

PROPORTIONALITY OF BIAS-MOTIVATION AND HATE CRIME: AN OVERVIEW OF HATE CRIME LAWS

NEHALUDDIN AHMAD¹,

GARY LILIENTHAL²

Professor of Law, University Islam Sultan Sharif Ali (UNISSA), Brunei Darussalam¹

Professor of Law, NALSAR INDIA²

ahmadnehal@yahoo.com¹

carrington.rand@icloud.com²

Abstract. *This article's overall research objective will be to critically analyze the foundational theory of hate crimes. The research question asks to what extent hate crimes are grounded in a foundational commonplace style of elaboration of statutory rules, as propounded by Nicolaus the Sophist, on the bases of the so-called 'final headings'. The argument seeks to sustain the view that the so-called hate crimes are cognate to final headings elaborations in order to ground commonplace judicial denunciation. The research paradigm identifies underlying norms; therefore, the research methodology is doctrinal, establishing a legal narrative analysis. In extended synthesis, a statute might not proscribe fighting words of racial animus any more than those of hatred of the victim's family. Regulation of the words' subject inferred elaboration by the heading of the just and the appropriate. The enigma of the 'something more' criterion is ostensibly an elaboration of the possible and the beneficial. Hate crime laws apply to conduct motivated by hate, instead of hate speech. Hate suggests a consequential vitiating of reputation, so that hate crime laws are impliedly elaborated based on the final heading of the appropriate. Online symbolic rhetoric is arguably the enigmatic 'something more' and elaborated by the final headings of the possible and the beneficial. Hate crime laws require extraordinary police inquiries into offenders' motives. This conflation of duty and avoiding turning a blind eye implies final headings elaboration by the appropriate and the just. A measurement of victim vulnerability by association with a suffering group is the primary indicium of commonplace, elaborated by the final heading of the beneficial. The key to a hate crimes prosecution for social media actions would be hostility as a vicious error, as already elaborated as being equivalent to hatred, susceptible to elaboration by the final heading of appropriateness.*

Keywords: *Hate crimes, Judicial Rhetoric, Bias motivation, Criminal Penalties, social media*

Table of Contents

Introduction

1. Judicial Construct Elaboration by Commonplace
2. American Judicial Rhetoric and Hate Crime Law
3. European Hate Crime Laws
4. Hate Crime and social media in the UK.

CONCLUSION

ACKNOWLEDGEMENT

INTRODUCTION

Hate crimes are criminal acts motivated by bias against a specific race, ethnicity, ancestry, religion, sexual orientation, disability, gender, or gender identity. Most of these kinds of crimes recorded were assault, intimidation or vandalism. The Federal Bureau of Investigation also recorded 9 murders, 13 rapes, and more than 700 hate-motivated thefts, robberies, and burglaries. The numbers were generally up, but some groups showed particularly large increases. Anti-Asian hate crimes more than doubled. Nearly two-thirds of this kind of crime involved racial or ethnic hate. Under half of the incidents were motivated by anti-African-American hate and around 20%

involved anti-white hate.¹ With this statement of significance, the overall research objective of this article will be to analyse critically the foundational theory of hate crimes.

Hate crime legislation has typically encompassed a ‘bias-motivation’ criterion,² with reference to such protected status categories as race, ancestry, religion, gender, national origin, age, ethnicity, sexual orientation, and physical and mental disabilities.³ In the ancient Greek progymnasmata oratory of ‘Introduce a New Law’, Nicolaus the Sophist had used the common ‘headings of purpose’ to amplify evils and identify a group with such inherent evil.⁴ These headings were the legal, the just, the beneficial, the possible and the appropriate. But Nicolaus added another heading, the honorable, which when all taken together were called the ‘final’ headings.⁵ The final headings were significant in that any one of them could make a complete and persuasive hypothesis.⁶ All the key sophists used them to construct commonplace oratories of identified errors that would be treated like crimes. Nicolaus the Sophist specified the ‘commonplace’ level of oratory as an amplification of an evil used to attack those involved. John of Sardis observed that the commonplace was an epilogue to sharpen the judges’ interest. He added that this amplification, or elaboration, was of inherently good or evil things.⁷ In this way, commonplace could orate a new crime constructed from publicly hated mere errors. In the light of these central propositions, the question arises as to what extent hate crimes are grounded in a foundational commonplace style of elaboration of statutory rules, as propounded by Nicolaus the Sophist, on the bases of the so-called ‘final headings’. We seek to sustain the view that the so-called hate crimes are cognate to final headings elaborations in order to ground commonplace judicial denunciation.

The research paradigm identifies underlying norms, and therefore, the research methodology is doctrinal, setting out a legal narrative analysis. Since hate crimes emanate from United Nations precepts, based on axioms of protection, we treat juridical manoeuvres in the field as independent of jurisdiction. While this delimitation is not strictly true, the principles against which we measure our central proposition will introduce few or no identifiable methodological artifacts.

The argument begins with a critical discussion of Judicial Construct Elaboration by Commonplace. The next link in the chain of argument is designated the main heading of American Judicial Rhetoric and Hate Crime Law, which includes the sub-discussions of: The Development of Hate Crime Law; Speech, Motives, and Criminal Penalties; Proportionality of Bias-Motivation; and, From Hate Crime to Bias Crime. We critically discuss European Hate Crime Laws, with sub-discussions on Evidentiary provisions in hate crime laws in France and the United Kingdom; and, Examples of Mixed Motive Laws - Belgium, the United Kingdom, and California. The argument then moves forward to the main section of Hate Crime and Social Media in the UK, in which we critically discuss: The Public Interest; Social Media Hate Crime Offences; and, Specific United Kingdom Hate Crime Offences.

The likely research outcomes may be stated as follows. In extended synthesis, a statute might not proscribe fighting words of racial animus any more than fighting words of hatred of the victim’s family. Regulation of the words’ subject inferred elaboration by the heading of the just and the appropriate. The enigma of the ‘something more’ criterion is ostensibly an elaboration by the possible and the beneficial. Hate crime laws apply to conduct motivated by hate, instead of hate

1 Mike Wendling, ‘US hate crimes jumped in 2021 - FBI’, 14th March 2023.

2 R Berk, EA Boyd & KM Hamner, ‘Thinking More Clearly about Hate-Motivated Crimes’, in G Herek & K Berrill, eds., *Hate Crimes: Confronting Violence against Lesbians and Gay Men*, Sage, Newbury Park, 1992; V Jenness & R Grattet, ‘The Criminalization of Hate: A Comparison of Structural and Polity Influences on the Passage of Bias Crime Legislation in the United States’, 39 *Sociological Perspectives*, vol. 39, no. 1, 1996, pp. 29-54.

3 S Phillips and R Grattet, ‘Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law’, *Law & Society Review*, vol. 34, no. 3, 2000, pp. 567-606, p. 572.

4 H Rabe, ed, *Aphnonii Progymnasmata*, Teubner, Leipzig, 1926, p. 47R.

5 J Felten, ed, *Nicolai Progymnasmata*, Teubner, Leipzig, 1913, pp. 77, 78.

6 GA Kennedy, trans, *Progymnasmata: Greek Textbooks of Prose Composition and Rhetoric*, Society of Biblical Literature, Atlanta, 2003, p. 207, citing John of Sardis.

7 GA Kennedy, trans, *Progymnasmata: Greek Textbooks of Prose Composition and Rhetoric*, Society of Biblical Literature, Atlanta, 2003, pp. 79, 105, 148, 201, 202.

speech. Hate suggests a consequential vitiation of reputation, so that hate crime laws are impliedly elaborations based on the final heading of the appropriate. Online symbolic rhetoric is arguably the enigmatic 'something more', and elaborated by the final headings of the possible and the beneficial. Hate crime laws require extraordinary police inquiries into offenders' motives. This conflation of duty and avoiding turning a blind eye implies final headings elaboration by the appropriate and the just. A measurement of victim vulnerability by association with a suffering group is the primary indicium of commonplace, elaborated by the final heading of the beneficial. The key to a hate crimes prosecution for social media actions would be hostility as a vicious error, as already elaborated as being equivalent to hatred, susceptible to elaboration by the final heading of appropriateness.

2.0 JUDICIAL CONSTRUCT ELABORATION BY COMMONPLACE

Construct elaboration has a contemporary meaning of the refinement and clarification of one legal construct into a slightly different construct. This process is by no means new. Rather, it is ancient. Thus, Hermogenes, Aphthonius, Nicolaus the Sophist and John of Sardis each discussed methodologies for elaborating a law. Hermogenes divided the headings for elaborating 'introduction to a law' into clarity, justice, legality, advantage, possibility, and appropriateness. He understood these terms as follows. Clarity is when it is simple and clear to all people to know something is just. Justice is when something accords with nature and morals. Advantage is when something does no harm. Neither will it harm in the future. Possibility is when all agree it can be done. Appropriateness is when we believe something does not hurt our reputation. These are all uniquely personal determinations.⁸

Aphthonius regarded 'introduction of a law' as, in specificity, more than a thesis, but less than a hypothesis. This is because it applied to a person without fully clarifying all applicable circumstances. He described a law as an invention of the gods, the opinion of wise men, the correction of errors, and the community's common covenant. It is elaborated under the headings of legal, just, advantage and possible, in the context of deliberating on future actions.⁹

Nicolaus the Sophist defined law as a political decision made either by a multitude, or, by an eminent man known as a lawgiver. Everyone in the jurisdiction is expected to live by it. It is elaborated the same way as a commonplace. Hermogenes regarded a commonplace as an amplification of something that was already agreed, putting all actors in the same category. Aphthonius added that it amplified evils attached to something, fitting all people taking part, in common. Nicolaus the Sophist specified the commonplace as an amplification of an evil, used as an attack on those involved. John of Sardis observed that the commonplace served as an epilogue to sharpen the judges' interest. He added that this amplification, or elaboration, was of inherently good or evil things.¹⁰ In this way, commonplace could orate a new crime constructed from publicly hated mere errors.

Nicolaus the Sophist used the common 'headings of purpose' to amplify evils and identify a group with such inherent evil. These headings were the legal, the just, the beneficial, the possible and the appropriate. But Nicolaus added another heading, the honorable, which when all taken together were called the 'final' headings.¹¹ Final headings were significant in that any one of them could make a complete and persuasive hypothesis.¹² All the key sophists used them to construct commonplace oratories of identified errors that would be treated like crimes.

8 H Rabe, ed, *Aphthonii Progymnasmata*, Teubner, Leipzig, 1926, p. 27.

9 H Rabe, ed, *Aphthonii Progymnasmata*, Teubner, Leipzig, 1926, p. 47R.

10 GA Kennedy, trans, *Progymnasmata: Greek Textbooks of Prose Composition and Rhetoric*, Society of Biblical Literature, Atlanta, 2003, pp. 79, 105, 148, 201, 202.

11 J Felten, ed, *Nicolai Progymnasmata*, Teubner, Leipzig, 1913, pp. 77, 78.

12 GA Kennedy, trans, *Progymnasmata: Greek Textbooks of Prose Composition and Rhetoric*, Society of Biblical Literature, Atlanta, 2003, p. 207, citing John of Sardis.

Thus, elaborating a law was by a series of publicly persuasive hypotheses, in pragmatic form. John of Sardis regarded all these headings of elaboration as distinguishing the merely morality-laden fable from a law. A fable is a fictitious story giving only an image of truth.¹³ In both forms, we do not speak ill of elders and do not dishonour the gods. In the fable, there already is enforcement by law. In elaborating a law, the genus of the headings of elaboration is whether or not the law has been ratified.¹⁴ It appeared the orator could attribute ratification to a deity, or in effect, any great lawgiver.

By means of a style of legal construct elaboration, courts could set out the circumstances in which a legal construct could be used, judging specific behaviours and mental circumstances as being either within or outside of the construct's scope.¹⁵ Construct elaboration established a new juridical basis for a statutory rule, some time after the statute been enacted. To this extent, it resembled commonplace oratory. As a result of this construct elaboration, a concept, in the form of a rule, became more like an agreed aphorism - a maxim. Elaboration is an early phase of the process of settling, in which protagonists develop the rhetoric to justify and legitimise, retroactively, a rule or concept not already in the statute.¹⁶ Statutes take on more complex meanings through a chronological series of appellate opinions, as courts both elaborate and explain the contexts of their newly-formed meaning.

Such litigation challenges generally are commenced to agitate perceived ambiguities in a statute, and thereby, to destabilize its general validity. Courts adopt the appellant's or the respondent's argued view, or they construct their own hybrid, to fill the gap with a new commonplace error, which looks to all the world like a crime. Thus, judges direct the so-called definitions of the statute's terms, and, by basing their views on analogous precedents, validate the new commonplace construct by embedding the statute's meaning in already established jurisprudential precepts.¹⁷

3.0 AMERICAN JUDICIAL RHETORIC AND HATE CRIME LAW

3.1 The Development of Hate Crime Law

The notion of 'hate crime' is relatively new, although legal responses to hate-motivated conduct in America dated back to, and arose from, early twentieth-century state statutes aimed at white supremacist organizations, such as the Ku Klux Klan. Such groups were under fire for their defacement of religious buildings, while wearing masks and hoods.¹⁸ In the 1960s and 1970s, the U.S. Department of Justice prosecuted some hate-motivated crimes under 18 U.S.C., sections 241, 242, and 245 for beaches of federal civil rights.¹⁹

By 1995, most U.S. states had legislated hate crime laws.²⁰ Hate crime legislation

13 T Morgan, *Literate Education in the Hellenistic and Roman Worlds*, Cambridge University Press, Cambridge, 1998, p. 221.

14 H Rabe, ed, *AphnoniiProgymnasmata*, Teubner, Leipzig, 1926, p. 261, 16.

15 S Phillips and R Grattet, 'Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law', *Law & Society Review*, vol. 34, no. 3, 2000, pp. 567-606, p. 577.

16 S Phillips and R Grattet, 'Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law', *Law & Society Review*, vol. 34, no. 3, 2000, pp. 567-606, p. 578.

17 S Phillips and R Grattet, 'Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law', *Law & Society Review*, vol. 34, no. 3, 2000, pp. 567-606, p. 578n.

18 G Bensinger, 'Hate Crimes: A New/Old Problem', *International Journal of Comparative and Applied Criminal Justice*, vol. 16, 1992, pp. 115-23; JB Jacobs, 'The Emergence and Implications of American Hate', *Crime Jurisprudence, Israel Yearbook on Human Rights*, vol. 22, 1993, pp. 113-39, p. 113.

19 Covering conspiracies against a person's constitutional rights, deprivations of their rights under the colour of law, and interference with a person's involvement in federally protected activities; J Morsch, 'The Problem of Motive in Hate Crimes-The Argument Against Presumptions of Racial Motivation', *Journal of Criminal Law and Criminology*, vol. 82, no. 3, 1991, pp. 659-89.

20 R Grattet, V Jenness & T Curry, 'The Homogenization and Differentiation of Hate Crime Law in the U.S. 1978-1995: An Analysis of Innovation and Diffusion in the Criminalization of Bigotry', *American Sociological Review*, vol. 63, 1998, pp. 286-307, p. 295.

encompasses a 'bias-motivation' criterion,²¹ with reference to such status categories as race, ancestry, religion, gender, national origin, age, ethnicity, sexual orientation, and physical and mental disabilities,²² suggesting elaboration from basic status by the just and the beneficial. Any crimes committed, as a consequence of considering these status affiliations, attract a penalty increase or are designated a more serious crime. The United States Hate Crime Sentencing Enhancement Act²³ orders an increase in sentences, by at least three levels of offense, for the eight base crimes of murder, forcible rape, non-negligent manslaughter, simple assault, aggravated assault, arson, vandalism, and intimidation. This applies when the crimes are both bias-motivated and occur on federal property.²⁴

Gellman has been the leading critic of the laws, stating that the debate over hate crime laws is between customary allies and within each side. She added that when either viewpoint prevailed, its protagonists seemed unhappy about their win. They could see each other's points of view, and agree with them. Those involved in the debate appeared to be on both sides at the same time.²⁵ This suggests major ambiguities in hate crime laws.

In *State v. Mitchell*,²⁶ the Wisconsin Supreme Court resonated with Gellman's views.²⁷ The court categorised the case's three First Amendment challenges as punishment of speech, overbreadth, and content discrimination.²⁸ It argued that punishment of speech challenges suggested that because the underlying offense was already punishable, the increased penalty must be directed at bias motivation. This was inevitably intertwined with an objective of punishing beliefs and opinions.²⁹ Overbreadth's challenges contended that hate crime statutes included lawful forms of expression, with a 'chilling effect' on protected speech.³⁰ Content discrimination challenges argued that hate crime laws regulated speech based on the speech's subject. Even though 'fighting words' were not permitted, statutes might not additionally regulate specific fighting words.³¹ Thus, a statute might not proscribe fighting words of racial animus any more than fighting words of hatred of the victim's family. Regulation of the words' subject inferred elaboration by the heading of the just and the appropriate.

Also, two Fourteenth Amendment questions were agitated in the case: equal protection and vagueness. Equal protection claims inferred that hate crime laws gave special treatment to people with specific status attributes.³² Vagueness claims inferred that hate crime laws violated due process, because the average person could not predict what would violate the statute.

21 R Berk, EA Boyd & KM Hamner, 'Thinking More Clearly about Hate-Motivated Crimes', in G Herek & K Berrill, eds., *Hate Crimes: Confronting Violence against Lesbians and Gay Men*, Sage, Newbury Park, 1992; V Jenness & R Grattet, 'The Criminalization of Hate: A Comparison of Structural and Polity Influences on the Passage of Bias Crime Legislation in the United States', 39 *Sociological Perspectives*, vol. 39, no. 1, 1996, pp. 29-54.

22 S Phillips and R Grattet, 'Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law', *Law & Society Review*, vol. 34, no. 3, 2000, pp. 567-606, p. 572.

23 Federal Hate Crime Sentencing Enhancement Act 1994 (United States).

24 Anti-Defamation League, *Hate Crimes Laws: A Comprehensive Guide*, Anti-Defamation League, New York, 1997; D Altschiller, *Hate Crimes: A Reference Handbook*, ABC-CLIO, Santa Barbara, 1999.

25 S Gellman, 'Sticks and Stones Can Put You in Jail, But Words Can Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws', *UCLA Law Review*, vol. 39, no. 2, 1991, pp. 333-396, p. 334.

26 *State v. Mitchell*, 169 Wis. 2d 153; 485 N.W.2d 807; 1992 Wisc. LEXIS 323 (1992).

27 *ibid.*, p. 160.

28 S Phillips and R Grattet, 'Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law', *Law & Society Review*, vol. 34, no. 3, 2000, pp. 567-606, p. 573.

29cf *State v. Mitchell*, 169 Wis. 2d 153; 485 N.W.2d 807; 1992 Wisc. LEXIS 323 (1992).

30 *ibid.*, p. 163.

31cf *R.A.V. v. Saint Paul*, 505 U.S. 377; 112 S. Ct. 2538; 1992 U.S. LEXIS 3863; 120 L. Ed. 2d 305; 60 U.S.L.W. 4667; 92 Cal. Daily Op. Service 5299; 92 Daily Journal DAR 8395; 6 Fla. Law W. Fed. S 479 (1992).

32cf *State v. Beebe*, 67 Ore. App. 738; 680 P.2d 11 (1984).



3.2 Speech, Motives, and Criminal Penalties

Many petitioners claimed that hate statutes chastised speech. One Oregon petitioner argued that the state's hate crime legislation was unconstitutional 'because it punishes belief and proscribes opinion or a subject of communication'.³³ The argument within the complaint of 'punishment-of-speech' ran as follows. If the punishment for the same crime, but without the motivation of bias, was the punishment for the *actus reus* of a specific offense, then the additional hate crime penalty must only be for motive. Thus, the standard for bias-motivation accessed the accused's opinions and beliefs. Therefore, hate crime statutes were drafted to punish the accused's opinions and beliefs.

In the 1992 case of *State v. Wyant*,³⁴ the Ohio Supreme Court, arguably engaging in commonplace denunciation, and held as follows. The base offences for ethnic intimidation also were proscribed pursuant to other legislation. Therefore, the increased penalty had to be for 'something more' than just those elements constituting the base offence. This enigmatic 'something more' is ostensibly an elaboration by the possible and the beneficial.

Thus, to begin, the court's argument tried to identify the attribute of 'something more', proscribed in the Ohio statute, not part of the base legislated offence. The statute did not mention any additional *actus reus*, extrinsic to the base legislation. Thus additional punishment only arose from the reason for the criminal action, or, in other words, the actor's motivation.³⁵ However, judges had argued that motive constituted an appropriate element for consideration when deciding the punishment.³⁶ As many had said, an actor's reason for the criminal act was indeed relevant. The same *actus reus* could be penalised differently, based on the defendant's reason for the action.³⁷

Thus, while homicide could be categorised as murder, or manslaughter, in certain circumstances, it might be excused based on the actor's motive.³⁸ A hate crime comprised committing a crime consequent on the victim's protected attribute. Speech on its own did not constitute hate crime. Nevertheless, courts have argued that speech might be probative as evidence of bias motivation.³⁹ One Illinois appellate court set out two arguments. It found that the statute did not punish an individual only for hateful thoughts, or uttering his or her bigotries. The relevant section 12-7.1 punished the offender's criminal conduct of choosing the victim by virtue of either those beliefs or hatred and then committing one criminal act proscribed in section 12-7.1.⁴⁰ The first amendment to the Constitution of the United States did not prohibit using speech as

33 *State v. Hendrix*, 107 Ore. App. 734; 813 P.2d 1115; 1991 Ore. App. LEXIS 1014 (1991), p. 739.

34 *State v. Wyant*, 64 Ohio St. 3d 566; 597 N.E.2d 450; 1992 Ohio LEXIS 1837 (1992), pp. 570-571.

35 *ibid.*

36 After this argument was introduced in the seventh case where the punishment-of speech claim was raised (*Dobbins v. State* 1992: 924-25), it was replicated in 65% (11 of 17) of the remaining punishment-of-speech cases (*People v. Miccio* 1992:701; *People v. Joshua H.* 1993: 1749-51; *People v. Superior Ct.* 1993:1608-9; *Wisconsin v. Mitchell* 1993:14-18; *State v. Ladue* 1993:630; *In re M.S.* 1993:1773; *State v. Talley* 1993:205; *State v. McKnight* 1994:394; *State v. Vanatter* 1994:756-57; *State v. Mortimer* 1994:528; *People v. McKenzie* 1995: 1267-68).

37 S Phillips and R Grattet, 'Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law', *Law & Society Review*, vol. 34, no. 3, 2000, pp. 567-606, p. 579.

38 *People v. Joshua H.*, 13 Cal. App. 4th 1734; 1993 Cal. App. LEXIS 227; 17 Cal. Rptr. 2d 291; 93 Cal. Daily Op. Service 1747 (1993), pp. 1750-1751.

39 *State v. Hendrix* (1991:740), *State v. Plowman* (1992:166-67), *State v. Talley* (1993:205, 209), and *In re Vladimir P.* (1996:1074).

40 A person commits hate crime when, by reason of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, regardless of the existence of any other motivating factor or factors, he commits assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, mob action, disorderly conduct, harassment by telephone, or harassment through electronic communications . . . 720 ILCS 5/12-7.1, sec. 12-7.1.

evidence to satisfy the elements of the crime or to prove the accused's intent or motive.⁴¹

Evidence of motive also could come from other places, as in the following 1992 example: "[I]f the state showed that every Saturday night for two months the defendants traveled to an area with a large Hispanic population and assaulted a Hispanic person, the trier of fact could infer that the defendants intended to cause physical injury to the present victim because he is perceived to be Hispanic."⁴² These arguments distinguished hate crime statutes from crimes of hate speech.⁴³ In the early 1990s, the interface between these two crimes was blurred.⁴⁴ It has become progressively evident that hate crime laws apply to conduct motivated by hate, instead of hate speech. Hate suggests a consequential vitiation of reputation, so that hate crime laws are impliedly elaborations based on the final heading of the appropriate.

3.3 Proportionality of Bias-Motivation

Judicial opinions on the "proportionality of bias motive" issue. The issue inquires into what proportion of motive must be correlated with the bias for the crime to be a hate crime. Victims are identified for multiple attributes, such as appearance, location, vulnerability, or potential for a successful robbery. No hate crime statute prescribes how to treat multiple and mixed motives.

In *People v. Superior Court*,⁴⁵ the California Court of Appeals argued that bias must be a 'substantial factor' in victim selection. Other courts have adopted this formula.⁴⁶ For example, shouting a racist slogan during a robbery would be enough for a court to say it showed bias, without addressing the cause or source of the bias. However, the bias might be trivial compared to vulnerability while selecting the victim. In another example, an assault might be founded on bias, but the accused robbed the victim because the assault made the victim vulnerable. Although both crimes involved bias and vulnerability, only the second instance could be a hate crime, pursuant to the 'substantial factor' criterion. The 'substantial factor' criterion elaborated the sense of hate crime by determining the grade of bias-motivation. Proportionality could have been determined more specifically, but it has not. Courts could have required a 'sole factor' test or a 'but for' causation criterion. Some Police training instructions⁴⁷ suggest that Police apply a "but for" test during their investigation phase of possible hate crimes.⁴⁸

In the 1997 case of *State v. Nye*,⁴⁹ the accused were convicted of affixing bumper stickers on road signs saying "NO I do not belong to CUT". They also placed them in mailboxes, and on Church Universal and Triumphant property. Such a pattern suggests that once the easier violent cases were successfully prosecuted, public prosecutors could later expand their task to more

41 In re Vladimir P. 283 Ill. App. 3d 1068; 670 N.E.2d 839; 1996 Ill. App. LEXIS 702; 219 Ill. Dec. 161 (1996), pp. 1073-1074.

42 *State v. Plowman*, 314 Ore. 157; 838 P.2d 558; 1992 Ore. LEXIS 158; 61 U.S.L.W. 2149; 22 A.L.R. 5th 835 (1992), p. 166.

43 S Phillips and R Grattet, 'Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law', *Law & Society Review*, vol. 34, no. 3, 2000, pp. 567-606, p. 580.

44 D Goldberger, 'Hate Crime Laws and Their Impact on the First Amendment', *Annual Survey of American Law*, 1992-1993, pp. 569-580.

45 *People v. Superior Court*, 15 Cal. App. 4th 1593; 1993 Cal. App. LEXIS 541; 19 Cal. Rptr. 2d 444; 93 Cal. Daily Op. Service 3828; 93 Daily Journal DAR 6594 (1993), pp. 1604-7.

46 *People v. Baker* 1993:14-17; In re M.S. 1995:25-35; *People v. Superior Court* 1995:741; *Wichita v. Edwards* 1997:10-12.

47 Bureau of Justice Assistance, *A Policymakers Guide to Hate Crime*, U.S. Department of Justice. GPO, Washington, 1997; R Berk, EA Boyd & KM Hamner, (1992) 'Thinking More Clearly about Hate-Motivated Crimes', in G Herek & K Berrill, eds, *Hate Crimes: Confronting Violence against Lesbians and Gay Men*, Sage, Newbury Park, 1992.

48 S Phillips and R Grattet, 'Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law', *Law & Society Review*, vol. 34, no. 3, 2000, pp. 567-606, p. 581.

49 *State v. Nye* 283 Mont. 505; 943 P.2d 96; 1997 Mont. LEXIS 154 (1997).

ambiguous circumstances, such as hate speech.⁵⁰ Thus, the core sections of a statute had to be established in case law as winnable before the more marginal and ambiguous issues, such as for example online symbolic rhetoric, could be prosecuted.⁵¹ This constituted, in effect, the hate crimes paradigm, allowing judicial construct elaboration. And so, while this was going on, there had also been a shift in interpreting the statutes from 'hatred' to 'bias'. This online symbolic rhetoric is arguably the enigmatic 'something more', already discussed above, and elaborated by the final headings of the possible and the beneficial.

3.4 From Hate Crime to Bias Crime

Hate crime laws infer extraordinary inquiries into offenders' motives,⁵² yet another instance of the 'something more' enigma. However, laws seem to suggest that 'hate' was the objective motivation to be proved, after the 1993 U.S. Supreme Court decision in *Wisconsin v. Mitchell*,⁵³ hatred, bigotry, or prejudice were not punished under the hate crime statutes. It was now the perpetrator's error of discrimination, as a vicious act, that was subject to punishment. Thus, hate crimes were not crimes of thought any more than was discrimination. Only acts of discrimination mattered. The Florida Court of Appeals held that it did not matter why a woman was dealt with differently than a man, or a black person differently than a white person, a Jew differently a Catholic. It only mattered that they were treated differently. The same was true with section 775.085 of Florida's hate crime statute.⁵⁴ It did not matter that Dobbins hated Jews or why. It only counted when he discriminated against Daly and beat him specifically because he was a Jew.⁵⁵

Suggesting a continuing ambiguity, some had moved to calling these laws 'bias crime', instead of 'hate crime'.⁵⁶ The scope of hate crime expanded, because newly discovered errors of circumstance, equally as vicious as hatred, now could qualify for punishment.⁵⁷ Further elaboration

50 S Phillips and R Grattet, 'Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law', *Law & Society Review*, vol. 34, no. 3, 2000, pp. 567-606, p. 583.

51 Uniform Crime Report (UCR) data on hate crimes reveal the same pattern. Hate crimes involving harassment and intimidation represent an increasing proportion of the total number of hate crimes, rising from 7% in 1990 to nearly 40% in 1997 (Bureau of Justice Statistics 1997).

52 S Gellman, 'Sticks and Stones Can Put You in Jail, But Words Can Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws', *UCLA Law Review*, vol. 39, no. 2, 1991, pp. 333-396.

53 *Wisconsin v. Mitchell*, 113 S. Ct. 2194; 1993 U.S. LEXIS 4024; 124 L. Ed. 2d 436; 61 U.S.L.W. 4575; 21 Media L. Rep. 1520; 93 Cal. Daily Op. Service 4314; 93 Daily Journal DAR 7353 (1993).

54 Section 775.085, Florida Statutes, was created to increase penalties for convictions of crimes where there was evidence of certain prejudice. "A hate crime is among the most insidious acts taken by one person against another, founded in prejudice and intolerance. A hate crime is an act committed or attempted by one person or group against another, or their property, that in any way constitutes an expression of hatred toward the victim based on his or her personal characteristics. It is a crime in which the perpetrator intentionally selects the victim based on one of the following characteristics: race, color, religion, ethnicity, ancestry, national origin, sexual orientation, mental or physical disability, or advanced age. Under section 775.085, Florida Statutes, criminal penalties are reclassified for such hate-based acts. As the Florida Department of Law Enforcement notes in its Hate Crime Report Manual, the motivation behind the act is the key element in determining whether an incident is hate-related." Office of Attorney General Bob Butterworth, *Hate Crimes in Florida*, 1999, <<http://myfloridalegal.com/99hate.pdf>>, p. 6.

55 *Dobbins v. State*, 605 So. 2d 922; 1992 Fla. App. LEXIS 10062; 17 Fla. Law W. D 2222 (1992), p. 925; S Phillips and R Grattet, 'Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law', *Law & Society Review*, vol. 34, no. 3, 2000, pp. 567-606, p. 584.

56 AM Dillof, 'Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes', *Northwestern University Law Review*, vol. 91, 1997, pp. 1015-1081, p. 1016.

57 In some instances, this elaborated conception of motive was imposed on statutes that appeared to require more information about the offender's state of mind than was implied in the "because of" construction. For example, Florida's statute, which enhanced penalties when the crime "evidences prejudice based upon race, religion, etc.," seemed to invite an investigation into the precise character of the offender's motivation. However, the Supreme Court of Florida, in *State v. Stalder* of 1994, narrowly interpreted the statute as providing for enhancement only when the victim was "intentionally selected because of race, religion, etc". In other words, the court ignored the specific terms included in the statute, that prejudice was required, and aligned its interpretation with the new elaboration.

only had to discover additional vice that was cognate to hatred.

4.0 EUROPEAN HATE CRIME LAWS

Hate crimes violate the so-called equality norm, evidenced by regular restatement in international human rights instruments. The opening line of the United Nations Declaration on Human Rights adverts to 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family'.⁵⁸ It is thematically repeated in many United Nations human rights instruments and is within the central constitutional documents of most world states. Violation of such norms by hate crimes would have a heavy rhetorical and symbolic impact.⁵⁹ The European Commission on Racism and Intolerance advised criminalising these acts in its 2002 General Policy Recommendations.⁶⁰ Subsequently, the European Union adopted its 2008 Framework Decision on Racist and Xenophobic Crime.⁶¹

In recent decisions, some representative examples of which are discussed below, the European Court of Human Rights has determined that, under the European Convention on Human Rights and Fundamental Freedoms,⁶² states have positive obligations to investigate the potential racial motivation of committed crimes. In the seminal 2005 case of *Nachova and Others v. Bulgaria*,⁶³ the Court discovered a state's duty to investigate likely racist motives underlying state officials' acts of violence. Bulgaria's failure to do this was a violation of the non-discrimination provision of the Convention.⁶⁴ The Court expressly recognized that hate crimes required a criminal justice response proportionate to the harm caused, such as for example an investigative response. The Court applied these discovered rules in *Secic v. Croatia*,⁶⁵ a 2007 matter agitating a skinheads attack on a Roma man. The *Secic* Court, echoing the 'something more' elaboration, discussed above, held as follows.

... when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.⁶⁶

This conflation of duty and avoiding turning a blind eye implies final headings elaboration by the appropriate and the just. This suggested a hostility model when looking at violent incidents, and, the construct elaboration was introduced as the corollary of guilt by turning a blind eye. In this hostility model, the offender committed the offence because of either hostility or hatred, layered on top of on one of the base crime attributes. Thus, hostility became a vicious error, and was made equivalent to hatred, repeating the commonplace denunciation of hatred as a breach of propriety. Certain OSCE-participating (Organisation for Security Cooperation in Europe) States have

58 The Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris.

59 *Hate Crime Laws - A Practical Guide*, OSCE Office for Democratic Institutions and Human Rights (ODIHR) Warsaw, 2009, www.osce.org/odihr, p. 19.

60 General Policy Recommendation No. 7 on National Legislation To Combat Racism And Racial Discrimination, ECRI website, 13 December 2002, <www.coe.int/ecri>.

61 The French Presidency of the EU, <http://www.ue2008.fr/PFUE/lang/en/accueil/PFUE-11_2008/PFUE27.11.2008/resultats_JAI>, adopted 28 November 2008.

62 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4. XI. 1950.

63 *Nachova and Others v. Bulgaria*, Judgment of the European Court of Human Rights (Grand Chamber), 6 July 2005, paragraphs 160-168, <<http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>>.

64 *European Convention on Human Rights and Fundamental Freedoms*, art. 14.

65 *Secic v. Croatia*, Judgement of the European Court of Human Rights, (Chamber Judgement), 31 May 2007, paragraph 66, <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>; *Hate Crime Laws - A Practical Guide*, OSCE Office for Democratic Institutions and Human Rights (ODIHR) Warsaw, 2009, www.osce.org/odihr, p. 27.

66 *ibid.*

amended their criminal legislation for specifically requiring an element of hatred, enmity, or hostility.⁶⁷ They require probative evidence of acting from one specific attribute, within the primary category of hostility towards the victim.

Thus, in the United Kingdom, the Crime and Disorder Act provides that the accused must either ‘demonstrate’ or be ‘motivated’ by hostility. However, the Act fails to state a definition of ‘hostility’.⁶⁸ Arguably, this leaves the meaning of ‘hostility’ to a court determination, based on ordinary usage and/or a dictionary meaning, or even allowing construct elaboration in specific cases. Suggesting the required construct elaboration threshold of ambiguity, a 2002 United Kingdom Home Office Research Study found that officials within the criminal justice system did not understand the requisite mental state of a criminal offence being motivated by hostility on the ground of ‘race’.⁶⁹

This kind of legislation, requiring evidence of a racist or hostile motive, might well succeed in satisfying the popular conception of a hate crime. However, its implementation might present difficulties for prosecuting authorities. A person’s feeling of ‘hate’ is so subjective, that it is not a question for non-expert officials to determine in a reasonable way. Even expert evidence in court, of a hate crime perpetrator, might be quite wrong, without extensive interviews and careful examination of an inevitably hostile witness. Almost none of these crimes required proof of motive, as Police must deal with that difficult question by inference and deduction, during their investigation.⁷⁰

4.1 Evidentiary provisions in hate crime laws in France and the United Kingdom

Using a *res gestae*⁷¹ kind of theory, the French Penal Code states that aggravating circumstances are established when “the offence is preceded, accompanied or followed by written or spoken words, images, objects or actions of whatever nature which damage the honor or the reputation of the victim, or a group of persons to which the victim belongs” because of membership or non-membership of a specific ethnic group, nation, religion or race, or because of actual or supposed sexual identity.⁷² The United Kingdom’s Crime and Disorder Act⁷³ provides only limited guidance on evidence that an offence was aggravated racially or religiously. It provides as follows: ‘At the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial or religious group’⁷⁴

Also using a *res gestae* kind of theory for an apparent sentencing uplift, the unreported English case of *Crown v. Paul Taylor* (United Kingdom) illustrated this reasoning. Two men chased Anthony Walker and his cousin through a park in Merseyside, England. Both the victims were teenagers of Afro-Caribbean descent. One Paul Taylor thrust an axe into Anthony’s skull, and killing him. The cousin gave oral evidence that both men had mocked them with racist insults. The manager of a bar nearby testified he had seen Taylor holding a knife and asserting, ‘Someone’s going to get this tonight’. Inside the bar, there were swastikas, and Taylor’s nickname was scratched into the bar’s sign with the same axe. The court held the attack to have been racially motivated. It sentenced Taylor to 23 years in jail. His co-conspirator was sentenced to a custodial

67 Art. 63 of the Russian Federation’s Criminal Code; Art. 62 of Tajikistan’s Criminal Code; Art. 58(1)(f) of Turkmenistan’s Criminal Code; Art. 67 of Ukraine’s Criminal Code; Art 63 of Armenia’s Criminal Code; Art. 61 of Azerbaijan’s Criminal Code.

68 Crime and Disorder Act 1998 (United Kingdom), sec. 28.

69 E Burney & G Rose, *Racist offences - how is the law working?*, Home Office Research Study 244, 2002, p. xvii, Home Office Website, <<http://www.homeoffice.gov.uk/rds/hors2002.html>>.

70 *Hate Crime Laws - A Practical Guide*, OSCE Office for Democratic Institutions and Human Rights (ODIHR) Warsaw, 2009, www.osce.org/odihr, p. 47.

71 The start-to-end period of a serious crime.

72 French Penal Code, articles 132-76, 132-77.

73 Crime and Disorder Act 1998, (United Kingdom), sec 28.

74 *ibid.*; *Hate Crime Laws - A Practical Guide*, OSCE Office for Democratic Institutions and Human Rights (ODIHR) Warsaw, 2009, www.osce.org/odihr, p. 52.

sentence of 17 years.⁷⁵

4.2 Examples of Mixed Motive Laws - Belgium, the United Kingdom and California

Belgian law provides for an increased punishment when ‘one of the motives of the crime’ is hatred, contempt, or hostility towards a person because of a protected characteristic.⁷⁶ United Kingdom law allows an increase in sentence for aggravated circumstances of disability or sexual orientation, whenever the offence was motivated, either wholly or partly ‘(i) by hostility towards persons who are of a particular sexual orientation, or (ii) by hostility towards persons who have a disability or a particular disability’ ‘It is immaterial whether or not the offender’s hostility is also based, to any extent, on any other factor not mentioned in that paragraph’.⁷⁷

California criminal law provides that “hate crime” is a criminal act, wholly or partly, because of at least one real or apparent protected attributes of the victim.⁷⁸ Thus, the bias motive must be a reason for the crime. Other reasons may exist simultaneously. For the case of multiple concurrent motives, the prohibited bias must be a substantial factor in causing the specified outcome. Bias need not be a main factor, and there is no requirement for a “but for” test.

Inquiries into motive require a lot of onerous police investigative work, such as interviews with the suspect’s friends, neighbors and co-workers. Police may need to use search warrants, and they may subpoena internet service providers for digital evidence. They may deploy surveillance of a suspect’s associations with any hate organisations. If there is no direct evidence of bias motive, courts might infer bias from other circumstantial evidence.⁷⁹

5.0 HATE CRIME AND SOCIAL MEDIA IN THE UK

5.1 The Public Interest

Daily, millions of communications are transmitted through social media. Provisions in the Malicious Communications Act 1988⁸⁰ and the Communications Act 2003⁸¹ suggest many social media hate

75 “Severe sentences for ‘poisonous’ racist killing”, Times website, 1 December 2005; “Walker killing: prosecution case”, BBC, 16 November 2006.

76 Art. 377bis of the Belgian Penal Code.

77 Criminal Justice Act 2003 (United Kingdom), sec 146.

78 California Penal Code, secs 422.55, 422.56.

79 *Hate Crime Laws - A Practical Guide*, OSCE Office for Democratic Institutions and Human Rights (ODIHR) Warsaw, 2009, www.osce.org/odihr, p. 55.

80 (1) Any person who sends to another person—

(a) a letter, electronic communication or article of any description] which conveys—

(i) a message which is indecent or grossly offensive;

(ii) a threat; or

(iii) information which is false and known or believed to be false by the sender; or

(b) any article or electronic communication] which is, in whole or part, of an indecent or grossly offensive nature, is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated. Malicious Communications Act 1988 (United Kingdom), sec 1.

81 127 Improper use of public electronic communications network

(1) A person is guilty of an offence if he—

(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or

(b) causes any such message or matter to be so sent.

(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—

(a) sends by means of a public electronic communications network, a message that he knows to be false,

(b) causes such a message to be sent; or

(c) persistently makes use of a public electronic communications network.

(3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

crime cases could be prosecuted. Social media platforms include the privately owned and run Facebook, Twitter, LinkedIn, YouTube, WhatsApp, Snapchat, Instagram and Pinterest.⁸² These circumstances suggest the possibility of a chilling effect on free speech. Prosecutors are instructed to consider carefully paragraph 4.12(c) of the Code for Crown Prosecutors,⁸³ reproduced and considered below in this sub-section, and its question about the circumstances of harm caused to the victim, when the communication targets a particular person.⁸⁴

Prosecutors are instructed that, when a particular victim is targeted, and they have clear evidence of intention to bring about distress or anxiety, (probably meaning the distress of anxiety), they must carefully weigh the effect on the victim. This is even more important when there is a hate crime aspect of the subject communication. The fact that prosecutors cannot possibly weigh all the effects on the victims repeats the 'something more' enigma. However, prosecutors are insufficiently expert to decide the threshold issue that causes of anxiety are entirely external to the anxious person.⁸⁵ In this context, and if continuing and flagrant, an offence covered by the Malicious Communications Act 1988,⁸⁶ might well be in the public interest. Also, as a clear construct elaboration, a prosecution might lie for an offence, pursuant to the Communications Act 2003,⁸⁷ for persistent use of a public electronic communications network purporting to cause annoyance, inconvenience or needless anxiety to the victim.⁸⁸

5.2 Social Media Hate Crime Offences

(4) Subsections (1) and (2) do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990 (c. 42)). Communications Act 2003 (United Kingdom) sec127.

82 The Crown Prosecution Service, *Guidelines on prosecuting cases involving communications sent via social media*, 2016, <http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/index.html#a09>, retrieved 12th May 2016.

83 The Crown Prosecution Service, *The Code for Crown Prosecutors*, 2016, <https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf>, retrieved 12th April 2023.

84 The Crown Prosecution Service, *Guidelines on prosecuting cases involving communications sent via social media*, 2016, <http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/index.html#a09>, retrieved 12th May 2023.

85 "One should bear in mind Lacan's lesson here: accepting guilt is a manoeuvre which delivers us of anxiety, and its presence signals that the subject compromised his desire. So when, in a move described by Kierkegaard, one withdraws from the dizziness of freedom by seeking a firm support in the order of finitude, this withdrawal itself is the true Fall. More precisely, this withdrawal is the very withdrawal into the constraints of the externally-imposed prohibitory Law, so that the freedom which then arises is the freedom to violate the Law, the freedom caught into the vicious cycle of Law and its transgression, where Law engenders the desire to "free oneself" by way of violating it, and "sin" is the temptation inherent to the Law - the ambiguity of attraction and repulsion which characterizes anxiety is now exerted not directly by freedom but by sin. The dialectic of Law and its transgression does not reside only in the fact that Law itself solicits its own transgression, that it generates the desire for its own violation; our obedience to the Law itself is not "natural," spontaneous, but always-already mediated by the repression of the desire to transgress it. When we obey the Law, we do it as part of a desperate strategy to fight against our desire to transgress it, so the more rigorously we obey the Law, the more we bear witness to the fact that, deep in ourselves, we feel the pressure of the desire to indulge in sin. The superego feeling of guilt is therefore right: the more we obey the Law, the more we are guilty, because this obedience effectively is a defence against our sinful desire." S Zizek, 'Anxiety: Kierkegaard with Lacan', *Lacanian Ink*, vol. 26, 2005, pp. 102-117, <<http://www.lacan.com/frameXXV15.htm>>, retrieved 18th May 2016.

86 Malicious Communications Act 1988 (United Kingdom), sec 1.

87 Communications Act 2003 (United Kingdom), sec 127(2).

88 The Crown Prosecution Service, *Guidelines on prosecuting cases involving communications sent via social media*, 2016, <http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/index.html#a09>, retrieved 12th May 2023.

According to the United Kingdom Crown Prosecution Service, the high evidence threshold, the public interest and ECHR considerations, apply just as much to social media hate crime cases, as in cognate cases.⁸⁹ The Code for Crown Prosecutors advises and instructs prosecutors as follows, using the “discrimination” construct elaboration explained as above.

The circumstances of the victim are highly relevant. The greater the vulnerability of the victim, the more likely it is that a prosecution is required. This includes where a position of trust or authority exists between the suspect and victim. A prosecution is also more likely if the offence has been committed against a victim who was at the time a person serving the public. Prosecutors must also have regard to whether the offence was motivated by any form of discrimination against the victim’s ethnic or national origin, gender, disability, age, religion or belief, sexual orientation or gender identity; or the suspect demonstrated hostility towards the victim based on any of those characteristics. The presence of any such motivation or hostility will mean that it is more likely that prosecution is required. In deciding whether a prosecution is required in the public interest, prosecutors should take into account the views expressed by the victim about the impact that the offence has had. In appropriate cases, this may also include the views of the victim’s family. Prosecutors also need to consider if a prosecution is likely to have an adverse effect on the victim’s physical or mental health, always bearing in mind the seriousness of the offence. If there is evidence that prosecution is likely to have an adverse impact on the victim’s health it may make a prosecution less likely, taking into account the victim’s views. However, the CPS does not act for victims or their families in the same way as solicitors act for their clients, and prosecutors must form an overall view of the public interest.⁹⁰

Prosecutors are instructed to be alert to any reference within the communication to a recent tragic event, involving many deaths of persons who share any of the protected characteristics,⁹¹ implying a measurement of victim vulnerability by association with a suffering group. This is the primary indicium of commonplace, elaborated by the final heading of the beneficial.

United Kingdom and European case law have agitated the matter of the European Convention on Human Rights’ Article 10⁹² and racist and/or religious hate crime speech. Four such seminal and relevant cases demonstrate the overall construct elaboration, as follows. DPP v. Collins confirmed that it is consistent with Article 10 to prosecute a person for using the telecommunications system to leave racist messages. Effect must be given to Article 17 of the convention,⁹³ which prohibits the abuse of any Convention rights, as held in *Norwood v. the UK*.⁹⁴

89 *ibid.*

90 The Crown Prosecution Service, *The Code for Crown Prosecutors*, 2016, <https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf>, retrieved 12th May 2023, para 4.12(c).

91 The Crown Prosecution Service, *Guidelines on prosecuting cases involving communications sent via social media*, 2016, <http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/index.html#a09>, retrieved 12th May 2023.

92 Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention

of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. European Convention on Human Rights, art 10.

93 Prohibition of abuse of rights

Pursuant to the Communications Act 2003⁹⁵ it was an offence to send a grossly offensive message by a public electronic communications network. In *DPP v. Collins*,⁹⁶ the House of Lords considered the meaning and application of the statutory provision.⁹⁷

The respondent had made telephone calls over a two-year period to the offices of a Member of Parliament, Mr Taylor. Sometimes he spoke to a staff member and sometimes he left recorded messages. Later, both Mr Taylor and his staff listened to the recorded messages. In these calls and recorded messages the respondent shouted, ranted and referred to 'Wogs', 'Pakis', 'Black bastards' and 'Niggers'. Some staff said they were 'shocked, alarmed and depressed' by the respondent's words.⁹⁸

The Magistrates Court, at first instance, held that the conversations and messages were 'offensive', but were not 'grossly' offensive by the test of a reasonable person⁹⁹ The prosecutor appealed, saying that the conduct was indeed grossly offensive. In allowing the appeal, the House of Lords elaborated its rhetoric as follows.

The House of Lords held that the object of section 127(1)(a) Communications Act 2003,¹⁰⁰ and its predecessor provisions, was as addressed in section 1 of the Malicious Communications Act 1988.¹⁰¹ That statute did not require proscribed messages to be sent by post, telephone, or a public electronic communications network. The purpose of the stream of legislation, culminating in section 127(1)(a) Communications Act 2003,¹⁰² was to prohibit using a service, publicly provided and publicly funded to benefit the public, for transmitting communications to contravene society's basic standards.¹⁰³

The House of Lords observed that the parties agreed that it was for the court to determine, as a fact, whether or not a message was grossly offensive, taking into account the relevant context. For example, speech or language, which otherwise might be insulting, also could be used in a positive or neutral sense. The test must be whether the message would be liable to cause gross offence to 'those people to whom it related'.¹⁰⁴

In contrast with section 127(2)(a) Communications Act 2003¹⁰⁵ and its predecessor subsections, which required proof of both an unlawful purpose and a certain degree of knowledge, section 127(1)(a) Communications Act 2003¹⁰⁶ states no guidance on requisite state of mind to be proved. By analogy to the Public Order Act 1986,¹⁰⁷ the defendant must intend his words to be grossly offensive to 'those to whom they relate, or be aware that they may be taken to be so'.¹⁰⁸

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention. European Convention on Human Rights, art 17.

94 (2004) 40 EHRR SE 111. References: [2003] EWHC 1564 (Admin), Times 30-Jul-2003.

95 Section 127. Improper use of public electronic communications network

(1) A person is guilty of an offence if he?

(a) sends by means of a public electronic communications network a message or

other matter that is grossly offensive or of an indecent, obscene or menacing character. Communications Act 2003 (United Kingdom), sec 127(1)(a).

96 *Director of Public Prosecutions v. Collins* [2006] UKHL 40 on appeal from [2005] EWHC 1308 (Admin).

97 *ibid.*, [1].

98 *ibid.*, [2].

99 *ibid.*, [4].

100 Communications Act 2003 (United Kingdom), sec 127(1)(a).

101 Malicious Communications Act 1988 (United Kingdom), sec 1.

102 Communications Act 2003 (United Kingdom), sec 127(1)(a).

103 *Director of Public Prosecutions v. Collins* [2006] UKHL 40 on appeal from [2005] EWHC 1308 (Admin), [7].

104 *ibid.*, [9].

105 Communications Act 2003 (United Kingdom), sec 127(2)(a).

106 *ibid.*, sec 127(1)(a).

107 Public Order Act 1986 (United Kingdom), sec 6(4).

108 *Director of Public Prosecutions v. Collins* [2006] UKHL 40 on appeal from [2005] EWHC 1308 (Admin), [10].

Thus, 'a culpable state of mind will ordinarily be found where a message is couched in terms showing an intention to insult those to whom the message relates or giving rise to the inference that a risk of doing so must have been recognised by the sender'.¹⁰⁹ This implies elaboration by the final headings of the beneficial and the possible. The message need not actually reach the recipient.¹¹⁰ All that matters is that reasonable persons in society would find the message grossly offensive.¹¹¹ This represented a move to an objective test, blurring the importance of the defendant's actual intention and state of mind.

The House of Lords held that this conclusion would not be inconsistent with article 10 of the European Convention,¹¹² given effect in the United Kingdom by the Human Rights Act 1998.¹¹³ Article 17 of the Convention¹¹⁴ must also be given effect, per the decision in *Norwood v. United Kingdom*.¹¹⁵ In *Norwood v. United Kingdom*,¹¹⁶ a man showed a sign in his shop window, which said 'Islam out of Britain - Protect the British People'. He also displayed the well-known Islamic symbol of a crescent and a star, alongside a public prohibition symbol. Police charged him under the United Kingdom's Public Order Act, which proscribed 'any writing, sign, or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm, distress thereby'.¹¹⁷ His High Court appeal was rejected, as the Court held that the subject legislation did not breach the 1998 Human Rights Act,¹¹⁸ or the European Convention (ECHR)¹¹⁹ freedom of speech provisions.¹²⁰ He appealed to the ECtHR, who found no breach of the article 10 free speech requirements.¹²¹ This now represents the general view of the ECtHR, in respect of hate crimes.¹²²

Similarly, in *Kuhnen v. Germany*,¹²³ the European Commission has held, in its major exercise of construct elaboration in the field of hate crime, that extreme racist speech is outside the protection of Article 10,¹²⁴ because of its potential to undermine public order and the rights of the targeted minority. The European Commission of Human Rights sitting in private, on 12 May

109 *ibid.*, [11].

110 *ibid.*

111 *ibid.*, [21].

112 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4. XI. 1950, art 10.

113 Human Rights Act 1998 (United Kingdom).

114 *ibid.*, art 17.

115 (2004) 40 EHRR SE 111; *Director of Public Prosecutions v. Collins* [2006] UKHL 40 on appeal from [2005] EWHC 1308 (Admin), [14].

116 (2004) 40 EHRR SE 111.

117 Harassment, alarm or distress.

(1) A person is guilty of an offence if he—

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

(3) It is a defence for the accused to prove—

(a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or

(b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or

(c) that his conduct was reasonable. Public Order Act 1986 (United Kingdom), sec 5.

118 Human Rights Act 1998 (United Kingdom).

119 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4. XI. 1950, art 10.

120 *Norwood v. DPP* (2003) WL 21491815.

121 (2004) 40 EHRR SE 111.

122 I Hare & J Weinstein, eds, *Extreme Speech and Democracy*, Oxford University Press, Oxford, 2009, p. 101.

123 56 RR 205.

124 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4. XI. 1950, art 10.

1988, observed that the applicant was convicted for originating publications advocating the re-establishment of the NAZI Party in Germany.¹²⁵ Therefore there was interference with his right to freedom of expression per Article 10 of the European Convention on Human Rights and Fundamental Freedoms ('the Convention').¹²⁶ The relevant German penal law aimed to protect the basic order of freedom and democracy among peoples. Therefore, it was legitimate under Article 10 of the Convention as being established 'in the interests of national security (and) public safety (and) for the protection of the ... rights of others'.¹²⁷

The Commission referred to Article 17 of the Convention, which stated as follows.

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.¹²⁸

The Commission had found previously that the freedom of expression set out in Article 10 of the Convention¹²⁹ might not be invoked contrary to Article 17.¹³⁰ Thus, the applicant's proposals were counter to one basic value underlying the Convention, that the fundamental freedoms of the Convention 'are best maintained ... by an effective political democracy'.¹³¹

The applicant's policy contained racial and religious discrimination, and therefore, the Commission found that the applicant was trying to use the freedom of information enshrined in Article 10 of the Convention¹³² to contribute to destroying the rights and freedoms within the Convention. Under these circumstances the Commission concluded¹³³ that the interference in the applicant's rights was "necessary in a democratic society" within the meaning of Article 10 of the Convention.¹³⁴ Similarly, in *Lehideux and Isorni v. France*,¹³⁵ the ECtHR confirmed that holocaust denial or revision was outside the protection of Article 10 by Article 17.¹³⁶

5.3 Specific United Kingdom Hate Crime Offences

Aggravated or hate crime offences include offences that may be committed via social media. They include the racially or religiously aggravated offences, under ss. 28-32 of the Crime and Disorder Act 1998 (CDA),¹³⁷ such as aggravated public order offences and Harassment and Stalking. To prove that the offence is racially or religiously aggravated the prosecution must prove the "basic" offence followed by racial or religious aggravation, as defined in s28 of the Crime and Disorder Act 1998.¹³⁸ Additional offences include stirring up racial or religious hatred under Part III of the Public Order Act 1986, specifically the offences of publishing and/or distributing written material, ss19 and 29C; and distributing/showing / playing a recording of visual images or sounds, ss21 and 29E. Sections 145¹³⁹ and 146¹⁴⁰ of the Criminal Justice Act 2003 provide for an increased sentence for aggravation

125Kuhnen v. Germany 56 RR 205.

126 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4. XI. 1950, art 10-1.

127 *ibid.*, art 10-2.

128 *ibid.*, art 17.

129 *ibid.*, art 10.

130 *ibid.*, art 17; Nos. 8348/78, 8406/78, *Glimmerveen and Hagenbeek v. the Netherlands*, Dec. 11.10.79, DR 18 p. 187.

131 *ibid.*, perambular para 5.

132 *ibid.*, art 10.

133Kuhnen v. Germany 56 RR 205

134 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4. XI. 1950, art 10-2.

135 [2000] 30 EHRR 665.

136 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4. XI. 1950, arts 10, 17.

137 Crime and Disorder Act 1998 (United Kingdom), secs 28-32.

138 *ibid.*, sec 28.

139 145 Increase in sentences for racial or religious aggravation

(1) This section applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 of the Crime and Disorder Act 1998 (c. 37) (racially or religiously aggravated assaults, criminal damage, public order offences and harassment etc).

(2) If the offence was racially or religiously aggravated, the court—

related to race, religion, disability, sexual orientation or transgender identity. The provisions apply to all the offences of aggravated assaults, criminal damage, public order offences, harassment, etc., apart from racial and religious crime under ss 29-32 of the Crime and Disorder Act 1998, as these offences carry higher maximum penalties than the basic equivalents.

To prove that the offence was aggravated and obtain a sentence uplift it would be necessary to show that either the offender demonstrated hostility to the victim based on the victim's protected characteristic of race, religion, disability, sexual orientation or transgender identity, or that the offence was motivated by hostility towards persons who had the protected characteristic. In any event, the key to a hate crimes prosecution for social media actions would be hostility as a vicious error, as already elaborated as being equivalent to hatred, susceptible to elaboration by the final heading of appropriateness.

6.0 CONCLUSION

The research question asked to what extent hate crimes were grounded in a foundational commonplace style of elaboration of statutory rules, as propounded by Nicolaus the Sophist, on the bases of the so-called 'final headings'. We have sought to sustain the view that the so-called hate crimes were cognate to final headings elaborations in order to ground commonplace judicial denunciation.

Nicolaus the Sophist used the common 'headings of purpose' to amplify evils and identify a group with such inherent evil. These headings were the legal, the just, the beneficial, the possible, and the appropriate. But Nicolaus added another heading, the honorable, which when all taken together were called the 'final' headings. The final headings were significant in that any one of them could make a complete and persuasive hypothesis. All the key sophists used them to construct commonplace oratories of identified errors that would be treated like crimes.

Hate crime legislation encompasses a 'bias-motivation' criterion, with reference to such status categories as race, ancestry, religion, gender, national origin, age, ethnicity, sexual orientation, and physical and mental disabilities, suggesting elaboration from basic status by the just and the beneficial. Content discrimination challenges argued that hate crime laws regulated speech based on the speech's subject. Even though 'fighting words' were not permitted, statutes

-
- (a) must treat that fact as an aggravating factor, and
 - (b) must state in open court that the offence was so aggravated.
 - (3) Section 28 of the Crime and Disorder Act 1998 (meaning of "racially or religiously aggravated") applies for the purposes of this section as it applies for the purposes of sections 29 to 32 of that Act. Criminal Justice Act 2003 (United Kingdom), sec 145.
 - 140 146 Increase in sentences for aggravation related to disability or sexual orientation
 - (1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).
 - (2) Those circumstances are—
 - (a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—
 - (i) the sexual orientation (or presumed sexual orientation) of the victim, or
 - (ii) a disability (or presumed disability) of the victim, or
 - (b) that the offence is motivated (wholly or partly)—
 - (i) by hostility towards persons who are of a particular sexual orientation, or
 - (ii) by hostility towards persons who have a disability or a particular disability.
 - (3) The court—
 - (a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and
 - (b) must state in open court that the offence was committed in such circumstances.
 - (4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.
 - (5) In this section "disability" means any physical or mental impairment. Criminal Justice Act 2003, (United Kingdom), sec 146.

might not additionally regulate specific fighting words. Thus, a statute might not proscribe fighting words of racial animus any more than fighting words of hatred of the victim's family. Regulation of the words' subject inferred elaboration by the heading of the just and the appropriate.

In the 1992 case of *State v. Wyant*, the Ohio Supreme Court, arguably engaging in commonplace denunciation, and held as follows. The base offences for ethnic intimidation also were proscribed pursuant to other legislation. Therefore, the increased penalty had to be for 'something more' than just those elements constituting the base offence. The enigma of this 'something more' is ostensibly an elaboration by the possible and the beneficial.

It has become progressively evident that hate crime laws apply to conduct motivated by hate, instead of hate speech. Hate suggests a consequential vitiation of reputation, so that hate crime laws are impliedly elaborations based on the final heading of the appropriate.

Core sections of a statute had to be established in case law as winnable before the more marginal and ambiguous issues, such as for example online social media symbolic rhetoric, could be prosecuted. This constituted, in effect, the hate crimes paradigm, allowing judicial construct elaboration. And so, while this was happening, there had also been a shift in interpreting the statutes from 'hatred' to 'bias'. This online symbolic rhetoric is arguably the enigmatic 'something more', already discussed above, and elaborated by the final headings of the possible and the beneficial.

Hate crime laws infer extraordinary police inquiries into offenders' motives, yet another instance of the 'something more' enigma. In *Secic v. Croatia*, a 2007 matter agitating a skinheads attack on a Roma man. The Secic Court, echoing the 'something more' elaboration, discussed above, held as follows: '... when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases with no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights'.

This conflation of duty and avoiding turning a blind eye implies final headings elaboration by the appropriate and the just. Thus, hostility became a vicious error, and was equivalent to hatred, repeating the commonplace denunciation of hatred as a breach of propriety.

Prosecutors are now instructed that, when a particular victim is targeted, and they have clear evidence of intention to bring about distress or anxiety, (probably meaning the distress of anxiety), they must carefully weigh the effect on the victim. This is even more important when where there is a hate crime aspect of the subject communication. The fact that prosecutors cannot possible weigh all the effects on the victims repeats the 'something more' enigma. The circumstances of the victim are highly relevant. The greater the victim's vulnerability, the more likely it is that a prosecution is required. Prosecutors are instructed to be alert to any reference within the communication to a recent tragic event, involving many deaths of persons who share any of the protected characteristics, implying a measurement of victim vulnerability by association with a suffering group. This is the primary indicium of commonplace, elaborated by the final heading of the beneficial.

Thus, 'a culpable state of mind will ordinarily be found where a message is couched in terms showing an intention to insult those to whom the message relates or giving rise to the inference that a risk of doing so must have been recognised by the sender'. This implies elaboration by the final headings of the beneficial and the possible. To prove that the offence was aggravated and obtain a sentence uplift it would be necessary to show that either the offender demonstrated hostility to the victim based on the victim's protected characteristic of race, religion, disability, sexual orientation or transgender identity, or that the offence was motivated by hostility towards persons who had the protected characteristic. In any event, the key to a hate crimes prosecution for social media actions would be hostility as a vicious error, as already elaborated as being equivalent to hatred, susceptible to elaboration by the final heading of appropriateness.



In extended synthesis, a statute might not proscribe fighting words of racial animus any more than fighting words of hatred of the victim's family. Regulation of the words' subject inferred elaboration by the heading of the just and the appropriate. The enigma of the 'something more' criterion is ostensibly an elaboration by the possible and the beneficial. Hate crime laws apply to conduct motivated by hate, instead of hate speech. Hate suggests a consequential vitiating of reputation, so that hate crime laws are impliedly elaborations based on the final heading of the appropriate. Online symbolic rhetoric is arguably the enigmatic 'something more', and elaborated by the final headings of the possible and the beneficial. Hate crime laws require extraordinary police inquiries into offenders' motives. This conflation of duty and avoiding turning a blind eye implies final headings elaboration by the appropriate and the just. A measurement of victim vulnerability by association with a suffering group is the primary indicium of commonplace, elaborated by the final heading of the beneficial. The key to a hate crimes prosecution for social media actions would be hostility as a vicious error, as already elaborated as being equivalent to hatred, susceptible to elaboration by the final heading of appropriateness.