

PHI 185
Advanced Topics in Philosophy and Law
Fall 2007
Professor Amy Baehr
Monday and Friday 11:15-12:40

This seminar-style course will take up the following question: Are penalty enhancements for hate crimes justified? In order to understand this question, and to suggest an answer, we will explore a variety of connected issues: the moral specificity of hate crime (is it more wrong than nonhate crime? If so, why?); the relationship between motives and culpability (may the state punish hateful motives?); and the ends to which state power may be put (is it democratically legitimate to use state power to bring an end to gender and racial animus?). Our readings will be taken from the recent legal and philosophical periodical literature. Participation in class discussion is essential. Students will be required to make presentations to the class, as well as to complete midterm and final papers. Please see the Blackboard site for all course materials (syllabus, assignments, and most readings).

Readings Students must purchase Frederick Lawrence's *Punishing Hate* from the bookstore. All other readings are available on the Blackboard site for this course.

Requirements	Attendance and Participation:	20%
	Short Papers (4% each):	20%
	2 Group Presentations (10% each):	20%
	Midterm Paper (6pgs):	20%
	Final Paper (8pgs):	15%
	Final Paper Workshop:	5%

Attendance and Participation Students are expected to come to class having read the material assigned for the day and with a printed copy of the reading. Completing the reading may take as long as 3 hours. Students are expected to participate actively in class discussions. More than two unexcused absences count against a student's grade. Exceptions are made for substantiated illness or family emergency. The use of cell phones, pagers, laptops, or other electronic devices in class is not permitted.

Short Papers Students will complete five 1-2 page papers responding to direct questions on the reading. The questions are attached to this syllabus. They will be given letter grades. No late papers or rewrites will be accepted. No papers will be accepted for days on which a student was absent without documented justification. No papers will be accepted by email. These papers are intended to keep students reading regularly and carefully, to allow me to offer regular feedback, and to aid me in assessing student effort and comprehension. Get started on them early in the semester!

Presentations Each student must participate in 2 presentations. In presentations, students should describe the thesis defended by the relevant reading and the reasons given for the thesis. Questions for discussion should be offered as well.

- Midterm and Final Papers Students will complete a midterm paper (6 pages) and a final paper (8 pages). Questions will be distributed two weeks before they are due. On December 7 rough drafts are due for an in-class writing workshop. Students should be prepared to show their drafts to other students on that day. 5% of your final grade depends on participation in the workshop. Final papers are due in my office (slipped under the door if I'm not there), not my mailbox, by December _____. Late papers will be marked down. No papers will be accepted by email.
- Academic Honesty Policy For the purposes of this class, you plagiarize when you take as few as two words in order from a text and place them in your written work, without putting them between quotation marks and citing the source. I will exercise my discretion in dealing with plagiarism. Slight offenses, due to carelessness, may be remedied by a rewrite. But offenses I judge to be more serious will be met with failure on the assignment and a report to the Dean's office. Please see Hofstra University's Academic Honesty Policy at http://www.hofstra.edu/senate/senate_fps11.cfm.
- Honors: Students wishing to receive honors credit for this course will do 6 additional readings (in italics in schedule). After the class session for which those extra reading are assigned, honors students will meet with me for a one hour discussion. Honors students should hand in short papers on each of the additional readings. (See attached syllabus for the extra reading questions.) Honors students' final papers should be 10, rather than 8, pages.
- The Arguments This semester we will be asking whether penalty enhancements for hate crimes are justifiable. Here is an overview of the arguments we will be discussing this semester, along with names of legal theorists who support or reject the arguments. This overview roughly follows Hurd and Moore (2004).

Justifying Penalty Enhancements/Evaluating the Arguments

1. The greater wrong thesis: *Hate crimes are more wrong than otherwise similar crimes.*

A. The greater harm thesis: *Hate crimes are more wrong than otherwise similar crimes because they create greater harms* (for example: greater physical injury; greater psychological trauma; vicarious injuries; social harms).

For: Lawrence (2000); Weisburd and Levin (1994);
(See also Devlin); Barnes and Ephross (1994);
Ehrlich, Larcom and Purvis (1995)
Against: Hurd and Moore (2004): 1085-93

B. The greater deontological wrong thesis: *Hate crimes violate additional moral duties (besides the duty to refrain from the already criminalized act).*

-The "Kantian" position: *It is more wrong to commit a prohibited act for a prohibited reason.*

For: Raz (1975);(See also excerpts from Kant and Aristotle)
Against: Hurd (1994); Moore (2000)

-The Non-Kantian position: *A crime is worse if it is done in the presence of some one of several objective circumstances* (for example: the victim is particularly vulnerable; the victim is chosen on the basis of an immutable characteristic; there is a relevant history of injustice; the criminal's choice is immorally discriminatory; the criminal's act expresses contempt).

For: Kamm (1992/1993); Crocker (1992/93)
Against: Hurd and Moore (2004): 1095-1100

2. The expressivist thesis: *Hate crimes express that the wrong-doer does not respect the true value of things; hate crime laws express society's repudiation of the wrong-doer's valuations.*

For: Kahan (1996, 1998); Anderson and Pildes (2000);
Beale (2000); Compare: Driver (1992)
Against: Hurd and Moore (2004): 1100-1118; Blackburn (2001)

3. The greater culpability thesis: *Those who commit hate crimes are more culpable because hate and bias constitute particularly culpable subjective mental states.*

For: Robinson (1992-1993); Murphy (1992); Arenella (1990)
Hurka (1993); Wall (1998)
Against: Hurd and Moore (2004): 1117-1138

4. The equality thesis: *Citizens are entitled to equal protection from crime. Hate crime victims are at greater risk of attack and therefore are due the greater protection afforded by enhanced penalties.*

For: Harel and Parchomovsky (1999); Compare: Simons (2000)
Against: Hurd and Moore (2004): 1138-1146

Schedule

- 9/7 Understanding Hate Crime
Film
- 9/10 Statistics: <http://www.fbi.gov/ucr/hc2004/openpage.htm>
Barnes and Ephross
Ehrlich, Larcom and Purvis
- 9/14 no class
- 9/17 Legal Responses
For: Lawrence (2000), 1-44
- 9/21 The Wrong-Doing Thesis. The Greater Harm Thesis
For: Lawrence (2000), 45-109
- 9/24 For: Lawrence (2000), 110-178
- 9/28 For: Weisburd and Levin (1994)
- 10/1 For: Weisburd and Levin (1994), compare Devlin
- 10/5 Against: Hurd and Moore (2004): 1081-1093
- 10/8 The Wrong-Doing Thesis. The Greater Deontological Wrong Thesis.
The Kantian Position
Background: Kant
- 10/12 Background: Aristotle, (Bayles on Hume?)
- 10/15 Against: Hurd and Moore (2004), 1093-1096
- 10/19 The Non-Kantian Position
For: Kamm (1992/93)
- 10/22 For: Crocker (1992/93)
- 10/26 Against: Hurd and Moore (2004)
- 10/29 The Expressivist Thesis
For: Kahan (1996; 1998)
- 11/2 For: Anderson and Pildes (2000); Beale (2000)
- 11/5 Against: Hurd and Moore (2004)
- 11/9 The Greater Culpability Thesis
For: Robinson (1992/93)
- 11/12 For: Arenella

- 11/16 Compare: Hurka (1993) and Wall (1998)
- 11/19 no class. Conversion day
- 11/23 no class.
- 11/26 Against: Hurd and Moore (2004): 1117-1138
- 11/30 The Equality Thesis
For: Harel and Parchomovsky (1999)
- 12/3 Against: Hurd and Moore (2004)
- 12/7 Final Paper Workshop
- 12/10 Final Paper Workshop

Course Readings:

Anderson, Elizabeth S. and Richard H. Pildes. 2000. Expressive Theories of Law: A General Restatement. 148 University of Pennsylvania Law Review.

Arenella, Peter. 1990. Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgements. 7 Social Philosophy and Policy.

Aristotle. Nichomachean Ethics.

Barnes, Arnold and Paul H. Ephross. 1994. the Impact of Hate Violence on Victims: Emotional and Behavioral Responses to Attacks. 39 Social Work: 247.

Beale, Sara Sun. 2000. Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement? 80 Boston University Law Review: 1227.

Crocker, Lawrence. 1992/93. Hate Crime Statutes: Just? Constitutional? Wise? Annual Survey of American Law: 485.

Ehrlich, Howard J, Barbara E. K. Larcom, and Robert D. Purvis. 1995. The Traumatic Impact of Ethnoviolence, in The Price We Pay: The Case Against Racist Speech, Hate Propoganda, and Pornography: 62.

Harel, Alon and Gideon Parchomovsky. 1999. On Hate and Equality. Yale Law Journal 109: 507-39.

Hurd, Heidi M. and Michael S. Moore. 2004. Punishing Hatred and Prejudice. 56 Stanford Law Review: 1081-1146.

Hurka, Thomas. 1993. Perfectionism.

Kahan, Dan. 1998. The Anatomy of Disgust in Criminal Law. 96 Michigan Law Review: 1621.

-----, 1996. What Do Alternative Sanctions Mean? 63 University of Chicago Law Review: 591.

Kamm, Frances. 1992/93. A Philosophical Inquiry into Punishment Enhancement. Annual Survey of American Law: 629.

Kant, Immanuel. Groundwork for the Metaphysics of Morals.

Lawrence, Frederick. 2000. Punishing Hate.

Robinson, Paul. 1992/93. Hate Crimes: Crimes of Motive, Character, or Group Terror? Annual Survey of America Law.

Wall, Steven. 1998. Liberalism, Perfectionism, and Restraint.

Weisburd, Steven Bennett and Brian Levin. 1994. On the Basis of Sex: Recognizing Gender-ased Bias Crimes. 5 Stanford Law and Policy Review: 21.

Additional Bibliography (Honors readings are here.)

Adams, David M. Punishing Hate and Achieving Equality. Criminal-Justice-Ethics. Wint-Spr 2005; 24(1): 19-30.

Alexander, Larry. 1992. The ADL Hate Crime Statute and the First Amendment Criminal-Justice-Ethics. Sum-Fall 92; 11(2): 49-51.

Altman, Andrew. 2001. The Democratic Legitimacy of Bias Crime Law: Public Reason and the Political Process. Law and Philosophy 20(2): 141-73.

Amar, Akhil Reed. 1992. The Case of the Missing Amendments: R.A. V. v. City of St. Paul. Harvard Law Review 106: 124-161.

Baehr, Amy. 2003. A Feminist Liberal Approach to Hate Crime Legislation. Journal-of-Social-Philosophy. Spr 2003; 34(1): 134-152.

Blake,-Michael, 2001. Geeks and Monsters: Bias Crimes and Social Identity. Law-and-Philosophy. Mr 01; 20(2): 121-139.

Card, Claudia. 2001. Is Penalty Enhancement a Good Idea? Law and Philosophy 20(2): 195-214.

Choundas, George P. 1995. Neither Equal nor Protected: The Invisible Law of Equal Protection, the Legal Invisibility of Its Gender-Based Victims. Emory Law Journal 44: 1069-85.

- Dillof, Anthony M. 1997. Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes. *Northwestern University Law Review* 91: 1016-81.
- Gellman, Susan. 1991. Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws 39 *UCLA Law Review* 333ff.
- , 1991. Brother, You Can't Go to Jail for What You're Thinking": Motives, Effects and "Hate Crime" Laws. *Criminal-Justice-Ethics*. Sum-Fall 92; 11(2): 24-28.
- , 1995. Hate Crimes Laws after *Wisconsin v. Mitchell*. *Ohio Northern University Law Review* 21: 863-70.
- Hurd, Heidi. 2001. Why Liberals Should Hate Hate Crime Legislation. *Law and Philosophy* 20(2): 215-32.
- , 1994. What in the Wrl'd is Wrong? 5 *Journal of Contemporary Legal Issues*: 157.
- Kahan, Dan M. 2001. Two Liberal Fallacies in the Hate Crimes Debate. *Law and Philosophy* 20(2): 175-93.
- Moore, Michael. 2000. Educating Oneself in Public.
- Mueller, Abby. 1993. Can Motive Matter? A Constitutional and Criminal Law Analysis of Motive in Hate Crime Legislation. *University of Missouri at Kansas City Law Review* 61: 619-32.
- Musselman, John D. 1995. Critical Race Theory on Hate Speech as a Bias Crime Contemporary-Philosophy. *S-O* 95; 17(5): 2-8.
- Nourse, Victoria. 1998. The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law. *Stanford Law Review* 50: 1435-69.
- Pollitt, Katha. 1999. Hate Crimes Legislation. *The Nation* 269(18): 10.
- Rawls, John. 1993. *Political Liberalism*. Cambridge: Harvard University Press.
- Raz, Joseph. 1975. *Practical Reason and Norms*.
- Redish, Martin. 1992. Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory. *Criminal-Justice-Ethics*. Sum-Fall 92; 11(2): 29-41.
- Rothschild, Eric. 1993. Recognizing Another Face of Hate Crimes: Rape as a Gender-Bias Crime. *Maryland Journal of Contemporary Legal Issues* 4(2): 231-85.
- Scanlon, Thomas. 1971. A Theory of Freedom of Expression. *Philosophy and Public Affairs* 1(1): 203.
- Simons, Kenneth W. 2000. On Equality, Bias Crimes and Just Deserts. 91 *Criminal Law and Criminology*: 237ff.

Steiker, Carol S. 1999. Identity and Equality: Punishing Hateful Motives. *Old Wine in a New Bottle Revives Calls for Prohibition*. *Michigan Law Review* 97: 1857-83.

Taylor, Krisin L. 1996. Treating Male Violence against Women as a Bias Crime. *Boston University Law Review* 76: 575-603.

Weinstein, James. 1992. First Amendment Challenges to Hate Crime Legislation: Where's the Speech? *Criminal-Justice-Ethics*. Sum-Fall 92; 11(2): 6-19.

Wellman, Christopher Health. 2006. A Defense of Stiffer Penalties for Hate Crimes *Hypatia* 21(2): 62-80.

Wisconsin v. Mitchell, 508 U.S. 476 (1993) (upholding facial challenge to Wisconsin bias crime statute).