverend Jerry Falwell—prominent Evangelical Christian minister, fervent opponent of gay rights and a big fan of the "if gay rights now, whither bestiality?" rhetorical parry—felt compelled to deny his own previous efforts to equate homosexuality with bestiality. See Posting to Media Matters of America's County Fair blog, Falwell Denied His Habit of Comparing Homosexuality to Bestiality, Crack Addiction, http://mediamatters.org/items/200411080004 (Nov. 8, 2004, 13:13 EST).
characteristically broad and subject to varying interpretations, leaving scholars, jurists, and activists plenty to work with as they attempt to establish (or deny) constitutional grounds for combating many different forms of social inequality. 48

For our purposes, one question that has long plagued the federal courts is especially critical: given its provenance, ought the Fourteenth Amendment’s Equal Protection Clause be interpreted to apply only to state practices that implicate racial classifications, or should it be given a broader application, given the plain, expansive language of the text? 49 Different rules and standards governing Equal Protection analysis have evolved over time, but it is now well established that race occupies a special place in Equal Protection jurisprudence. 50 As a general matter, racial classifications provoke the strictest scrutiny by the courts as they determine whether a given state action comports with the Equal Protection

48. A prior question in all of the debates that arise around the Reconstruction Amendments (and most, if not all, constitutional issues) is just how broad, ambiguous, and/or subject to interpretation the language of the text really is. That question is entirely too enormous to cover here, and is in any case beside the point. Whether one adopts an originalist textualist position (such as the kind espoused by Justice Antonin Scalia, see generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1998)), or a more consequentialist view (such as that advanced by Justice Stephen Breyer, see generally STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION (2005), or, even more so, by political theorist Sotirios Barber, see generally SOTIRIUS A. BARBER, WELFARE AND THE CONSTITUTION (2003)), there is interpretive work that must be done in any Fourteenth Amendment case that comes before the Court. For example, one cannot make sense of the phrase “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws,” U.S. CONST. amend. XIV, § 1, without some prior conception of what “equal” means—in a metaphysical, political, social, and/or material sense. Surely, not every law must treat every person the same—how, then, to justify the tax code? Or laws that regulate the conduct of doctors and lawyers and pharmacists in ways that average citizens are not regulated? The Constitution does not contain an appendix of definitions of words like “equal” to help courts and citizens identify the legally significant dimensions of equality. Thus, one must resort to some extratextual understanding of the word “equal” to make sense of the Fourteenth Amendment’s mandate. It is in this extratextual space that all the fun, nuance, and deadly serious and important work occurs.

49. FRIEDMAN, supra note 47, at 257–60.

50. See, e.g., Parents Involved in Cmty. Schs. vs. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); Adarand Constructors v. Pena, 515 U.S. 200 (1995); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Brown v. Bd. of Educ., 347 U.S. 483 (1954). How the Court conceives of race varies in these decisions. For example, the Court has struggled with the question of whether racial classifications that privilege non-whites over whites ought to be subject to the same level and kind of scrutiny as those that privilege whites over non-whites. In each case, however, the Court has reiterated its belief that racial classifications raise at least a prima facie equal protection issue.
guarantee of the Constitution. Most other social classifications—including gender, social class, and sexual identity—fail to provoke the same level of scrutiny by the courts. Still, those working to combat gender and sexual inequality have managed to obtain some (limited) traction in their efforts to ground legal challenges to sexist and anti-gay state practices in the Fourteenth Amendment’s Equal Protection guarantee. Indeed, during the early 1980s, many activists and legal scholars firmly believed that gender would soon be identified by the United States Supreme Court as a second suspect classification, on par with race as a legal category deserving the strictest scrutiny in cases alleging Equal Protection violations. They were wrong, as it turned out, but in 1990 (when the HCSA was being debated) the matter had not yet been entirely settled.

Arguably, one reason federal courts have struggled to formulate a coherent approach to Equal Protection analysis implicating questions of gender- and sexuality-based inequality (among others), is that running

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51. However, those statutory classifications that touch upon “fundamental rights” often do invite strict scrutiny—but this analysis is pursued under what has become known as the Court’s “substantive due process” jurisprudence, not Equal Protection analysis. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965); see also infra note 54.


53. See JANE J. MANSBRIDGE, WHY WE LOST THE ERA ch. 6 (1986).

54. Arguably, the nail in the coffin of strict judicial scrutiny of gender distinctions did not come until 1996, when the Court enunciated an intermediate standard of review for gender-based equal protection claims. See Virginia, 518 U.S. at 531–34; id. at 567–74 (Scalia, J., dissenting) (using the term “intermediate scrutiny”). But while equal protection strategies remained at least theoretically viable as of 1990, one legal strategy that did seem to be foreclosed to LGB advocates focused on the Fourteenth Amendment’s Due Process Clause. Some advocates of LGB equality had hoped to leverage the Court’s “substantive due process” jurisprudence—particularly its articulation of a right to privacy—to strike down anti-gay laws. Cases such as Roe v. Wade, Stanley v. Georgia, and Griswold v. Connecticut, seem to have established the Court’s recognition of a constitutionally protected zone of privacy, within which one could pursue one’s liberty interests without state interference. However, in 1986, the Court dashed these hopes when it held in Bowers v. Hardwick, 478 U.S. 186, 191 (1986), that there was no constitutional “right to engage in homosexual sodomy” and rejected a Fourteenth Amendment Due Process challenge to state sodomy statutes. The decision in Bowers makes clear the importance of issue framing in judicial opinions. Had the issue been framed as whether there was a constitutional right to sexual privacy (rather than sodomy), the Court’s desired outcome would have been quite difficult to square with the holdings of Griswold, Roe, and Stanley.

55. My interest here is in gender and sexuality, but clearly religion, socio-economic class, disability, and what is often termed “alienage” are among the other classifications that raise similarly difficult jurisprudential questions.
alongside the constitutional questions posed by social inequality are a series of statutory questions that echo similar themes. Partly in response to the Supreme Court's crabbed interpretation of the Reconstruction Amendments, and in the face of unprecedented racial unrest and social movement activism, in 1964 Congress passed, and President Lyndon Johnson signed, the 1964 Civil Rights Act: a landmark piece of legislation that became the cornerstone of American antidiscrimination law. At its inception, the Civil Rights Act was—like the Fourteenth Amendment before it—plainly focused on racial discrimination; other forms of social inequality had not yet been folded into the discourse of "civil rights." However, even as early as 1964, some well placed feminist state actors were prepared to claim that gender-based discrimination was analogous to racial discrimination and, accordingly, should also be prohibited by federal law. Whether as a result of clever lobbying and positioning by these state-based feminists, or because of an error in calculation by the white Southern Congressman who many believed introduced the Amendment in an effort to kill the entire bill, "sex" was included as a protected classification in Title VII (the employment nondiscrimination provision of the bill) when it emerged in its final version.

Despite its early inclusion, however, "sex" as a protected Title VII classification has long occupied an unsettled status. Courts that have found themselves readily capable of dismissing race-based classifications as being grounded in indefensible (or at least anachronistic) notions of race as a social, psychological, or biological category remain hesitant to dismiss all generalizations about gender as equally wrongheaded. And sexual orientation remains entirely excluded from protection under Title

56. See The Civil Rights Cases, 109 U.S. 3 (1883).
58. On the articulation of gender and sexual orientation-based civil rights discourses, see generally John D'Emilio, Sexual Politics, Sexual Communities (1983); Sara Evans, Personal Politics: The Roots of Women’s Liberation in the Civil Rights Movement and the New Left (1980); Lawrence M. Friedman, Total Justice ch. 6 (1994); McAdam, supra note 57, ch. 3.
60. Harrison, supra note 59, at 176–79.
VII, although it is listed as a protected classification in many state-level antidiscrimination laws modeled on Title VII.

At the heart of the reluctance of courts and legislatures to extend antidiscrimination protection to women and sexual minorities is the contested character of the notion of “equality” when applied to gender and sexuality. Where gender is concerned, the debate within American feminism over whether “equal” means “same” or, alternatively, “different, but equitable” is of long standing. Unpacked, this question spawns only more questions: what is the status of the body in shaping women’s political, social, and legal status? Do biological differences between men and women “matter” in a socio-legal sense? Should they? What does the law mean when it speaks of “gender” and “sex”? Are these the same meanings that operate politically or socially? Is gender an innate characteristic, or is it something that is achieved or enacted? Is “woman” an intelligible concept of political subjectivity? Each of these questions is, in a sense, prior to any Title VII gender discrimination inquiry, and yet one could, I think, fairly characterize the answers currently provided by case law (and theory) as either non-existent or, at best, provisional. While appearing to define “equality,” antidiscrimination case law brackets the most difficult and essential questions one ought to answer—or at least pose—in order to produce an intelligible definition of the term.

Where sexuality is concerned, the troubles only deepen and multiply. Is sexuality a status (like race, like gender), or is it a quality of conduct? In other words, is it what you are, or what you do? If it is conduct, then it begins to look a lot less like the legal conceptions of race


65. The question has plagued First, Second, and even Third Wave feminists. See generally, Harrison, supra note 59; Catharine A. MacKinnon, Toward a Feminist Theory of the State (1989); To Be Real: Telling the Truth and Changing the Face of Feminism (Rebecca Walker ed., 1995).

66. See generally Janet Halley, Split Decisions: How and Why to Take a Break from Feminism (2006) (arguing for a consideration of “sex” as a legal and social concept that is not reducible to “gender”); MacKinnon, supra note 65 (arguing that sex, sexuality, and gender are legally and socially co-constitutive).


68. See generally Butler, supra note 14; Denise Riley, Am I That Name? Feminism and the Category of “Women” in History (1988).

69. See generally Zylan, supra note 15.
and sex embedded in Equal Protection and Title VII doctrines. But if it is a character of the self, or of the body, then sexuality still faces the difficulty that it must (unlike race and sex in most instances) be disclosed in some way to ever become the basis of discrimination (and litigation). In that case, sexuality becomes something much closer to conduct. If so, is it expressive conduct? Or is it private conduct, like watching dirty 8 millimeter movies in the quietude of your own home or opting for contraception in the marriage bed? Must it then remain private to be free of government regulation?

Each of these is a question addressed by activists and social theorists, but each is, again, largely bracketed by the Equal Protection/Title VII institutional and discursive framework. Instead, the questions are posed in particular ways—and particular answers begin to suggest themselves—because Equal Protection analysis and Title VII structure how advocates may frame their justificatory arguments. In the debate on the

70. Let me be clear that I am referring only to these doctrinal notions of race and sex. I believe that race and sex are no less performative than sexuality. However, their standing as forms of legal status—that is, as characteristics of legal personhood—is, by now, much more firmly established than that of sexual identity.

71. It should be noted that "disclosure" is a complicated social process. Coming out can be intentional and celebratory, but it can just as easily be accidental and often traumatic. Moreover, one can come out without consciously doing anything at all—indeed, even while taking great care to conceal one's gay identity. Cf. Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991) (denying summary judgment for defendant principal when he allegedly refused to hire plaintiff, a married teacher, based on his perceived 'homosexual tendencies'), rev'd, 976 F.2d 623 (10th Cir. 1992), cert. denied, 508 U.S. 952 (1993).

72. This reasoning permits the articulation of policy positions such as those of the Catholic Church (hate the sin, love the sinner) and the United States Military ("Don't Ask, Don't Tell"). See 10 U.S.C. § 654 (2008).


75. Jenness and Grattet make a similar argument using the language of Cress and Snow's framing analysis:

[O]rganizers and advocates construct frames, but they do not invent them anew. On the contrary, activists and advocates necessarily relate their goals and programs to extant meanings; thus they are simultaneously consumers and producers of cultural meaning. Institutionalized collective action frames constitute the raw material(s) from which comparatively new collective action frames are built, but not always with the same neighborhood in mind.

HCSA, advocates and opponents contested the inclusion of the phrase "sexual orientation" precisely because the status of LGB identity as a status was in play. This contest can be broken down into two sub-inquiries. First, is LGB identity the sort of social phenomenon that, like race and gender, ought to serve as the basis of a legal definition that sorts out invidious discrimination? That is, is discriminating on the basis of sexual orientation analogous to discriminating on the basis of gender or race and, therefore, "bad" in a way justifying state efforts at redress? If so, then LGB activists were merely seeking "equal" rights under the law. But if there was some difference between sexual orientation and race/gender that made LGB identity something other than, or more than, a status category, then discrimination might not always be invidious. In that case, LGB activists were seeking not equal but "special" rights.  

The second sub-inquiry concerned the implications for Title VII of codifying LGB identity as a protected status category in the HCSA. As noted above, Title VII did not then, and does not now, include protection for LGB people at the federal level. Time and again, federal courts have looked to the absence of such protection as an indication that Congress affirmatively refuses to extend nondiscrimination protection to LGB people. Thus, Title VII is important in sexuality jurisprudence beyond its own four statutory corners; courts consistently look to the failure of Congress to amend Title VII as evidence of its unwillingness to include sexual orientation generally as a basis upon which to confer legal protection. Consequently, congressional conservatives vigorously resisted any suggestion that the inclusion of "sexual orientation" in the list of HCSA protected categories would alter that state of affairs.

B. Contesting and Defining the Status of One's Status: The Congressional Debate Over the Hate Crimes Statistics Act

Having examined the doctrinal policy environment within which the HCSA was produced, it is now possible to see how and why: (a) the phrase "sexual orientation" was replaced with "homosexuality or
heterosexuality”; and (b) Congress added a new section to the bill expressly establishing that it not be interpreted as creating a right for LGB people to bring nondiscrimination actions on the basis of sexual orientation. In the earliest manifestation of their opposition to the inclusion of LGB people in the HCSA, dissenters to the House report to the Committee of the Whole House which recommended passage of the bill claimed there was no “federal nexus” justifying inclusion of sexual orientation as a protected category because “[t]here is no mention of homosexual rights in the Constitution.”78 Including LGB people would, therefore, raise their status vis-à-vis other would-be claimants, including “women, the elderly, members of the police or passengers on urban mass transit.”79 In short, it would give them “special rights.”80 Congressman William Dannemeyer put the point bluntly: the gay community, he argued, was trying (apparently with the help of the American Psychiatric Association) to create a “rational basis on which to suggest we should change the laws of the culture of our society so that we will accept and equate homosexuality with heterosexuality.”81 Dannemeyer objected “in a very firm way to an effort . . . [to] elevate sexual preference, whether you call it heterosexuality or homosexuality, on the same basis as race, color, religion, or natural [sic] origin.”82 Congressman Gekas also worried that the inclusion of sexual orientation would “raise[] [LGB people] to the same level of constitutionally protected classes of people.”83

Although Dannemeyer and Gekas invoked the language of constitutional status, much of the stated opposition to the bill seemed to confuse constitutional status with statutory status under the Civil Rights Act of 1964. Dannemeyer claimed that including sexual orientation in the

79. Id.
82. Id.
83. 136 CONG. REC. 6330 (1990).
HCSA would elevate homosexuality’s legal status—perhaps even to constitutional standing—because it would “change the basic definition of the 1964 Civil Rights Act to include a new status that would have the dignity of being within the proscription of that act.”

Congressman Gerry Studds responded with an empirical claim that the categories included in the bill made sense simply because “these are the principal categories of such acts based on hate.” For Studds, it was not members of Congress, but perpetrators of hate crimes, who were analogizing between race, gender, and sexual orientation. Congressman Green sought to redefine the expressive content of the legislation to emphasize its focus on hatred and violence rather than sexuality and civil status by contending that “[i]rrespective of one’s views on civil rights protections, it is critical that Congress take a stand against hate violence.”

By changing the phrasing from “sexual orientation” (a status) to “homo-sexuality or heterosexuality” (a form of conduct), some proponents argued the amended bill would signify the Congress’ opposition to anti-gay crime, while saying nothing about whether or not it endorsed a particular “lifestyle” and making plain that it did not intend to alter Title VII in any way. Congresswoman Boxer went further in seeking to attenuate the relationship between Title VII and the HCSA when she reminded her colleagues that “we are all God’s children.”

But not all God’s children enjoy protected legal status. And one critical method by which anti-gay hate crime law advocates sought to justify the location of sexual orientation in the catalog of protected categories in the HCSA was by invoking the discourse of sexuality as an innate human characteristic—like race, like gender.

Was this purely a strategic choice on the part of advocates? Probably not; the (false) opposition between “biology” and “choice” (which is frequently mapped onto the more social scientifically pleasing categories of “ascribed” and “achieved” statuses) resonates throughout LGB politics and activism. Either way, however, posing the issue in this way—while

85. Id. at 13,547 (statement of Rep. Studds).
86. Id. at 13,544–45 (statement of Rep. Green).
87. See 134 Cong. Rec. 11,404–07 (statements of various Representatives, debating the perfecting amendment offered by Rep. Miller).
89. JENNESS & GRATTE, supra note 15, at 61. See Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (“[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.”); see also FREIDMAN, supra note 58, at 107–10.
90. For example, in a 2007 debate between Democratic Presidential primary contenders about gay issues, much was made of Gov. Bill Richardson’s response to a question about whether sexuality is a “choice” or “biological.” See Rachel Sklar, LOGO Debate:
perhaps strategically useful in the short term and intuitively appealing to many LGB people—represents a discursive cul-de-sac with respect to anti-hate crime legislation.

This is because status-based arguments on behalf of LGB equality are necessarily tied to a binary construction of sexuality. That is, to determine one's “status” within this framework, courts and litigants must repair to static definitions of sexual identity. One either is or is not gay or lesbian and—by operation of the binary—if one is gay/lesbian, then one is not heterosexual. This seems an unremarkable, unobjectionable, and frankly functional approach to take in one's daily encounters with sexual identity. As we shall see, however, within the context of anti-gay hate crime legislation, it raises intractable jurisprudential problems associated with such laws' embedded notions of causation and mens rea.

IV. Passion, Desire, and the Problematics of Identity: Justifying and Defining Anti-Gay Hate Crime Laws

As important as the Congressional debate over enacting hate crime tracking laws was, it permitted only a first order set of justificatory arguments. That is, the debate over including sexual orientation in the HCSA was directed at the basic question of whether the state ought to recognize (and try to measure) the existence of anti-gay hate crime. This was an important (and probably necessary) first step for the anti-gay

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92. It is equally unpromising when applied to same-sex sexual harassment law. See Zylan, supra note 15, passim.

hate crime movement, but it failed to touch upon the deeper, more specific, and much more difficult issues raised by the codification of anti-gay hate crime sentence enhancement laws. What is anti-gay hate crime, exactly? What legal mechanisms are implicated in an effort to define and establish the terms of proof for this new category of crime? How does one justify treating this particular kind of crime differently—indeed, more harshly—than other kinds of crime? Anti-gay hate crimes seem worse, but why? And are they? More to the point, can anti-gay hate crime law advocates make the case that they are, without rendering incoherent the premises upon which the project for LGB equality is based?

Answers to these questions present and suggest themselves in a now expansive literature seeking to justify and define the operation of hate crime legislation. As noted earlier, for reasons both moral and political, criminal punishments must be justified in some way; if we are going to deprive someone of his or her liberty (and, in the case of capital crimes, his or her life), we have to demonstrate a compelling reason to do so. Justifications for criminal sanctions tend to fall into three broad categories: retributivist accounts (which assert that punishment is just to the extent that it is deserved by the offender as a result of his or her culpable conduct), utilitarian accounts (which assert that punishment is just if the benefits it provides to a society outweigh the costs incurred by imposing it—often described in terms of whether there is a sufficient “deterrent” effect), and expressivist accounts (which assert that punishment is just if it serves an important symbolic purpose in expressing society’s condemnation of the conduct at issue).

Advocates of anti-gay hate crime laws resort to each of these kinds of arguments, though retributivist and expressivist arguments are most prominent. For example, the Human Rights Campaign contends that hate crimes should be punished specially because they are more harmful than other crimes:

All violent crimes are reprehensible. But the damage done by hate crimes cannot be measured solely in terms of physical injury or dollars and cents. Hate crimes rend the fabric of our society and fragment communities because they target a whole group and not just the individual victim. Hate crimes are committed to cause fear to a whole community. A violent hate

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95. See Foundations of Criminal Law, supra note 33, chs. 2.1–2.4.
96. This includes both general deterrence (aggregate deterrence of crime in the population) and specific deterrence (“incapacitation” of the offender).
crime is intended to "send a message" that an individual and "their kind" will not be tolerated, many times leaving the victim and others in their group feeling isolated, vulnerable and unprotected.  

The National Gay and Lesbian Task Force echoes this theme of terroristic harm generated by anti-gay hate crime, and adds the expressivist claim that hate crime laws "send a message that certain crimes that strike at this country's core values, such as the freedom to live free of persecution, will be punished and deterred by both enhanced penalties and federal involvement in the investigation and prosecution of the crime."  

Whether they rely upon utilitarian, expressivist, or retributivist rationales, however, the justificatory claims offered in support of anti-hate crime laws produce troubling discursive consequences for advocates of LGB equality. The intersection of hate crime discourse and LGB identity discourse produces a sexual truth regime— that is, as a particular bodily experience that is produced at the boundary marking off fixed sexual categories. This fictive construction of animus in turn defines a fictive construction of desire (as its antithesis). As a result, desire is positioned as the disciplinary outcome of a legal mechanism of prohibition. Simply put, in the truth regime produced by hate crime jurisprudence, we understand sexual desire primarily by what it may not be: the transgression of sexual status categories.  

Whether they sound in utilitarianism, retributivism, expressivism or some combination of the three, justificatory claims concerning hate crime laws are primarily normative claims; that is, they establish arguments explaining why hate crime laws ought (or ought not) to exist as distinct instruments of punishment. However, in making such normative arguments, advocates and opponents of hate crime legislation also deploy and instantiate certain empirical and ontological claims about  

99. Because much of the normative heavy lifting on behalf of hate crime legislation is not specifically addressed to anti-gay hate crime laws, in the following discussion I will refine the logic of existing claims about hate crime laws generally so that they are tailored to anti-gay hate crime sentence enhancements specifically.  
the nature of sexuality, animus, desire, identity, and the nature of the criminal law (among other things). I take no position on which of the justificatory claims I discuss below is or is not persuasive in a normative sense. Instead, I examine these claims in order to unpack the empirical and ontological assertions that serve to ground hate crime legislation’s justificatory discourses. It is in this space, I contend, that law produces an account of sexuality that is both institutionally specific and polysemic.\footnote{On the institutional dimensions and polysemic quality of legal discourse, see Zylan, supra note 5, ch. 2.} Extant cultural and political discourses of desire, animus, fear, and identity are read into law as a kind of lay behavioral science, and as they circulate through the institutional processes of legalism they are reduced to a set of predictive and reconstructive maxims about sexual status and identity.\footnote{Id.} The complexity of desire and animus is thus sacrificed in favor of a set of evidentiary practices that make sense within law as a specific institutional location, but which, when exceeding the bounds of this location, inscribe an unduly limiting conception of sexuality upon the social body.\footnote{Zylan, supra note 5, chs. 2–3.}

A. Utilitarian Justifications

Utilitarian theories of punishment are consequential in nature. That is, they conceive of punishment as just so long as the consequences that it produces are, on balance, favorable for society as a whole. In short, utilitarians conceive of punishment as a social evil that must be outweighed by a social good (however defined).\footnote{See Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 158–59 (J.H. Burns & H.L.A. Hart eds., 1996) (1789).} Thus, a pure utilitarian approach to the criminal law would be indifferent to the intrinsic quality of punishment—that is, to whether or not it is deserved by the individual defendant as a result of his or her culpable conduct. As philosopher Michael Moore has suggested, this raises the specter of a discomfiting hypothetical: what if a host of social ills could be avoided through the punishment of a single innocent person?\footnote{Michael S. Moore, The Moral Worth of Retribution, in Responsibility, Character and the Emotions 179, 212–17 (Ferdinand Schoeman ed., digital ed. 1999) [hereinafter Moore in Responsibility]; Michael S. Moore, The Moral Worth of Retribution, in Foundations of Criminal Law, supra note 33, at 86, 86–97 [hereinafter Moore in Foundations].} One adopting a pure utilitarian approach should find such punishment just. Moore
contends that our intuitive sense that this would be morally wrong signals our fundamental (perhaps universal) allegiance to retributivism. 106

Whether or not this is true, however, a pure utilitarian approach is plainly incompatible with the institutional and political reality of the American criminal justice system. As a result, many contemporary utilitarian theories are best characterized as “mixed” theories, in which utilitarianism is tempered with retributivism as a limiting condition. 107 A punishment is just, on this view, if and only if: (a) the good it produces outweighs the evil that is produced by inflicting it; and (b) the target of punishment is deserving of at least some punishment. The addition of the limiting condition may (or may not) serve to rule out the most objectionable hypothetical punishments, but it does little to solve utilitarianism’s seemingly intractable measurement and definitional problems. For example, how does one define and measure a social “good”? In Bentham’s theory, utility is defined as “benefit, advantage, pleasure, good, or happiness” 108 and social utility is simply the aggregate of every person’s individual utility—in Bentham’s words, “the total happiness of the community.” 109 But what if some (or many) criminals derive a very high degree of satisfaction from committing crime, while their victims experience a comparatively lower level of “disutility” from being their targets? Should the criminal law be predicated on the notion that, on balance, this is a satisfactory state of affairs? This question suggests a key weakness of utilitarian justifications of criminal punishment: they are agnostic about what counts as a good to an individual (and, consequently, to society as a whole). 110 Like Moore’s hypothetical punishment of an innocent to benefit the many, this implication of utilitarianism does not sit well with our intuitive sense of justice. 111

On the other hand, utilitarian criminal law theorists’ focus on the deterrence of future crime does enjoy great intuitive appeal. 112 But deter-
rence is a complicated phenomenon in its own right and perhaps especially so when considered in the context of hate crime legislation. As a general matter, utilitarian theories rely on a kind of market model of deterrence predicated on the logic of rational decision-making. All other things being equal, such theories contend, the marginal utility gained by committing a crime will diminish in direct proportion to the severity of the criminal sanction one might expect to receive if caught committing it, multiplied by the risk of being caught and prosecuted. The econometric dimensions of this account are fairly plain; what is important to notice here is the cognitive rationality displayed by the erstwhile criminal. Deterrence requires several cognitive transactions. First, the would-be criminal must make an educated guess about the likely costs and benefits of a given criminal act. Next, s/he must make a rational calculation along the lines of: (benefits of crime) - (costs of crime * risk of imposition of costs). Finally, s/he must choose and carry out the course of action that rationally implements the result of this calculation. While it is possible that this series of rational cognitive steps might unfold as hypothesized, and might even do so more quickly than this description suggests (based on the embedded knowledge that each of us carries around with us about crime and the criminal law), this account, when offered as a justification for sentence enhancements, fundamentally conflicts with the discursively constructed archetypical hate crime.

As articulated by advocates of anti-gay hate crime legislation, hate crimes are—above all else—explosive manifestations of a particular emotion: hatred. While different jurisdictions have taken different positions on how much of the motivation behind a hate crime must be accounted for by hatred, one can say that—at a minimum—an anti-gay hate crime ought to be characterized to some degree by animus toward gay people and/or homosexuality. Because the underlying crimes


115. See, e.g., Press Release, Nat'l Ctr. for Lesbian Rights, Hate-Crime Assailant Pleads Guilty to Aggravated Battery Charges (Apr. 1, 2003) (on file with author) (describing beating of three men leaving a gay pride event as "a blatant display of hatred and violence").


117. This, too, is not necessarily an uncontroversial claim. Indeed, several scholars seem to embrace the notion that the existence of hatred may not be a necessary element of an anti-gay hate crime. See, e.g., Jenness & Grattet, supra note 15, at 110; Jordan B.
committed by the perpetrators of hate crime (assault, battery, rape, murder, etc.) are already punishable by the criminal law, the sentence enhancement that attaches to hate crimes must, according to a utilitarian justification, represent an additional punishment that increases the "cost" of committing such crimes and therefore serves as a deterrent. To be persuasive, the utilitarian justification must make a convincing case that hatred is subject to deterrence and that sentence enhancements are an effective mechanism for achieving such deterrence.

One need not adopt an overly mechanistic conception of emotion to find the hypothesized deterrent effect of anti-gay hate crime laws problematic. Certainly, it is not self-evident that emotions—unlike action-relative mental states—are susceptible to deterrence. Action-relative mental states (the traditional mens rea categories of intentionality, knowledge, recklessness, and negligence) arise directly out of the relationship between thought and action. Within the criminal law, culpability increases in direct proportion to the level of cognitive deliberation (the mens rea) that attends a given prohibited act (the actus reus). This framework makes sense within a utilitarian conception of deterrence; the culpability scale simply reflects levels of resistance to so-

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Woods, Taking The "Hate" Out Of Hate Crimes: Applying Unfair Advantage Theory To Justify The Enhanced Punishment Of Opportunistic Bias Crimes, 56 U.C.L.A. L. Rev. 489 (2008). From a social problems perspective on the construction of hate crime as a social phenomenon, this is a consistent position to take. However, it makes no sense to eliminate hate as an element from an account of hate crime legislation that focuses on its discursive dimensions.

118. See LAWRENCE, supra note 31, ch. 3; Hurd & Moore, supra note 3, at 1086.

119. Advocates also offer a version of this justification that focuses on the increased risk of being caught that may attend the enactment of laws expressly sanctioning anti-gay hate crime. They contend that passage of such laws increases society's overall awareness of the existence of anti-gay hate crime as well as the state's disapproval of it. As a result, law enforcement may be more likely to ferret out and prosecute anti-gay hate crimes, thus increasing the risk that one who commits such a crime would be caught (and increasing the relative "cost" of committing the crime). This justification does rely on a utilitarian logic, but it seems to me that it partakes more fundamentally of expressivism in that it makes sense only if the denunciation effect of law is taken into account. See infra Part IV.B., particularly text accompanying notes 140–148.

120. An analogous case might help demonstrate why this is so. Consider arguments and evidence concerning the deterrent effect of the death penalty on, for example, murder rates. The central question utilitarians must ask in such debates is not whether capital punishment reduces murder in a given jurisdiction. Rather, it is whether capital punishment reduces murder in the jurisdiction more effectively than other, lesser sanctions, do. Remember, for utilitarians, punishment itself is a social evil. Thus, imposing a greater punishment than is needed to deter the commission of crime would, on balance, produce a less than optimal level of social welfare. See THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 127–34 (Hugo A. Bedau ed., 1997).
cial and criminal prohibitions. A person who intentionally commits a crime fully understanding the consequences of his or her wrongful act will need a greater threat of punishment in the future to dissuade him or her from doing so again than will someone who merely negligently commits a crime (and who, it can be assumed, did not think as long about its consequences and, therefore, may not have given them adequate weight). Indeed, negligence is a contested basis for criminal liability precisely because a negligent actor is being held responsible for what s/he should have known (and acted upon), but did not. Knowledge and foresight form the backdrop within which the economic model of deterrence operates; deterrence presupposes a distance between thought and action within which one might interpose informed free will.

Emotions such as hatred, however, fit poorly (if at all) within the deterrence model. Even if, as legal scholar Martha Nussbaum contends, emotions are hardly devoid of cognition, they nonetheless appear rather resistant to the interposition of free will. In Nussbaum’s account, while emotions are not to be conceived as drives, reflexive actions, or “animal” instincts, the cognitive dimension of emotion is nonetheless distinguishable from the kind of thought that attends action-relative mental states. For Nussbaum, emotions and the thoughts that attend and inform them are essentially simultaneous. An emotion requires an “assent” to a “judgment,” and therefore embraces an “intentional” element. But this is a notion of intent quite different from the one that characterizes motivation:

Emotions, in short, are acknowledgements of our goals and of their status. It then remains to be seen what the world will let us do about them. Desires may all contain a perception of their object as a good; but not all perceptions of good give rise directly to action-guiding desires. This suggests that the tendency to explain actions in terms of two distinct sorts of items, beliefs or

121. It also coheres with retributivism. A person who thinks through the consequences of his or her wrongful actions and nonetheless proceeds with them is more deserving of punishment precisely because he or she had opportunities to choose the right path of action and decided each time to forego them.


124. Nussbaum, Upheavals of Thought, supra note 123, ch. 1.
judgments and desires, needs to be made more complicated. Emotions are judgments, but not inert judgments; on account of their evaluative content, they have an intimate connection with motivation that other beliefs do not. On the other hand, because they may not hook into the situation at hand in a way productive of a concrete plan of action, they are different from desires as well.\textsuperscript{125}

Emotions are thus \textit{not} “action-guiding desires,” and they stand apart from “motivation.” Indeed, a crucial part of Nussbaum’s neo-Stoic account of emotion is her assertion that “most of the time emotions link us to items that we regard as important for our well being, but do not fully control” and therefore indicate “a certain passivity before the world.”\textsuperscript{126} This is plainly distinguishable from action-relative mental states, which are very much about acting upon the world. Because deterrence must operate within the space between emotion and action—where “action-guiding desires” are formed—the utilitarian justification for anti-gay hate crime laws fails on its own terms. To prevent such crimes, it is not hatred that must be deterred (as if it could be);\textsuperscript{127} rather, deterrence must operate via the conventional mens rea categories (the decision boxes of intentional action) to change the “action-guiding desire” calculation. In the end, Nussbaum’s evaluative conception of emotion fails to rescue a deterrence theory of anti-gay hate crime laws.\textsuperscript{128}

\begin{footnotesize}
\begin{enumerate}
  \item [125] Id. at 135–36 (emphasis added).
  \item [126] Id. at 43.
  \item [127] Given Nussbaum’s assertion that evaluative thoughts/beliefs and feelings emerge simultaneously in emotion, this seems doubtful at best.
  \item [128] Nonetheless, Nussbaum expressly endorses hate crime legislation. \textsc{Nussbaum, Hiding from Humanity}, supra note 123, at 293–96. Dan Kahan—Nussbaum’s coauthor and equally forceful proponent of an evaluative conception of emotion—argues that courts’ treatment of the homosexual panic defense in anti-gay hate crime cases is traceable to society’s ambivalence about whether homosexuality or homophobia is more disgusting. Kahan contends that, because both pro- and anti-gay sentiments are grounded in social norms and hierarchies, the legal status of gay panic defenses and sentence enhancements reflects (in a fairly straightforward manner) social judgments about whether homosexuals or homophobes are worthy of social respect (or conversely, whether homosexuals or homophobes are “disgusting”). \textsc{Dan M. Kahan, An Anatomy of Disgust in Criminal Law}, 96 \textsc{Mich. L. Rev.} 1621, 1637–38 (1998). At least two problems arise in Kahan’s account. First, in his discussion of anti-gay hate crime and the homosexual panic defense, Kahan seems to reduce disgust to the desire to shore up social status. See id. at 1635. This ignores the complex emotional mixture that constitutes sexually grounded animus. Not all social minorities are treated with disgust per se. The disgust which operates in anti-gay hate crime is specific in its formulation, and its connection to sexuality is hardly incidental. See \textit{infra}
\end{enumerate}
\end{footnotesize}
More importantly, the deterrence justification for hate crime laws is squarely at odds with the politically-constructed "normal" hate crime narrative. The archetypical anti-gay hate crime is one characterized by irrationality—the irrationality of homophobia, bias, and prejudice.
Within the juridical and discursive field constituting the terrain upon which anti-gay hate crime legislation is debated, it is precisely this irrationality that renders a hate crime more socially pernicious than conventional crime and makes the passage of anti-gay hate crime legislation a politically progressive act. Advocates correctly point out that crimes committed against gay people have historically been under-reported, under-prosecuted, and under-punished because of the unreasonable and objectively baseless disapprobation of gay people and homosexuality (which rendered anti-gay crimes not crimes at all). And crimes committed against gay people because they are gay are senseless in almost too many ways to count. For starters, homophobia seems to betray a simultaneous disgust of gay sexuality (which hate crime perpetrators seek to violently destroy) and a fear that homosexuality is almost irresistibly crime as pathology. Describing attacks on transgendered woman Gwen Araujo and lesbian Sakia Gunn, the NCLR’s Executive Director Kate Kendell wrote,

> These crimes are separated by seven months and 3,000 miles but they share the deep-seated misogyny and homophobia of every hate crime directed at a lesbian, gay, bisexual or transgendered person. These two women tell the same story from a different lens: transgressions of gender, whether based on who one loves or how one identifies, will be brutally repressed and savagely responded to.


131. If we, as a society, continued to believe that hatred of gay people was reasonable, it is hard to see how there would be any support for legislation singling out and targeting anti-gay hatred for specific criminal punishment.

132. See McVeigh, supra note 22, at 843–67; Am. Civil Liberties Union, Letter to the House Urging Support for the Local Law Enforcement Hate Crimes Prevention Act, May 2, 2007, http://www.aclu.org/ght/crimjustice/29600leg20070502.html (quoting the report of one victim who wrote that her gang-rape was ignored by her local police department: “They closed their book, and said, ‘Well, you were asking for it.’”). The ACLU has also seized upon the failure of state and local police departments to adequately prosecute crimes against gay people to assert a jurisdictional basis for federal legislation prohibiting anti-gay hate crimes sounding in Equal Protection doctrine:

> Federal legislation addressing such criminal civil rights violations is necessary because state and local law enforcement officers are sometimes unwilling or unable to prosecute those crimes because of either inadequate resources or their own bias against the victim. The prospect of such failure to provide equal protection of the laws justifies federal jurisdiction.

Id.

133. The term “homosex” may be a bit perplexing. It is intended to elide the distinction between a status—a “being”—and a practice—a “doing”—of same-sex sexuality. Zylan, supra note 5, ch. 1.
Likewise, gay men (within the normal hate crime narrative, the prototypical victims of anti-gay hate crime) are simultaneously demonized as effeminate and weak, yet also deeply threatening.

These discourses serve to construct the homophobic social and cultural fabric out of which, activists and scholars contend, hate crimes emerge as the almost inevitable consequence. Yet if homophobia is this objectively irrational (and I agree that it must be, when conceived as a distinct combination of fear and hatred), it is also manifestly ill-suited to

134. Drawing upon Georges Bataille and Sigmund Freud, Leo Bersani has written provocatively and convincingly about the nature and source of this simultaneous loathing and desire. See Leo Bersani, Is the Rectum a Grave?, 43 OCTOBER 197, 209–12 (1987); cf. Nussbaum, HIDING FROM HUMANITY, supra note 123, at 113–14 (describing homophobia as a form of disgust predicated on the notion that "you can be penetrated").

135. The (widely recognized and admitted) limitations of data collection render generalizations about the gender composition of the population of anti-gay hate crime victims perilous at best. But the latest figures offered by the Anti-Violence Project do not offer empirical support for the normal hate crime narrative's almost exclusive focus on male victims. NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, ANTI-LESBIAN, GAY, BISEXUAL & TRANSGENDER VIOLENCE IN 2007, at 9 (2007). According to the Anti-Violence Project, in 2006, 57% of anti-gay hate crime victims identified as male, while 41% identified as female. Interpreting these numbers invites extensive speculation, especially since 13% identified as transgendered, meaning that some victims identified themselves as male or female and as transgendered. Id. But if one assumes that women and men are about equally represented in the population of gay people (as they are in the general population—an assumption that almost certainly overstates the number of self-identified lesbians), the gender imbalance is minimal at best.


respond to legal mechanisms of deterrence relying upon rational cost-benefit analyses.

Still, even if anti-gay hate crime sentence enhancements cannot deter anti-gay hatred in a utilitarian sense, they might serve—in some other way not relying upon the cognitive reasoning of the would-be hate criminal—to reduce the likelihood that anti-gay hatred would arise in the first instance. As Nussbaum points out (correctly, I think), the evaluative content of emotions is profoundly socially constructed. If I feel grief over the death of my mother, the content of that grief—and its "appropriateness"—is deeply constituted by the social construct "mother" (or "mother love").

Emotions are "localized" and "eudaimonistic," but their content plainly varies with social norms—a fact, Nussbaum notes, that is reflected in the criminal law's treatment of "passion." If so, changes in the content of an emotion must come from deep and extensive changes in social norms. Sentence enhancements might contribute in some small measure to such a normative shift and, if that is true, such an effect might provide sufficient justification for the imposition of additional criminal penalties. Such an argument takes us away from utilitarianism, however, and into the realm of expressivist justifications.

B. Expressivist Justifications

Expressivist justifications make a seemingly commonsensical claim about law: whatever else it might do, law serves an expressive function in communicating what a society values and what it disdains. Rooted in Durkheimian functionalism, expressivism highlights the symbolic import of laws (and of their enforcement) in changing, publicizing, and/or solidifying social norms. The criminal law is particularly important in this respect because, expressivists contend, it has a particularly powerful

139. Id. at 163.
denunciatory effect. Not only do criminal laws typically carry harsher sanctions than civil laws do, but the stigma associated with criminality lends added symbolic value to the enforcement of laws falling within the criminal, rather than the civil, code.\footnote{Beale, supra note 140, at 1266–67.} Thus, apart from whether or not a given law “fits” a crime (in a retributivist sense) or whether it is likely to deter future crimes (in a utilitarian sense), expressivists contend that laws may be justified if they communicate a socially valuable message. For expressivists, the commission of a crime sends a message of disrespect for social norms and values, and punishment must, therefore, respond with an equally forceful message denouncing the criminal’s conduct and, therefore, reaffirming the norms and values shown disrespect by virtue of the criminal’s actions.\footnote{Kahan, supra note 128, at 1641; Kahan, supra note 140, at 599. See also Hurd & Moore, supra note 3, at 1100–01.}

As applied to hate crime laws, expressivism typically amounts to one or both of the following claims. First, expressivists contend that hate crimes send particularly pernicious messages to victims and their communities and consequently require particularly strong messages of denunciation in response.\footnote{Kahan, supra note 128, at 599; see also Beale, supra note 140, at 1265–66.} Second, expressivists claim that hate crime legislation is important not only for what it says about hate crime (that it is particularly disfavored compared with other sorts of crime), but also for what it affirmatively says about the targets of hate crimes (that they are valued members of the civic community) or about equality more generally (that it is an important social objective).\footnote{Hurd & Moore, supra note 3, at 1100–17 (describing expressivists justifications of hate/bias crime legislation).} At a slightly higher level of abstraction, Heidi Hurd and Michael Moore note that expressivist claims about hate crime laws may be divided into those that are tethered to conventional theories of punishment and those that make the claim that the expressive function of hate crime laws suffices, per se, to justify their enactment and enforcement.\footnote{Id. at 1101.} Expressivist claims tethered to conventional theories add the expressivist justification to either retributivist or utilitarian justifications, while per se expressivist justifications claim that “punishment is justified if and only if it sends an appropriate message of denunciation to a defendant and those who share the defendant’s corrosive views.”\footnote{Id.} On this view, “legally conveyed denunciation [is] such a good thing that it and it alone can justify punishment.”\footnote{Id.}

143. Kahan, supra note 128, at 1641; Kahan, supra note 140, at 599. See also Hurd & Moore, supra note 3, at 1100–01.
144. Kahan, supra note 128, at 599; see also Beale, supra note 140, at 1265–66.
146. Id. at 1101.
147. Id.
148. Id.
Whether one relies upon a mixed or a pure version of the expressivist justification for hate crime laws, however, one is directed to the same essential query: if hate crime sentence enhancements are important because they express important social values, what, precisely, are those values and how are they specifically conveyed by sentence enhancements? Hurd and Moore point out that most expressivist accounts of hate crime sentence enhancements seem to assume that the denunciatory effect of such laws begins and ends with passage of the legislation. Yet plainly this cannot be the case. Actual defendants are charged with, and tried for, offenses characterized as "hate crimes." Actual crime victims give voice to their experiences of suffering as a result of crimes that may or may not be characterized as hate-motivated. How that affects the experience of victimhood remains an open empirical question, but that naming—or failing to name—a criminal act a "hate crime" matters in some way seems incontestable.

To my mind, expressivists are absolutely correct that law conveys meaning—to offenders, to victims, and to bystander publics. But expressivist accounts of anti-gay hate crime laws have thus far vastly understated the complexity of meaning that attends anti-gay hate crime discourse. Anti-gay hate crime sentence enhancements do not, and cannot, simply assert that "hate crimes are bad," or that "LGB people are valuable members of the community"; to suggest this is to ignore the institutional specificity of law. Even the broadest statements about hate crimes and sentence enhancements conveyed in legislative debates evince greater nuance than these simple statements, interacting as they do with specific jurisprudential frameworks that confine and delimit the terms within which such laws are drafted, considered, and acted upon. In practice, these discourses are refined even more—by advocates seeking to prod law enforcement into defining and prosecuting specific incidents as hate crimes, by prosecutors seeking to fulfill their professional mandates of doing justice and protecting the public, by defense attorneys seeking to fulfill their professional mandates of representing their clients and forcing the state to prove their cases, and by judges seeking to make sense of the formal and practical dictates of the criminal code. There can be little doubt that this is highly expressive work of a deadly serious kind. Yet what is most prominently expressed in the polysemic

149. Id. at 1114–15 ("[T]he question remains as to why so many proponents of hate/bias crime legislation regard the need to 'send a message' to be a sufficient justification for such laws. We think it is because such proponents are focusing only on the passage of the bills enacting hate/bias crime legislation.... Forgotten is the obvious fact that when one uses the criminal law as a medium for sending a message, one then has to punish those who do not get the message.").
construction of anti-gay hate crime, and anti-gay hate crime law, is a set of discourses that sound deeply and specifically in retributivism.

C. Retributivist Justifications

Retributivists contend that punishment should always follow culpability. As Michael Moore puts it, "[a] retributivistpunishes because, and only because, the offender deserves it." Retributivism, however, can be defined in terms of the amount of harm that is wrought by the conduct at issue or, alternatively, by the level of culpability with which the harmful conduct is undertaken. Accordingly, as Anthony Dillof notes, hate crime laws may be justified on retributivist grounds in one of two ways. First, such laws may be justified if it can be demonstrated that the enhanced penalties associated with bias-motivated crimes correspond to the greater wrongdoing that results from the crimes themselves. Alternatively, such enhanced penalties may be justified if hate-motivated crimes imply greater culpability on the part of those who perpetrate them than do crimes that do not implicate concerns about social equality. According to Dillof, neither of these claims is sustainable.

Dillof begins by disposing of the idea that a greater wrong is necessarily perpetrated against a person when s/he is "discriminatorily" violated by another than when s/he suffers random violation. The claim here is a straightforward one: because each human life is morally equal in weight, one cannot assign greater wrongdoing to the violation of one person's rights than is assigned to the violation of another's. It is only justifiable to trace greater levels of wrongdoing to the characteristics of the victim if it can be said that those characteristics are indicative of greater protectable rights or interests. Unless advocates of bias crime legislation are prepared to say that members of one group—in this case, gay men and lesbians—have greater rights than those who fall outside of that group, the wrongdoing variant of the retributive justification must fail. Clearly, such an argument is inconsistent with the other political

150. Moore, supra note 105, at 179.
152. Id. at 1036.
153. Id. at 1063.
154. Id. at 1032.
155. Id. at 1034–36.
156. Id. at 1034.
157. To be fair, there is another (perhaps more common) invocation of the greater wrongdoing claim: that each hate crime amounts to greater wrongdoing because of the
claims of gay and lesbian advocates of bias/hate crime legislation—for example, the assertion that gay and lesbian people are morally and socially equal to heterosexuals and therefore deserving of equal legal rights. Indeed, such an articulation of the retributivist argument for hate crime legislation would seem to lend support to the “special rights” discourse that, as noted above, has been so ubiquitous in efforts to deny legal rights and benefits to gay men and lesbians.

Dillof’s claim that this rendition of the wrongdoing justification for hate crime legislation fails is therefore persuasive as far as it goes. Yet it seems to bypass the very essence of the argument advocates of bias crime legislation offer on its behalf: such legislation is needed to redress the political, social, and legal devaluation of the lives the statutes seek to protect. In other words, while Dillof assumes an equal moral playing field in evaluating his hypothetical matching crimes (one committed because of the victim’s social identity, the other committed without the attendant bias), advocates of bias crime legislation assume a profoundly unbalanced terrain. On this view, the retributive satisfaction that one experiences upon the enhanced punishment of a bias-motivated offender is derived in significant part from the sense that a larger social wrong (here homophobia) has been partly righted.

This claim is not one grounded in notions of distributive justice, however. It does not envision a “grand moral chalkboard,” upon which individual rights and wrongs are recorded in opposing columns, to be summed up at some discrete point in time to arrive at the aggregate balance of justice. Instead, the moral and political calculation is specific to the individual victim and perpetrator: this victim deserves this (additional) measure of justice, and this perpetrator deserves this (subtracted) measure of privilege. One can easily contend that this calculus

secondary harms that typically attend such an offense. See generally Berrill & Herek, supra note 25. For example, advocates point to the harm inflicted on an entire community by a single hate- or bias-motivated attack. One need not deny the evidence suggesting the terroristic quality of hate crimes to dispose of this justificatory claim. As Dillof notes, this argument fails because it supports punishment by proxy where there is no reason to believe that such harms could not be directly addressed by the criminal law. See Dillof, supra note 151, at 1050–55. Bias crime legislation, on this view, tends toward both over- and under-inclusiveness. See id. at 1055–61; see also Heidi M. Hurd, Why Liberals Should Hate “Hate Crime Legislation,” 20 LAW & PHIL. 215, 215–32 (2001); Hurd & Moore, supra note 3.


159. For example, consider this observation attributed to Judy Shepard, whose son was killed in what has been widely characterized as an anti-gay hate crime: “Matt is no longer with us today because the men who killed him learned to hate. Somehow and somewhere they received the message that the lives of gay people are not as worthy of
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assumes too much (that the victim has experienced injustice and that the perpetrator has experienced privilege). Failing evidence of actual experiences, the attempt to measure wrongdoing in this way may amount to finding wrongdoing in the mere increased risk of harm, as Hurd and Moore have argued.\textsuperscript{160} Advocates of hate crime legislation counter that individual victims and perpetrators are the products of social forces of inequality. Whether individuals experience in a conscious way their relative levels of oppression or privilege is irrelevant to whether it actually exists. Indeed, the very fact of the crime itself provides prima facie evidence of the victim’s socially constituted vulnerability and the perpetrator’s socially constituted sense of entitlement.\textsuperscript{161} Thus, one might wish to reframe this debate in social, rather than moral, terms. Herein lies the rub.

If the perpetrator is socially constituted as such, s/he cannot be held morally responsible for his or her actions unless there is some other source of culpability beyond the mere enactment of a homophobic script. Put another way, solving the wrongdoing question in this way only begs the question of why criminals who commit their offenses in a manner evincing homophobia are more deserving of blame and punishment than those who commit them without such attendant motivations. We are thus directed to the second type of retributivist argument that may be raised in favor of bias crime legislation: that based on the culpability of the offender. In contrast to the wrongdoing-based claim, the culpability-based claim measures desert by the accountability of the offender, rather than by the harm produced by his or her conduct. The emphasis on culpability represents the state’s recognition that equivalent wrongs may be attended by varying levels of accountability and responsibility. While intuitively sensible, this narrative of justification raises an important and difficult prior question: on what principle may we distinguish between levels of culpability?

In asking this question, we are again made aware of the difficulties that emerge from the failure of the legislation’s advocates to articulate a coherent account of what a hate crime is.\textsuperscript{162} To begin, there is the

\textsuperscript{160} Hurd \& Moore, supra note 3, at 1139.

\textsuperscript{161} Introduction, supra note 31, at 1–3.

\textsuperscript{162} Much of the scholarship on anti-gay hate crime law fails to address this question in any satisfying way. Jack Levin and Jack McDevitt suggest that some crimes are obviously hate crimes, or that one can identify hate crimes on the basis of certain common characteristics (i.e., they tend to be more violent, they often involve groups
question of whether the legislation at issue is designed to operate upon hate, bias, or some combination of the two. Advocates frequently move back and forth between references to “bias” and “hate” in describing the characteristics of the conduct that the legislation seeks to prohibit, indicating (by this linguistic inconsistency) that they have not yet established their justificatory allegiances.\footnote{163}

However, there is a second, more ominous, problem lurking behind this linguistic slippage. It may be the case that bias and hatred are not sufficiently distinguishable for purposes of articulating a theory of why the presence of one or the other might justifiably give rise to particularly harsh criminal sanctions. Or, at the very least, it may be that we have yet to develop a sustainable theory of how they differ from each other and operate together to produce the necessary degree of culpability. In short, advocates have yet to solve the most basic chicken-and-egg questions underlying the justification for bias crime statutes. Advocates have tended to gloss the issue by asserting simply that, where bias and hatred are found together in the commission of a crime, they create a synergistic effect that renders the resulting offense worse in some way than it otherwise would have been. Whether it is bias that feeds hatred, or hatred that finds particular expression in bias, or whether the two are

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163. The terms “bias” and “hate” can function as a kind of shorthand in referencing specific justificatory frameworks. The use of the phrase “hate crime” may be strategically intended to highlight the egregious and indefensible quality of such crimes, thus emphasizing the culpability of the offender and resting on a retributivist rationale. Political advocacy groups, such as the HRC and the National Gay and Lesbian Task Force, prefer this terminology when speaking to their constituents. HRC Hate Crimes, supra note 97; NGLTF Hate Crimes, supra note 98. The use of the phrase “bias crime,” on the other hand, lends itself more comfortably to expressivist and utilitarian claims. Legislatures almost always use the term “bias,” perhaps deeming it a more appropriate object of legislative disapproval or (alternatively) a more amenable object of the apparatus of deterrence.
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unintelligible in isolation from one another, has not been a question advocates have addressed head-on.

Moreover, it is here that justifications based on wrongdoing and culpability seem to fade into one another. For example, one common argument on behalf of hate crime laws states that enhanced penalties are warranted because hate crimes tend to be more violent and/or tend to produce greater psychological harm in their victims.\footnote{164} Putting aside the empirical uncertainties associated with this claim,\footnote{165} a key weakness of the argument is that it relies upon a conflation of what the victim perceives or experiences and what the mental state of the perpetrator is. According to Hurd and Moore, this argument uses the mental state of the perpetrator as a proxy to indicate the allegedly greater harm experienced by the victim when such harm is (a) already used directly as a means of elevating the severity of a crime and (b) is better measured directly on a case-by-case basis than via a blanket rule enhancing all penalties based on the culpability of the perpetrator.\footnote{166}

There are several other ways in which one might conceive of the relationship between hatred and bias in the anatomy of an anti-gay crime, however. One possibility is that hatred and bias are coexisting mental states of significant duration.\footnote{167} Unlike action-relative mental states (such as intentionality and knowledge), hatred and bias function together as a kind of foundational cognitive or emotive terrain, upon which particular encounters are played out with more or less predictable consequences. If this account is to be believed, there is no more justification for attributing culpability to the presence or absence of bias and hatred than there is for attributing it to one's tendency to be suspicious of strangers (because, say, one was raised in New York rather than a small town in the Midwest). Such dispositions are, as Hurd claims, at best only indirectly subject to volitional control, and are therefore illegitimate bases upon which to assign culpability.\footnote{168}

Advocates of hate crime legislation probably have an alternative view of the relationship between bias and hatred in mind, however. As Frederick Lawrence has argued, the hatred that bias crime statutes target is distinguishable from the sort of individual-specific hatred that, for example, is deemed to operate in incidents of violence where the

\footnote{164} See Iganski, supra note 31.
\footnote{166} Hurd & Moore, supra note 3, at 1086.
\footnote{167} See Hurd, supra note 157, at 219–24.
\footnote{168} See id. at 224–26.
perpetrator and the victim are known to each other personally. In a bias crime, bias operates as the dispositional state, while hatred appears as an emotion specific to the circumstances. The mechanism operates something like this: generalized bias against the group is condensed via the emotion of hatred, which is directed toward a particular group-identified victim. Hatred, in this sense, is a vehicle through which bias operates as a kind of prior, foundational mental state.

How accurate is this model of the workings of hate and bias? Let us start with an ostensibly simpler question: how certain are we that bias-motivated crime even requires the presence of hatred for its accomplishment? On one level, it seems incontestable that the ability to physically violate another person requires that the perpetrator suspend his or her belief in the victim's fundamental humanity. Hatred is one way of accomplishing this. Rage is another. The key process seems to be objectification, whereby one person becomes an object upon which another's passions may find their fullest expression. Yet objectification is a poor indicator of the emotion that underlies it. If certain feminist and object relations theorists are to be believed, sexual desire may be the most common form of objectification that we observe in contemporary societies. Certainly advocates of hate crime legislation would not contend that all expressions of objectification are culpable.

If this is so, then the claim must proceed along the lines that only some kinds of objectification are reprehensible and that we can identify what they are and when they occur. Thus it is not the objectification per se that is culpable, but the quality of objectification, which is another way of saying we are interested in passions. Yet can we be responsible for the passions we feel? To attribute responsibility in this way, we would (at a minimum) have to be confident that we had properly identified the

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170. Jenness and Grattet contend that it is a measure of the influence of activist groups that hatred may be disappearing as a required element of the offense. See JENNESS & GRATTE, supra note 15, at 112–19.
172. About this, Moore has written,

We can no more choose which emotion it will be that causes our judgments or actions than we can choose the reason for which we act. We can choose whether to act or not and whether to judge one way or another, but we cannot make it be true that some particular reason or emotion caused our action or our judgment. We must look inward as best we can to detect, but not to will, which emotions bring about our judgments; and here there is plenty of room for error and self-deception.

Moore in FOUNDATIONS, supra note 105, at 90.
passions in play. Yet evidence suggests this may be a problem not only because emotions leave unreliable evidentiary trails in their wake, but also because they may not be identifiable even to the person who experiences them.\(^{173}\)

Empirical difficulties aside, there is a bigger problem lurking here—one that emerges as a result of the ways in which law disciplines the evidentiary boundaries within which hate crime cases may be adjudicated. That is, law uses a mechanical approach to identify the presence of hatred as a motivation through the deployment of proxy measures. Thus, the inquiry is constructed as a series of questions: was the defendant "heterosexual"? How do we know? Was the victim "gay"? How do we know? How did the defendant know? What conduct occurred between the victim and the defendant such that we can infer the existence of a particular emotional state existing within the defendant?\(^{174}\)

The use of categorical assignments to identify an underlying emotional dynamic is an unremarkable feature of law, but it is terribly consequential when law is envisioned as a vehicle of progressive sexual politics. The danger of such a strategy may be readily discerned by examining the way in which hate crime causation inquiries open additional space for the deployment of a defense strategy that takes up, reinscribes, and authorizes an especially pernicious account predicated upon the binary matrix: the so-called homosexual panic defense.

V. Ambivalent Discourses of Desire and Identity: The Homosexual Panic Defense

The homosexual panic defense (HPD) is a claim frequently offered on behalf of those accused of committing crimes against gay men or lesbians.\(^{175}\) Sometimes called "homosexual panic" or "gay panic," and

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173. See Kahan & Nussbaum, supra note 110, at 284.
174. See, e.g., In re M.S., 896 P.2d 1365, 1369 (Cal. 1995) (noting that the alleged attack occurred in a gay neighborhood and that victims "were homosexual"); People v. Williams, No. 272779, 2007 WL 4179322, at *4 (Mich. Ct. App. Nov. 27, 2007) (noting that trial court erred in characterizing crime as a hate crime because "[w]hile the fact that the victim was a homosexual could be verified, whether defendant shot the victim because of his sexual orientation could not, particularly where defendant maintained that he was not the shooter"); People v. Diaz, 727 N.Y.S.2d 298, 299 (N.Y. Sup. Ct. 2001) (noting defendant sought out "a gay man" and attacked a man near a gay bar whom he "perceived to be a gay man").
175. See also Howe's analysis of how the American HPD framework has been imported into Australian courts via the "provocation" defense. Adrian Howe, Homosexual Advances in Law: Murderous Excuse, Pluralized Ignorance and the Privilege of Unknowing, in Sexuality in the Legal Arena 84–89 (C.F. Stychin & D. Herman eds., 2000).
sometimes referred to as “homosexual advance” claims, the defense may be offered to establish diminished capacity, or to negate mens rea (via a claim of provocation). It is only very rarely effective as a complete defense, but defendants continue to raise some variant of the defense with regularity in an effort to reduce their criminal liability.


77. See, e.g., Bautista, 145 F.3d 1140; United States v. McGee, 29 F.3d 625 (5th Cir. 1994); Parsons, 57 F. Supp. 2d at 1157; Commonwealth v. Pierce, 642 N.E.2d 579 (Mass. 1994).

78. This may be a sexual advance by the victim visited upon the perpetrator or it may be something the victim does in complete ignorance of the presence of the perpetrator. For example, in one well-publicized case, a man who had shot two lesbians camping in the Adirondacks claimed he did so after he became enraged upon spying them making love in their tent. He argued that he was particularly susceptible to such panic because, inter alia, he believed that his mother had been a lesbian. Commonwealth v. Carr, 580 A.2d 1362 (Pa. Super. Ct. 1990). It is worth noting that it is quite rare that the defense is used in precisely this form. Indeed, as noted in a trenchant critique by Gary Comstock, most defense attorneys seem to pick and choose aspects of the clinical diagnosis of “homosexual panic” in an effort to produce an account of the crime that they hope will resonate with the fact-finder. Comstock, supra note 4, at 89. In short, they attempt to produce a heteronormative account of the crime that emphasizes the danger presented by an unwelcome homosexual advance. Ironically, there is evidence that this account is less and less resonant with finders of fact. See Michael A. Smyth, Queers and Provocateurs: Hegemony, Ideology, and the "Homosexual Advance" Defense, 40 LAW & SOC’Y REV. 903, 904, 926 (2006).

79. There is a justification version of this defense and an excuse version. The justification version ("provocation") is the one that really gets under the skin of gay men and lesbians, because it seeks to establish that violence is the socially appropriate response to uninvited sexual attention from a gay person. The excuse version makes a less ambitious claim, stating something akin to temporary insanity (or diminished capacity) as a result of overwhelming, confusing, sexual stimulation.

The homosexual panic defense, while displaying decreased effectiveness as a complete defense to anti-gay violence, may paradoxically be reinvigorated by the adjudication of hate crime allegations. While hate crime laws imagine a crisp distinction between desire and hatred, invocation of the defense draws the fact finder’s attention to the complex nature of sexual desire as a motivating emotion. Desire, as we understand it—and as it has been constructed by those representing the interests of sexual minorities—is a simultaneously personal and social phenomenon. We are neither fully determined by it (think: “gay people are just like everyone else”), nor are we free to disregard it (think: “we do not choose our sexuality”). Yet if this is so, on what ground might one claim the authority to punish the Aaron McKinneys of the world for the complex mixture of sexual desires that serve to motivate their behaviors? One response is that, even conceding that Aaron McKinney experienced some complicated and alienating form of desire in the moment before he first struck Matthew Shepard, his conduct was really the product of his hatred, not of his desire. But to say this is to engage in a fictive disarticulation of the emotive and cognitive motivations that result in anti-gay violence. Not only can a court or jury not “know” whether Aaron McKinney felt mostly hatred or mostly desire before he killed Matthew Shepard, it might also be worth considering the implications of inviting such a judgment for the regulation of other complicated forms of passion.

VI. Conclusion: This is Not Your Post-Modern Legal System

Though one might hold open the hope that hatred and desire might be accurately identified as motive forces in anti-gay criminal conduct, LGB activists should be particularly skeptical of the ability of courts and juries to get this right. This is because, in adjudicating such

Such a Strategy; Defense Rests Case, as reprinted in St. Louis Post-Dispatch, Nov. 2, 1999, at A3, available at 1999 WLNR 934086. As Comstock has argued, this defense did not cohere with a clinical diagnosis of homosexual panic; rather, the defense strategy appears to have been to link social approbation of pedophilia with the specter of an unwanted homosexual advance. The trial court precluded McKinney’s lawyers from pursuing the defense qua defense. However, the defense was able to offer evidence that Matthew Shepard had made unwelcome sexual advances to other men, and did allege a “homosexual advance” claim in closing arguments. McKinney was nonetheless convicted and, in 2004, gave an interview to a television newsmagazine in which he claimed the “gay panic” claim was a fabrication. See Virginia Heffernan, Was Killing of Shepard an Anti-gay Hate Crime?, N.Y. Times, Nov. 26, 2004, at E1, available at http://www.nytimes.com/2004/11/26/arts/television/26heff.html.
cases, finders of fact regularly rely upon popular conceptions of sexual dualism. Specifically, they assume several things about the nature of human sexuality: (a) that it is organized exclusively around the sex of the desired object; (b) that it is fixed and stable; and (c) that categories of sexual attraction are mutually exclusive. Additionally, as discussed above, they assume that desire and animus are mutually exclusive states of human emotion. Thus: (a) one is attracted to either men or women; (b) this orientation (once determined) is the essential truth of the person; (c) one cannot be simultaneously heterosexual and homosexual; and (d) evidence of animus precludes a finding of sexual desire. Nor

181. See, e.g., Parsons v. Galetka, 57 F. Supp. 2d 1151, 1157 (D. Utah 1999) (rejecting homosexual advance claim where evidence showed victim had heterosexual relationships and autopsy "showed no evidence of anal sexuality"); Cuevas v. Florida, 770 So. 2d 703, 704-05 (Fla. Dist. Ct. App. 2000) (noting sufficiency of evidence in hate crime plea where, according to the state, victim was a "declared lesbian" and was therefore "part of the statutory protected class"); People v. Williams, No. 272779, 2007 WL 4179322, at *4 (Mich. Ct. App. Nov. 27, 2007) (unpublished opinion); People v. Ortiz, 48 A.D.3d 1112 (N.Y. App. Div. 2008) (evidence sufficient to establish hate crime where defendants were strangers to victims, crime was unprovoked, defendants began to beat victims after inquiring about victims' relationship and repeatedly made derogatory comments concerning sexual orientation of victims); In re John V., 820 N.Y.S.2d 490 (N.Y. Fam. Ct. 2006) (use of epithet "faggot" by defendant insufficient evidence of hate motivation, where there was no evidence that victim was a homosexual or that defendant perceived him to be a homosexual).

182. Note that often this means simply accepting categorical descriptions and identities (gay, homosexual, heterosexual, etc.) as evidence of a stable, prediscursive ontological reality (that a defendant or victim was, or was not, likely to have engaged in sexual or non-sexual or aggressive behavior in a given interaction with the defendant/victim, given his or her categorical assignment). See cases cited supra note 181. In prior research, I have found a similar dynamic operative in same-sex sexual harassment cases. This is not surprising, as anti-harassment law embodies a causation requirement that is virtually identical to that embodied in hate crime law. See generally Zylan, supra note 15.

183. See generally FOUCAULT, supra note 100 (describing the emergence of the modern conception of homosexuality as a source of identity and personal truth).

184. One might object here and say, "But what about bisexuality?", at which point, I would point out the lack of acceptance of the notion that bisexuality is a real, independent category of sexual identity (rather than a transitional state from one pole to the other). See Paul, supra note 93.

185. Let me anticipate an objection here, which is that there are many cases demonstrating that courts can simultaneously find animus and desire. In cases of workplace sexual battery, for example, courts frequently find it possible to reconcile evidence of violence and evidence of the assailant's sexual desire. This is due to a specific doctrinal influence, however: the influence of Catharine MacKinnon's theory of sex/gender violence in shaping workplace harassment law. See Zylan, supra note 15. Per MacKinnon, where men and women are concerned, the fact that sexual behavior may take an aggressive or even violent form is unremarkable; the sexual element is presumed by the very fact that the incident involves a male aggressor and a female target.
should we be surprised to see these tropes deployed in legal discourse. Law as a set of structured institutions necessarily delimits the field of sexual and social possibility. There may be opportunities for postmodern identity deconstruction elsewhere in the modern American state, but law is hardly a promising place in which to find them.\textsuperscript{166}

Arguably, the presumption against finding sexual desire where a nominally heterosexual person physically violates a person of the same sex should work in favor of a finding of liability in hate crime cases. This would reverse the usual fortunes of gay and lesbian people and—on that basis—might be said to auger well for the community. But at what price would the “right” outcome be purchased in hate crime cases? At a minimum, the adjudication of such cases would require that courts endorse the model of sexual dualism outlined above. That model—serviceable in certain respects—may be the very source of much anti-gay discrimination and violence. Return again to the claims of the homosexual panic defense. More than anything else, HPD tells us that an individual’s investment in a fixed, polar, and unassailable sexual orientation can be experienced as a matter of life and death. To the extent that the boundary between heterosexual and homosexual is deemed a fundamental signifier of selfhood, should anyone be surprised that some people will go as far as murder in order to define it publicly and conclusively? Certainly gay and lesbian people deny this consequence of sexual dualism only at the cost of appearing disingenuous.\textsuperscript{187} We also do so at our collective peril.

The intuitive perception that there is something particularly wrong and culpable in the commission of a hate crime is eminently reasonable. We recognize that such crimes are qualitatively different from other

Where, however, the parties are two men or two women, the sexual element must be proved, because it cannot—within a social context that renders heterosexuality the default sexual state—be presumed. MacKinnon, \textit{supra} note 65, at 126–54. As Justice Scalia noted in \textit{Oncale v. Sundowner Offshore Oil}, the landmark case addressing same-sex harassment: “Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.” 523 U.S. 75, 80 (1998).

\textsuperscript{166} See generally Wendy Brown, States of Injury: Power and Freedom in Late Modernity (1995); Halley, \textit{supra} note 66; Left Legalism/Left Critique, \textit{supra} note 9.

\textsuperscript{187} One way of describing contemporary social movements for gay and lesbian equality is as public efforts to assert the importance of sexuality as a feature of personal identity. Of course, the essential tension within gay and lesbian politics is that between asserting sexuality’s primacy and asserting its irrelevance. This is not, by any means, a settled debate. All the more reason, in my view, to recognize the inherent indeterminacy of any account of sexual motivation.
offenses, and that they tend to inflict a particular injury on those communities of which the victim is a member. Yet this intuitive response must be critically examined if retributivist justifications are not to devolve into expressions of unreasoned vengeance. Criminal codes and procedures afford us adequate tools to express social condemnation of brutal, vicious, and otherwise harmful crimes—whatever the particular quality or source of the brutality, viciousness, or harm. Advocates of gay and lesbian equality can and should organize to pressure law enforcement agencies to investigate crimes committed against gay men and lesbians and to vigorously and equitably enforce the criminal law. We can and should draw public attention to all events (including crimes) that highlight or symbolize the persistence of anti-gay animus or homophobia.

At the same time, however, the criminal law ought not to codify and reify the construct: “anti-gay hate crime.” In spite of the best intentions of lawmakers, courts, and advocates, anti-gay hate crime laws paradoxically constrain and thwart the pursuit of sexual justice by channeling complex and indeterminate facts into categorical conceptions of human experience and identity. The justificatory narratives underlying punishment for “anti-gay hate crimes” are internally contradictory at best. Even if one is not concerned about the integrity of the moral justifications for criminal sanctions, it is worth considering the long-term consequences of discursive choices. If courts and juries are asked to make determinations of criminal liability and punishment based on impoverished conceptions of sexual motivation, it is virtually assured that they will do so in a way that replicates the very hegemonic models that serve as the foundation of anti-gay violence and discrimination. While one may experience certain retributive satisfactions along the way, it is worth considering the price at which such satisfactions will be purchased. §