

Criminalizing Hate? **R A Duff & S E Marshall¹**

Introduction

Our task in this chapter is to explore the role that criminal law might play in combating ‘hatred’, and in particular whether and why we might appropriately criminalize ‘hatred’. The criminal laws of a number of polities take formal notice of ‘hatred’ in several ways, discussed in more detail later; two typical examples will serve as an introduction here. First, the English Crime and Disorder Act 1998 (ss. 28-32) defines a set of ‘racially or religiously aggravated offences’: these involve the commission of a pre-existing, base offence (such as wounding or criminal damage), which is ‘aggravated’ if the offender ‘demonstrates’, or is ‘motivated’ by, ‘hostility’ based on the victim’s membership ‘of a racial or religious group’. Second, s. 18(1) of the Public Order Act 1986 makes it an offence to ‘use[] threatening, abusive or insulting words or behaviour’ intending ‘to stir up racial hatred’ or if ‘racial hatred is likely to be stirred up thereby’. Such provisions might seem odd, for two reasons.

First, the criminal law does sometimes give certain emotions an *exculpatory* role, notably fear (in the defence of duress) and anger (in the partial defence of provocation), but it does not typically give specific emotions an *inculpatory* role as defining particular offences: an attack on someone’s person or property might be motivated by, and might express, a range of emotions—anger, greed, envy, fear, contempt, jealousy, hatred; but whilst the perpetrator’s motivation might figure informally as an aggravating factor at sentencing, it does not usually figure formally in the law’s definition of the relevant offences. So why should we pick out hatred as meriting distinctive, formal legal recognition? Second, most types of hatred do not receive such legal recognition: whether my attack on another is motivated by hatred (because he ‘stole’ my lover, or the job I thought was mine), or by anger, or fear, or envy or greed, it constitutes the same crime, and renders me liable to the same kind of punishment. The law takes formal notice of the offender’s hatred only when it is directed against particular groups: only if the hatred that informs my attack is directed, not against an individualized feature of its victim, but against a group to which he belongs—a group defined, for instance, in terms of its members’ racial or religious identity. But why should the law take formal notice only of this kind of hatred?

To answer this question we begin, in s. 1, with a brief sketch of some salient features of a liberal, democratic republic (as the kind of polity in which we can aspire to live, and whose citizens can be expected to be committed to combating ‘hatred’). We then explain, in ss. 2-3, why a certain kind of ‘hatred’ should concern members of such a polity, as a distinctive civic vice manifested in a distinctive kind of civic wrong. In ss. 4-5, we discuss the limited but significant role that criminal law can play, in principle, in responding to such hatred. Finally, in s. 6, we say a little about the difficulties involved in turning ‘in principle’ into ‘in practice’, particularly those concerning offence definitions. Our argument will be normative rather than descriptive: although we attend to some existing ‘hate crime’ laws, our aim is to ask how the criminal law *should*, rather than how it does, deal with ‘hate’, and to explore the values, the conceptions of law and society, that can help us answer that question.

1. A Liberal Republic

We cannot give a detailed account of a liberal republic here, and must limit our discussion to two slogans: ‘equal concern and respect’, and ‘the eyeball test’.

¹ We are grateful to the editors, and Eric Heinze, for helpful comments on an earlier version of this paper.

Equal concern and respect are central to Dworkin's account of liberalism; but his concern is with what governments owe their citizens rather than with what citizens owe each other: we 'do not suppose that we must, as individuals, treat our neighbor's children with the same concern as our own or treat everyone we meet with the same respect'; but a government must 'treat all those in its charge as *equals*, that is, as entitled to its equal concern and respect'.² Now in our lives as private individuals—as members of families, as friends—we do not owe equal concern and respect (in some senses of the term) to everyone: what I owe my children, my friends, is different from and typically more than what I owe other citizens. In our mutual dealings *as citizens*, however, equal concern and respect is what we owe each other; indeed, since the government must claim to act in our name, if this is what the government owes, we must owe it too. To say that this is what we owe each other in our dealings *as citizens* is to say that it should guide our conduct in the public, civic realm: the realm in which we interact not as friends or family members, but as citizens.

The content and scope of the civic realm is a matter for democratic deliberation; different polities will develop different conceptions. It is the realm in which we live with each other as citizens: it includes various public goods, spaces and services, some provided by individuals rather than by governmental agencies;³ and various public or civic activities, notably those that constitute the realm of 'public discourse',⁴ in which citizens discuss the terms of their shared civic life. Concern is especially a matter of welfare, although polities take different views about what sorts of welfare should be provided publicly by the polity, or privately by individuals. Respect concerns such values as dignity, autonomy and privacy. It is exemplified by the way in which citizens engage in public debate—by their willingness to listen to each other as equal participants in the enterprise of self-governance; and in the limits set on the ways in which citizens and the government intrude into individuals' lives. That concern and respect is equal, because democratic citizens must recognize each other as equal participants in the civic enterprise. In their private lives, they may be partial, paying particular attention to friends, family, or other intimates: but when acting in the public realm as citizens, they must see and treat each other as equals.

This leads us on the 'eyeball test' as a test of civic recognition. As Pettit explains it, it is a one-way test of republican freedom as non-domination: free citizens 'can look others in the eye without reason for the fear or deference that a power of interference might inspire'.⁵ But it should be a two-way test: republican citizens must be willing, as well as able, to look each other in the eye—to recognize each other as participants in the civic enterprise. That is an essential feature of public discourse: we engage with others in discussing matters of civic significance—with any other citizens who wish to engage; and to engage with others as equal participants we must be willing to look them in the eye. One way in which we display equal concern and respect for each other is thus in our willingness to look each other in the eye—with a look not of threat or fear, but of recognition of fellowship.

To talk of concern and respect, of recognizing fellowship, is also to talk of the emotions that republican citizens are disposed to feel: to be concerned for others, or to respect them as fellows, is to be disposed to feel a range of appropriate emotions, which will also motivate

² Ronald Dworkin, *A Matter of Principle* (Oxford: Oxford University Press, 1986), 190.

³ The English Equality Act 2010 provides an interesting example of a legislative attempt to distinguish a public realm within which discrimination on such grounds as race, religion or sexual orientation is unlawful, from a private realm that lacks such legal constraints.

⁴ On public discourse as a legitimizing condition of democracy, see E Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press, 2016).

⁵ Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012), 84.

appropriate action. We can talk here of civic virtue, understood in Aristotelian terms, as a matter of being properly disposed in relation to our fellow citizens: a disposition that includes patterns of appropriate emotion as well as of attention, deliberation and action. However, we must distinguish such an ideal of civic virtue, as something to which citizens should aspire, from the idea of civic duty as what we owe each other and can demand of each other. One feature of a liberal republic is that it respects an extensive area of privacy into which the state must not intrude—an area including the realm of ‘private’ thoughts and feelings. We might aspire, and hope that our fellows aspire, to Aristotelian civic virtue, but our civic duties are more modest: they do not concern how we think or feel about each other, so long as those thoughts and feelings are not displayed in the public realm; they concern how we behave towards each other in that realm.⁶ This is not to say that a liberal republic should do nothing to foster civic virtue; only that the civic *duties* of such a polity’s citizens, whose performance we can demand from each other on pain of public censure, fall well short of civic virtue.

That is not to say, however, that our duties consist only in certain kinds of ‘behaviour’ as understood reductively in terms of bodily movements and their effects. Our civic duties, like all duties, consist in actions, not mere movements; and an important dimension of actions is their meaning. The equality of concern and respect, the recognition, that we owe each other is a matter not merely of the material impact of our conduct, but of the attitudes that our actions manifest or enact: do we treat each other as fellow citizens; are our actions appropriate ways of actualizing an equal concern and respect for our fellows?⁷ One key point here is that our actions can enact appropriate attitudes even if we do not in fact have, or feel, the emotions appropriate to those attitudes: I can do my duty by treating another as a fellow, treating her with proper concern and respect, although my feelings towards her are at odds with such attitudes. This is a familiar phenomenon in our personal lives: we must often grit our teeth (but not show that we are doing so) in order to do our duty despite our contrary emotions; I behave politely towards another, although I feel like punching him.

In our more intimate dealings with each other, it matters whether we are *merely* enacting appropriate attitudes. If the best I can do with my partner, or my friends, is to enact attitudes without feeling the emotions intrinsic to them, there is something amiss with me, or with our relationship. It might be reasonable to ask me what I (‘really’) feel as I act appropriately, and to say that action without appropriate feeling is of little value.⁸ In our public lives, however, the civic lives we lead with others who are not intimates, whilst we may hope that appropriate conduct flows from appropriate emotion, this is not something we should insist on or inquire into. This is true of our everyday dealings—the ordinary conduct that constitutes the minimal civility we should expect of each other: if an American says ‘Have a nice day’, or a stranger says ‘I’m sorry’ when she bumps into me on the street, it would be impertinent (not pertinent, rude) to ask ‘Do you mean that?’. It is also true of the rituals of civic life: of such affairs as public funerals, ceremonies to commemorate those killed in war or to praise those who have performed notable public service, and other ways in which a polity gives formal expression to its sense of itself and its values. Officials and lay citizens have their roles in such rituals, and should play them with appropriate demeanour, but it would be impertinent to ask whether they really feel the emotions appropriate to the attitudes that they are enacting: what matters is the enactment. Institutions can also enact attitudes: civic institutions, through their rules

⁶ Fuller’s distinction between the ‘morality of duty’ and the ‘morality of aspiration’ is relevant here: Lon Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969), ch. 1.

⁷ On actions as ‘enacting’ attitudes see Antti Kauppinen, ‘Hate and Punishment’, *Journal of Interpersonal Violence* 30 (2015): 1719.

⁸ See Mary Midgley, ‘The Objection to Systematic Humbug’, *Philosophy* 53 (1978): 147.

and procedures, their architectural and physical manifestations, can enact a range of civic attitudes towards those who use them.

There are attitudes—of equal concern and respect, of mutual recognition—that we ought to enact towards our fellow citizens. There are attitudes that we ought not to enact: attitudes inconsistent with the equal concern and respect, with the recognition as fellows, that we owe each other. These include ‘hatred’, as a distinctive civic vice.

2. *Hatred and the Denial of Fellowship*

Why should ‘hatred’ concern the citizens of a liberal republic? As Brudholm reminds us,⁹ scholars disagree about how hatred should be understood, and about whether ‘hate crime’ is a useful label for the kinds of wrong that concern us here. Insofar as we understand hatred as an emotion, it is also surely not something that should concern a liberal republic’s criminal law: as many liberals point out, such law is properly concerned with actions, not with the emotions that might lie behind them.¹⁰ We can, however, identify a kind of hatred, ‘civic hatred’, that should be of concern to the citizens of a liberal republic, as being inconsistent with their civic duty.

Many attitudes, although in some way aversive, are still consistent with recognising the other as a fellow. I might dislike someone, find him boring, disapprove of his morals or his taste in art, be irritated by him or jealous of him. Such reactions might stand in the way of being his friend (though not necessarily), or make me less inclined to spend time with him or to accept his social invitations; but they need not undermine my recognition or treatment of him as a fellow citizen. Hatred, however, as we can understand it in this context, is different, as involving a radical kind of alienation or exclusion: to hate is to exclude from fellowship and recognition. What I hate is what I would like to destroy, or to push right away from me; it is something unworthy of my respect, concern, or even attention; it has no place in my life. Similarly, what we hate (if the hatred is collective) is something we wish to exclude from our shared life: we might feel loathing or contempt for those whom we hate; we cannot accord them respect or concern.¹¹ We can behave appropriately towards those whom we hate: like other attitudes and emotions, hatred (even when powerfully felt) can be resisted or overcome. Hatred itself, however, is inconsistent with respect, concern, or recognized fellowship: it must be overcome if we are to behave as we should.

To hate any fellow citizen is thus already to lack civic virtue—even if I recognize that I should not hate, and behave as I should. If I then enact that hatred in my conduct towards the other person, I violate my civic duty to her. For the enactment of hatred, as this exclusionary and alienating attitude, must involve conduct that is itself exclusionary and alienating. If that conduct is verbal, its meaning is explicit: it says to the other person that she does not belong, has no place, in the polity. We could also talk of a kind of defamation—discourse calculated to expose a person to ‘hatred, ridicule, and contempt’:¹² thus Waldron talks of ‘hate speech’

⁹ Thomas Brudholm, ‘Hatred as an Attitude’, *Philosophical Papers* 39 (2010): 289.

¹⁰ See e.g. Heidi Hurd, ‘Why Liberals Should Hate “Hate Crime Legislation”’, *Law and Philosophy* 20 (2001): 215; Heidi Hurd and Michael Moore, ‘Punishing Hatred and Prejudice’, *Stanford Law Review* 56 (2003-4): 1081.

¹¹ Compare attitudes to enemy soldiers in wartime: the rules of *jus in bello* enjoin us, on a plausible reading, to respect enemy soldiers as our fellows (even if we are trying to kill them); by contrast, to urge soldiers to hate the enemy is to urge them to abandon any such conception of the enemy as a fellow (soldier, or human being) to whom respect could be owed. See Nigel Biggar, *In Defence of War* (Oxford: Oxford University Press, 2013), ch. 2, on ‘Love in War’.

¹² See Lawrence McNamara, *Reputation and Defamation* (Oxford: Oxford University Press, 2007), ch. 4, on the common law of defamation.

as a kind of ‘group defamation’;¹³ the German Criminal Code (s.130(1)) counts ‘assault[ing] the human dignity of others by insulting, maliciously maligning or defaming segments of the population’ as ‘Incitement to Hatred’. Such an attitude can also be enacted in my non-verbal behaviour—in attacks that express or take their meaning from hatred of the other.

We will say more about such enactment shortly. We should note first, however, that if I am acting as an individual who hates another individual, nothing of great civic moment hangs on my conduct or hatred. I wrong her, but I lack the power to give effect to my exclusionary attitude; I cannot secure her exclusion from the community. If, however, my conduct has a more collective dimension, its character changes—especially if it is directed against victims who are, as a group, already vulnerable or threatened: it takes on the character of a genuine threat. If, for some idiosyncratic reason, I hate people with red hair, and enact that hatred in my behaviour towards them, this is a wrong, and constitutes an individual threat to the safety of redheads with whom I come into contact; but it does not threaten their membership of the polity—their civic status. If, however, my hatred is directed, and enacted, against a group identified by a characteristic that is more widely seen and treated as contemptible or hateful, as disqualifying from proper citizenship, its enactment is genuinely threatening. The point is not (simply) that, empirically, my conduct is likely to hasten their exclusion; it is that such a context affects the meaning of my conduct—just as saying, however fiercely, ‘I’ll kill you’ constitutes a more genuine threat if I say it while brandishing a knife than if I say it while brandishing a pea-shooter.

What kinds of enactment of hatred are relevant here? The literature on hate crimes is full of vivid descriptions of enacted hatred,¹⁴ which we need not repeat here: we should, however, say something about the difference between ‘hate speech’ and ‘hate crimes’.

One way of enacting hatred is through direct verbal expression. This might take the form of urging others to join me in excluding or harassing members of the target group, or simply of expressing my hatred towards them, but the difference between these two kinds of speech is not sharp: for this kind of hatred involves the thought not merely that *I* happen to hate these people, but that they are worthy of hatred—they do not belong in *our* community. To express such hatred is thus at least implicitly to invite (to incite) others to share it. Furthermore, such hatred is naturally expressed in conduct designed to actualize the exclusion: to see someone as unworthy of inclusion, as meriting exclusion, is to be motivated to exclude them; to incite others to share that hatred is to incite them to recognize that reason for action.

The other way to enact hatred, already indicated, is through action that makes exclusion from fellowship real: action that might include a kind of ostracism,¹⁵ but that can also include physical attacks on people or their property. We should note, however, that enactment is not (just) a matter of motivation: that my action is motivated by a certain attitude does not make it the case that the action enacts that attitude. I might act in a way that will damage another, and be motivated to do so because it will damage her—because I dislike her and want to hurt her; but I might keep my motivation hidden, so that my action will not be seen as a malicious attack. In one sense, I ‘enact’ my malicious dislike of her: I actualize, give material effect to, my desire to see her suffer. But I have not enacted my malice in the communicative sense that concerns us here: I have not said to her, through my action, ‘I hate you and want to hurt you’. Others might draw inferences from my action: given background knowledge, they might infer

¹³ Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2012), ch. 3.

¹⁴ See e.g. Mark Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms* (Oxford: Oxford University Press, 2014); Waldron, *The Harm in Hate Speech*.

¹⁵ Ostracism too must be done collectively: I can turn my back on other people, but cannot ostracize them by myself.

that I dislike her and want to hurt her. But our concern here is with what is communicated, rather than with what might be inferred: with what I say to and about my victim in attacking her; with conduct that communicates hatred for her.¹⁶ There are distinctions here that it might be hard to draw in practice: between what can be inferred from my action, and what it says; between how others read my action, and what it says. But this is true of all communication, and does not undermine the distinction between what I say and what others infer from it. Our suggestion is that the distinctive wrong committed by one who enacts his hatred of another person or group is a communicative wrong: his action is not just an attack on another person or her property, nor just an attack that is in fact motivated by hatred; it is an attack that itself communicates that hatred.¹⁷

Waldron is thus wrong to argue that ‘hate speech’ and ‘hate crimes’ ‘raise quite different issues’. The defining feature of hate crimes, he thinks, is hatred as the motivation of criminal conduct, whereas in hate speech, ‘hatred is relevant not as the motivation of certain actions, but as a possible *effect* of certain forms of speech’.¹⁸ However, first, what marks out a distinct category of ‘hate wrongs’ (we will not talk about *crimes* until s. 4) is not the motivation as such, but the meaning of the action—the message of civic exclusion, of being unworthy of membership, that it communicates to the victim and to others. Second, what marks out ‘hate speech’ as a particular civic wrong is also what it communicates, rather than its contingent effects. The distinctive wrong of hate speech does involve, paradigmatically, a genuine threat of exclusion or oppression, and a genuine threat requires a context that makes its actualization a plausible prospect: but the wrong nonetheless consists, essentially, in the meaning of the speech as a rejection of the other’s membership of the polity, and thus as a threat of exclusion.¹⁹

This implies that ‘hate speech’ need not be speech that either expresses or seeks to arouse ‘hatred’ understood as violent emotion. One image of hate speech is that of the rabble-rouser spewing vitriolic hatred at his targets, but on our account hate speech could also consist in a measured, coolly expressed speech or article asserting that a particular group of citizens has no place in the polity: that its members are unworthy of citizenship.²⁰ It is wrong to threaten others with violence, or to incite violence against them: but that is not how the wrong of hate speech should be understood. Nor need the wrongful enactment of hatred involve violence: I commit that wrong if, for instance, I turn away from a member of the hated group who needs my help, when I would readily have helped someone else; or if I deny them entry to my shop or my hotel, without even a hint of violence.²¹

This might seem implausible—and to be at odds with a proper recognition of the value of freedom of speech: how could liberals argue that it might be wrong to assert one’s views in

¹⁶ Indeed, such communicative conduct need not be motivated by hatred: someone might join in a racist attack not because he shares the racist attitudes of the other attackers, but to gain favour with them.

¹⁷ See Rae Langton, ‘Speech Acts and Unspeakable Acts’, *Philosophy & Public Affairs* 22 (1993): 293, on pornography as speech and the importance of illocutionary speech acts. We thus do not ally ourselves with the general account of crime offered by theorists like Hampton, who argue that every crime communicates the same distinctive message about the victim (Jean Hampton, ‘Correcting Harms versus Righting Wrongs: The Goal of Retribution’, *UCLA Law Review* 39 (1992): 1659; see Kauppinen, ‘Hate and Punishment’, n. 7 above; our account of enactment also thus differs from Kauppinen’s.)

¹⁸ *The Harm in Hate Speech* (n. 13 above), 35 (emphasis in the original).

¹⁹ We might compare the wrong involved in a criminal attempt, as a wrong distinct from that of endangerment—as not consisting entirely in the fact that the harm intended might actually ensue.

²⁰ Compare Brudholm, ‘Hatred as an Attitude’ (n. 9 above), 295, on the court’s description of Eichman’s ‘cold and calculated’ hatred of ‘the Jewish People’.

²¹ Note that we are not talking yet of what kinds of conduct we may *criminalize*; our aim so far is only to identify a distinctive civic *wrong* that is structured by hatred.

public, as a contribution to the public discourse upon which democracy depends?²² A quick answer is that we can act wrongly in exercising the freedoms that a liberal polity should allow us. But another and better answer is that there must be content-based limits on what can count as a genuine contribution to public discourse, and thus on the kinds of speech that could have value in a liberal polity. Public discourse is a discourse among the members of the polity, to which all members must be entitled to contribute, as equals: contributions to public discourse must therefore be consistent with recognition of the equal entitlement of all other citizens to take part; but that is what ‘hate speech’, as we are characterizing it, denies to the targeted group of citizens. That is why some condemn hate speech as a violation of the ‘dignity’ of those against whom it is directed, when someone, ‘through contempt for the principle of equality, is depicted as “inferior”’, and their ‘right to live within the community is contested or relativised’.²³ Hate speech asserts not merely *of* another group that its members have no place in the polity, but *to* its members that ‘*You* have no place here’: it denies that they are participants, let alone equal participants, in the polity’s public discourse, and it denies them that place on the basis not of judgments about their qualities as individuals, but of a reaction to a group characteristic—their ethnicity, or religion, or sexuality; that is part of the reason why group-directed hatred is distinctively wrong.

It might be argued that a democratic polity must have valued room in its public discourse for debate about the conditions of membership: it must therefore accept, and not censure as wrongful, arguments that some who are currently recognized as members should not be so recognized, and should be excluded from membership. Such arguments must be couched in appropriate terms: they must offer reasons why this group is ineligible for membership; they must not incite violence. But citizens must be free to question each other’s standing. This is indeed what happens, without objection to the debate, in relation to some groups. There is, for instance, debate about whether those serving prison terms should retain the right to vote (a right central to citizenship); those who insist that they should retain that right do not suggest that it is illegitimate even to raise the question. Similarly, we should object to other ways in which those who commit crimes are portrayed and treated as less than full citizens; but we should not claim that someone who argues that those who commit (serious) crimes thereby forfeit their civic status wrongs them simply by offering such an argument.

One response to this objection is to distinguish denials from questioning. If we deny *V*’s membership, her right to be recognized and treated as fellow, we thereby cease to that extent to recognize her, and preclude ourselves from engaging with her in public discourse. Perhaps, however, we can raise questions about her entitlement, and even argue that she is not worthy of recognition as a fellow, without thereby yet *denying* her membership; perhaps we can still engage with her as a fellow member, in pursuing that argument. *If* this is possible (depending on the grounds on which membership is questioned), we could then say that whilst denials of fellowship wrong those whose membership is wrongly denied, questioning their entitlement to membership need not do so—at least if it does not assert their *inferiority*.

Another response, which makes the first one more plausible, is to argue that there must be substantive limits on the kinds of reason that can be offered as grounds for excluding from equal membership: thus whilst a person’s commission of a serious crime, for instance, could qualify as an intelligible reason (which is not to call it a good reason), his ethnicity or sexual orientation cannot. This leads into debates about ‘public reason’, on which we cannot embark

²² See Heinze, *Hate Speech and Democratic Citizenship* (n. 4 above).

²³ M-E Geis, ‘Meinungsfreiheit und das Verbot rechtsradikaler Äußerungen’, *Recht der Jugend und des Bildungswesens* 42 (1994): 218, at 226 (quoted by Heinze, *Hate Speech and Democratic Citizenship*, n. 4 above, 156).

here,²⁴ save to note that it will not do to say that what matters is whether the characteristic in virtue of which membership is questioned is within one's control or choice: even if sexual orientation was a matter of choice, it would not be a legitimate reason to deny membership.

We have argued that there is a distinctive kind of hatred that involves the radical denial of fellowship—a radical exclusion of or alienation from its object. This constitutes a kind of 'civic hatred' when it is directed against one's fellow citizens, and a distinctive civic vice, that of denying civic fellowship. When such hatred is enacted, in words or in deeds, it constitutes a distinctive civic wrong: it wrongs those against whom such words or deeds are directed; it also wrongs the whole polity, as an attack on one of the fundamental terms of its existence. We have yet to discuss the role that the criminal law might play in responding to such a wrong: but we must first deal with two complications, and one objection, to what we have said so far.

3. *Two Complications, and an Objection*

The first complication concerns the depth or extent of 'civic hatred'. We have described a radical form of hatred, involving (in thought if not deed) the other's complete exclusion from civic fellowship—from membership of the polity.²⁵ But there are less radically exclusionary attitudes that might also count as 'civic hatred': attitudes that portray, and are enacted in the treatment of, others not as outsiders who have *no* place in the polity, but as inferior members who are not entitled to *equal* concern and respect; as second (or third) class citizens. Such hatred is enacted in denials (verbal or material) that those against whom it is directed have an equal right to participate in the polity's public discourse, or equal rights of access to its public benefits (housing, other kinds of welfare, public spaces): they are recognized as (subordinate) members of the polity, so long as they 'know their place'.²⁶ Such hatred is also a civic vice, and a civic wrong if it is enacted: if liberal citizenship is *equal* membership of the polity, it also constitutes a denial of fellow citizenship.

Once we recognize such less radical kinds of civic hatred, we face the question of line-drawing: just what kinds of attitude, and enactment, should be taken to constitute this kind of civic vice and this kind of civic wrong? This question is problematic for the law, since legal wrongs must be defined in tolerably precise terms, and be applicable by courts with tolerable consistency: but we are not yet discussing whether the law should take formal notice of this kind of wrong, and so need not worry that—like many wrongs—it lacks precise boundaries.

The second complication concerns the fact that 'hate crimes', as currently defined, are often not committed against citizens of the polity: the victims might be would-be immigrants who are not yet citizens, or refugees or asylum-seekers, or people in the country as tourists or workers with no desire to seek citizenship. An account of hate wrongs must cover these kinds of case; but it is not clear that our account could do so, given its focus on citizenship.

Now there is room for argument about whether we should ground an account of political community, and of the civic rights and duties that belong with it, as firmly as we do here in a

²⁴ See Andrew Altman, 'The Democratic Legitimacy of Bias Crime Laws: Public Reason and the Political Process', *Law and Philosophy* 20 (2001): 141.

²⁵ This is thus the most radical form of *civic* hatred, but not of hatred as exclusion: the most radical form of exclusionary hatred, which is displayed in genocide and 'crimes against humanity' (see Rome Statute of the International Criminal Court, Articles 6-7), involves a denial of the humanity of its objects; they are not even recognized as fellow human beings.

²⁶ Compare e.g. Amy R Baehr, 'A Feminist Liberal Approach to Hate Crime Legislation', *Journal of Social Philosophy* 34 (2003): 134, on acts of 'violent subordination'; Altman, 'The Democratic Legitimacy of Bias Crime Laws', on 'systematic subordination'; Mark Walters, 'Conceptualizing "Hostility" for Hate Crime Law', *Oxford Journal of Legal Studies* 34 (2014): 47, on the 'subordinating effect' of hate speech.

conception of citizenship, and about how ‘citizenship’ should be understood: but that is not an argument in which we can engage here.²⁷ All we would say here is, first, that there is more to say about the conditions of citizenship—about how citizenship should be acquired, and the criteria by which people count as a citizen; but a democratic republic should be open-armed, welcoming would-be citizens rather than treating them with exclusionary distrust. Second, we might distinguish a substantive from a formal notion of citizenship: many who are not legally citizens are substantively members of the civic community who have made their lives there, and *should* be recognized formally as citizens. Third, we can understand the normative status of those who find themselves within the polity temporarily, without being citizens, by seeing them as guests: visitors to whom the polity and its members owe duties of hospitality. Civic hatred, of a kind that denies appropriate civic bonds, can be shown against guests as well as against fellow citizens; when enacted against them, it also constitutes a civic wrong.

The objection is to our inclusion of the verbal enactment of hate speech as a civic wrong: this commits, Heinze argues, ‘the denial fallacy’, of ‘equivocating between two meanings of the word “denial”’. Hate speakers might “deny” their targets’ citizenship in an aspirational sense, wishing those targets to be deprived of all or some elements of citizen status’; but we should not confuse this with “denial” in the literal sense of a material negation of the targets’ equal abilities to exercise all attributes of citizenship’.²⁸ Now Heinze’s target is an argument for banning hate speech, whereas our concern here is with the wrong involved in hate speech; we will ask later whether only what Heinze calls “denial” in the literal sense’ could give us good reason to criminalize speech.²⁹ However, it is worth emphasizing here the way in which even the verbal enactment of hatred constitutes what can be a serious civic wrong.

An assertion that *V* is unworthy of citizenship cannot, it is true, by itself deprive *V* of recognition as a citizen by other members of the polity. However, first, Heinze is wrong to suggest that only ‘material negation’ is ‘literal’ denial: if I say to *V* ‘I don’t recognize you as a fellow’, or ‘you do not belong’, that is a literal denial. Second, such denial impinges on the ‘equal abilit[y] to exercise all attributes of citizenship’: it constitutes a refusal to engage in public discourse with its target as an equal; but such engagement with one’s fellow citizens is an important dimension of citizenship. Third, although I might not wrong another merely by harbouring attitudes of contempt or hatred towards her in the privacy of my soul or my home, I do wrong her, in a civically significant way, if I enact such attitudes in public action (including speech).

We have tried so far to identify the distinctive wrong involved in ‘hate speech’ and ‘hate crimes’, although we have not yet asked whether we have reason to criminalize such wrongs. That is our next topic, but we must first note three final points about this kind of civic wrong.

First, if we think of ‘hate’ in general, it is arguable whether it is always wrong, or (since hatred can take a range of objects) whether hatred *of other people* is always wrong—whether we should never hate the sinner, but only the sin.³⁰ Hatred of the kind we have described is, however, always wrong: it involves the denial of fellowship that should be recognized.

Second, to say that there are distinctive civic wrongs of hatred is not to say that they are more serious than other wrongs. Theorists sometimes talk as if we could have good reason to

²⁷ But see R A Duff, ‘Relational Reasons and the Criminal Law’, *Oxford Studies in Legal Philosophy* 2 (2013): 175, at 189-91, 207-8; and for criticism, see Lucia Zedner, ‘Is the Criminal Law only for Citizens?’, in K F Aas and M Bosworth (eds), *The Borders of Punishment* (Oxford: Oxford University Press, 2013) 40.

²⁸ Heinze, *Hate Speech and Democratic Citizenship*, n. 4 above, 157.

²⁹ See at nn. 55-56 below.

³⁰ See Jeffrie G Murphy, ‘Hatred: A Qualified Defense’, in J G Murphy and J Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988), 88.

criminalize *X* but not *Y*, or to separate *X* from *Y* as a distinct crime, only if *X* is a more serious wrong than *Y*; but there are reasons (of ‘fair labelling’, for instance)³¹ to distinguish wrongs other than differences in seriousness; and, as we will see, the reasons to criminalize one kind of civic wrong but not another need not depend on the greater seriousness of the former.

Third, we have not said anything about which groups may be wronged by enacted hatred, or figure in a legal definition of a ‘hate crime’. Enacting hatred is a serious civic wrong only when committed against groups that are already vulnerable to denials of citizenship, meaning both that they must in fact be targets of such hatred (collective victims of a collective wrong), and that such hatred, when enacted, must constitute a genuine threat to their civic standing; but which groups fit that description in any particular society is a contingent matter.³²

We must now move to our main question: does the criminal law have a part to play in responding to this distinctive civic wrong? Should we create a category of ‘hate crimes’?

4. *Hatred and the Criminal Law*

Any discussion of whether, why and how we should criminalize hatred must depend on an account of the role of criminal law in a liberal republic (the kind of polity with which we are concerned). We can here only gesture towards an account we have developed in more detail elsewhere.³³ The criminal law serves to define a set of public wrongs—wrongs which are ‘public’ in the sense that they properly concern all members of the polity, since they fall within or impinge on the polity’s civic realm, and are wrongs for which we must therefore answer to our fellow citizens; it also provides for the procedure (the criminal trial) through which those who commit such wrongs are called, formally and publicly, to answer for them. Five aspects of such an account are important here.

First, to justify criminalizing a type of conduct, we must argue not just that it constitutes a wrong, but that it constitutes a public wrong in the sense indicated above: that it implicates matters that are our collective business as citizens (something over which there will often be controversy). Our view is thus a kind of legal moralism, but not the kind espoused by Moore, according to which every kind of wrong is, in principle, the criminal law’s business:³⁴ for as a part of a polity’s political structure, criminal law operates in the public realm, and deals only with wrongs that are identifiable within that realm.

Second, to say that criminal law is concerned with wrongs is to deny that it is concerned with mere lack of virtue. It is concerned with wrongs because it serves to censure—to blame; and whilst we can be blamed for wrongs we commit, and can attract critical comment on our lack of virtue, we are not *blameworthy* merely for falling short of virtue. Wrongs involve a violation of duty: insofar as criminal law is concerned with morality, it is thus concerned with a morality of duty, not of aspiration.³⁵ Furthermore, since the criminal law is concerned only with wrongs that fall within the public realm; and since in a liberal republic the public realm

³¹ See James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’, *Modern Law Review* 71 (2008): 217.

³² See further at nn. 82-6 below.

³³ See S E Marshall & R A Duff, ‘Criminalization and Sharing Wrongs’, *Canadian Journal of Law and Jurisprudence* 11 (1998): 7; R A Duff, *Answering for Crime* (Oxford: Hart, 2007); R A Duff, Lindsay Farmer, S E Marshall, Victor Tadros, *The Trial on Trial (3): Towards a Normative Theory of the Criminal Trial* (Oxford: Hart, 2007); R A Duff, ‘Towards a Modest Legal Moralism’, *Criminal Law and Philosophy* 7 (2014): 217.

³⁴ See Michael S Moore, *Placing Blame* (Oxford: Oxford University Press, 1997), esp chs 1, 16-18.

³⁵ Thus Moore is right that crime must consist in *wrongdoing*, not merely lack of virtue—though we would reject his account of what ‘doing’ involves: see Moore, *Act and Crime* (Oxford: Oxford University Press, 1993), 46-59.

is concerned with how we behave towards each other, not with how we feel: the criminal law can only be properly concerned with how we behave towards each other.

Third, this view of criminal law makes the criminal process—the criminal trial—central to the function and significance of criminal law: to criminalize a type of conduct is to declare that it involves a kind of wrong whose perpetrator should be called to public account; and the criminal trial is the public culmination of the process through which alleged perpetrators are called to public account. It is also a typical—some would say defining—feature of criminal law that it provides for the imposition of punishment on those found guilty of public wrongs; but even if a system of law without punishment would not strictly speaking count as *criminal* law (a question on which we take no view here), it is a mistake to think that the primary point or significance of criminalization is that it paves the way to the imposition of punishment.

Fourth, the criminal law as thus understood is an inclusionary practice, in that it enacts a recognition of those with whom it deals as members of the polity. This is true of victims of crime: by trying, through the criminal process, to call to account those who wronged them, we partly enact our recognition of them victims as our fellows, in whose wrongs we share.³⁶ But it is also true of the perpetrators of crime: to call a perpetrator to account through the criminal process is to treat him as a fellow member of the polity. It is a familiar, depressing feature of much contemporary penal rhetoric and practice that it portrays and treats offenders as outsiders—as enemies against whom ‘we’, the law-abiding, must be protected: one merit of this conception of criminal law is that it requires us to treat both victims and offenders as insiders—as members of the polity.

Fifth, to say that the criminal law is concerned with public wrongs is to say that we have reason to criminalize kinds of conduct that constitute public wrongs; it is also to imply (since a democratic criminal law will define as crimes what citizens can recognize as public wrongs) that we have reason to define and individuate crimes in ways that capture their character as public wrongs. But this is not to say that we should, all things considered, criminalize every public wrong: a good reason to criminalize might well not be a conclusive reason, and we might have stronger reasons (both principled and pragmatic) not to criminalize many public wrongs.³⁷ Nor is it to say that the criminal law’s individuations of offences must be as fine-grained as is the public morality that the law aims to reflect (as well as to shape): legislative drafting always involves difficult choices between broad offence definitions that risk losing touch with lay understandings of the relevant wrongs, and a particularism that tries (vainly) to capture every significant moral distinction in its definitions of precise criminal wrongs.

On the basis of this sketch of a liberal republic’s criminal law, we can ask why such a polity might see reason to create a distinct category of ‘hate crimes’. We have identified a distinctive wrong committed by someone who enacts hatred of members of a group of fellow citizens: who, by words or deeds, denies their full membership of the polity, or their standing as participants in the community’s civic life to whom equal concern and respect are owed. That denial, even if it consists only in speech giving public form to the speaker’s dismissive, exclusionary, demeaning attitude, is already a wrong: the wrong is exacerbated if the speech also encourages others to share and enact that attitude and to give the denial of fellowship material force; or if that attitude is enacted in actions that attack members of the hated group. It is also exacerbated if that group is already vulnerable or disadvantaged—if its members’ standing as fellow citizens is already (or has been in recent history) insecure or threatened.

³⁶ Only partly, because there is much else we should do for victims of crime; but criminal law is a way of recognizing the wrong (not just the harm) that the victim has suffered.

³⁷ Compare J Schonsheck, *On Criminalization* (Dordrecht: Kluwer, 1994), on the ‘filters’ through which decisions to criminalize must pass.

That wrong is a public wrong: as an enacted denial of a citizen's civic status, it implicates the polity's civic life, and thus concerns all its citizens. Given the conception of criminal law sketched above, we therefore have initial answers to the questions with which s. 3 ended. We have reason to criminalize such enactment of hatred, since we have reason to criminalize any public wrong: we have reason to define and declare it, formally and publicly, as a wrong, and to seek to call to public account those who perpetrate it. But this is only an initial answer: to say that we have reason to criminalize is not to say that we should, all things considered, do so, or that criminalization should be our first or only way of dealing with such a wrong. We will not dwell here on the latter point: we need simply remind ourselves of the familiar ways in which a polity, through informal social action and formal state policies, can seek to foster respectful and inclusive attitudes among its members, and combat exclusionary attitudes, without relying on the criminal law.³⁸ As to the former point, we noted earlier that even good reasons to criminalize are not always conclusive reasons: we must ask how strong the reason to criminalize is, and what reasons, principled or pragmatic, militate against criminalization.

The strength of the reasons to criminalize a public wrong depends both on the seriousness (and prevalence) of the wrong, and on what criminalization could be expected to achieve. The wrong's seriousness matters, because criminalization is costly. Enforcing the law will require resources of various kinds (police, prosecutors, courts, correctional institutions), and impose burdens both on those who actually commit the wrong, and also on those who are suspected or accused of doing so: we must ask whether the wrong constitutes a serious enough mischief to warrant the expenditure of such resources.

As for what criminalization can be expected to achieve, we should attend first to the aims internal to the criminal law as a distinctive institution: to define a set of public wrongs, and to provide for those who commit such wrongs to be called to formal public account. The pursuit of such aims has some consequential significance: we can hope that such public declarations of wrongs will remind all citizens of their significance, warn those who might be tempted to commit them that they should not do so, and reassure those who fear their commission that they are wrongs that we will, collectively, take seriously; and such effects can be reinforced if those who commit the wrong are then called to public account for it through a criminal trial.³⁹ But we should not focus solely on such potential consequential benefits, since such aims are also intrinsically significant: for they express our collective commitment to the values whose violation is criminalized. If we care as we should about the extent to which all citizens are recognized as full members of the polity, we will see reason to condemn, as public wrongs, kinds of conduct that deny citizens such recognition, and to call to account those who commit such wrongs—not because this might be consequentially beneficial, but because that is what it is to care. Such a calling to account enacts an appropriate attitude towards, and recognition of, both wrongdoers and victims: it gives formal expression to our commitment to the victims as our fellow citizens; it addresses the wrongdoers as citizens who must answer to us, their fellow citizens, for what they have done.

This account of the reasons we have to criminalize enactments of hatred does not appeal to either of two familiar arguments for criminalizing 'hatred' by creating aggravated versions of such crimes as wounding or criminal damage:⁴⁰ it does not rest on a claim either that such

³⁸ These possibilities include some kinds of 'restorative justice'—those that seek to operate independently of the criminal law; but see further at nn. 48-51 below.

³⁹ But see Bill Dixon and David Gadd, 'Getting the Message? "New" Labour and the Criminalization of "Hate"', *Criminology and Criminal Justice* 6 (2006): 309, for a very sceptical assessment of the efficacy of the Crime and Disorder Act 1998.

⁴⁰ See ss. 28-32 of the Crime and Disorder Act 1998, discussed in more detail in s. 6 below.

enactments cause greater harm (to their direct victims, or to the whole polity), or that they display greater culpability, than such crimes typically cause or display.⁴¹ It is understandable that advocates of criminalization should make such claims: if hatred figures in the offence definition as an ‘aggravating’ factor, it must be taken to make the basic offence more serious; seriousness is determined by harm (caused or threatened) plus culpability; so if hatred is to aggravate the underlying offence, it must either cause more harm or bring greater culpability. We will discuss this way of defining hate crimes in s. 6, and need only note here that it is misleading to portray hatred as this kind of ‘aggravating factor’. For this implies that we have the same wrong—wounding or damaging—which is rendered more serious by virtue of being an enactment of hatred; but we should rather say that what we now have is a distinct wrong.

We might compare the offence of robbery, which is defined in English law as stealing, together with the use or threat of force to accomplish the theft.⁴² It would be misleading to say that the use or threat of force simply aggravates (renders more serious) the underlying offence of theft; or to say that we have two distinct wrongs, of theft and assault, which could be treated separately.⁴³ We should see robbery as a distinctive kind of wrong—distinct both from ordinary theft and from ordinary assault. So too, when hatred is enacted in wounding or in criminal damage, that that constitutes a new, distinct wrong. This is not to say that harm and culpability do not matter: such enactments of hatred are indeed liable to cause distinct harms,⁴⁴ and express a distinct kind of culpability. Even if they do not lead to further material harms, they may undermine their victims’ secure sense of membership, their expectations of respect and concern from their fellows; and they manifest a distinctive civic fault of refusing to recognize civic fellowship. But, first, the distinctive harm in such enactments of hatred is not a further, separately identifiable consequence of the enactment: we can understand the harm only in terms of the wrong from which it flows, as the harm of being denied one’s civic status.⁴⁵ Second, what makes such harm and such culpability of distinctive interest for the criminal law is not that they are greater, on some single scale of seriousness, than the harm or culpability involved in crimes that do not enact hatred, but their civic character—that they concern the offender’s unwillingness to recognize their victim’s standing as a citizen: we need not claim that that makes the wounding or criminal damage *worse* than if it had been an act of spite, or of calculated self-interest; only that it gives the wrong a distinctive civic character, which the criminal law thus has distinctive reason to mark.

5. *The Role of Criminal Punishment*

It might seem that we have so far ignored the primary reason for wielding the criminal law against such wrongs: that criminalization paves the way to punishment, which is what will achieve the goods that make criminalization worthwhile. Retributivists will argue that punishment is necessary to impose on such wrongdoers the punitive suffering they deserve; others will argue that criminalization is justified (only) if we can expect that punishing those

⁴¹ For useful critiques, see Ivan Hare, ‘Legislating against Hate: the Legal Response to Bias Crimes’, *Oxford Journal of Legal Studies* 17 (1997): 415; Hurd and Moore, ‘Punishing Hatred and Prejudice’, n. 10 above; Mohamad Al-Hakim and Susan Dimock, ‘Hate as an Aggravating Factor in Sentencing’, *New Criminal Law Review* 15 (2012): 572.

⁴² Theft Act 1968, s. 8.

⁴³ Contrast Paul H. Robinson, *Structure and Function in Criminal Law* (Oxford: Oxford University Press, 1997), 188.

⁴⁴ See also Waldron, *The Harm in Hate Speech* (n. 13 above); Walters, *Hate Crime and Restorative Justice* (n. 14 above), ch. 1.

⁴⁵ Compare Jeffrie G. Murphy, ‘Bias crimes: What do Haters Deserve?’, *Criminal Justice Ethics* 11 (1992): 20; Dan Kahan, ‘Two Liberal Fallacies in the Hate Crimes Debate’, *Law and Philosophy* 20 (2001): 175.

who commit this kind of wrong can achieve the consequential goods that a system of criminal punishment should serve—detering future wrongs, reforming or rehabilitating the wrongdoers. We cannot embark here on a discussion of how far the punishment of ‘hate-wrongs’ could achieve such benefits.⁴⁶ Instead, first, we emphasize a point already made—that the aim of criminalization need not be simply to pave the way for punishment, and that the making of criminal law and its application through the criminal trial have value that does not depend on the punishment that might follow conviction. Second, we will sketch a distinctive, limited, purpose that criminal punishment can serve in this context.

Criminal punishment, of the familiar kinds (imprisonment, fines, community service, and other restrictions on liberty), is not a good way of trying to achieve a range of desirable ends: (re)building appropriate kinds of personal relationship between citizens (which ‘hate-wrongs’ preclude), or bringing offenders or victims into a better emotional state. ‘[C]onventional justice measures’ Walters argues, ‘fail to address effectively both the causes and the consequences of hate crime’: to emphasize punishment

does little to aid the emotional or physical recovery of victims. Furthermore, the retributive (and punitive) principles upon which such penalties are based do little to engender greater acceptance of ‘difference’.⁴⁷

That is why, Walters argues, although the criminalization of hate-wrongs can serve a useful purpose, our response to those convicted of such crimes should focus on restorative justice rather than on punishment.

We will sketch two responses to this line of thought—one punitively modest, the other more ambitious. The modest response agrees that criminal punishment cannot be expected to benefit either victims or perpetrators of hate-wrongs in the way that Walters seeks, but argues that this does not constitute a ‘failure’ of conventional criminal justice. If someone criticized a doctor’s report on a patient by saying that it ‘failed’ to bring out the patient’s beauty, the appropriate response would be to deny that this constituted a failure, because that is not what medical reports are meant to do. It is analogously misleading to say that criminal punishment ‘fails’ to bring such benefits to the victims or perpetrators of hate-wrongs—or of other kinds of crime: for the achievement of such benefits is not part of the proper aims of punishment. It does not follow that punishment is not *an* appropriate response to such wrongs: indeed, we will suggest, punishment can serve ends of reparation, rehabilitation and reconciliation—but understood in formal and civic, rather than in personal, terms.

The criminal law is concerned with our relationships as citizens: not with the personal, intimate dealings we have with our friends or families, but with our more formal, somewhat detached, relationships simply as fellow citizens of a liberal polity. It is therefore concerned, not with our inner feelings or thoughts towards each other, but with how we treat each other: with our conduct—although sometimes with our conduct as enacting (or as failing to enact) relevant kinds of attitude. This focus structures the criminal process: at the trial, the defendant is called to answer a formal charge of wrongdoing; the trial holds him to account for his own enactment of civically inappropriate attitudes, and enacts appropriate attitudes towards him and his victim.⁴⁸ If he is convicted, the verdict formally condemns his conduct: it enacts the censure that he deserves from his fellows, and so makes clear that he now owes it to them to

⁴⁶ But see n. 39 above.

⁴⁷ Walters, *Hate Crime and Restorative Justice* (n. 14 above), 236; see also 25-30; See also Walters, ‘Criminalizing Hate without Enhancing Punishment?’, in this volume.

⁴⁸ The prevalence of plea-bargained ‘Guilty’ pleas, and the rather mechanistic courtroom processes that result from this, undercut this picture of the criminal trial; but that is one reason why such plea-bargaining is problematic.

recognize his wrong. Such recognition includes a recognition that he should now apologize, and make such reparation as is possible: not merely material compensation for any harm he might have caused (if that is possible), but moral reparation for the wrong that he has done. Criminal punishment can be seen as constituting that apologetic reparation: by requiring the wrongdoer to undertake this burdensome punishment,⁴⁹ the court (speaking in our collective name) aims to communicate to the offender an appropriate understanding of his crime, by specifying this as appropriate moral reparation for what he has done (as the apologetic debt that he owes his victim and his fellow citizens). By undertaking his punishment, the offender secures formal rehabilitation and reconciliation: he pays his debt, and thus restores his civic standing and his civic relationships with his fellow citizens; he ‘wipes the slate clean’.

In talking of apology, reparation, rehabilitation and reconciliation, we are still talking of the enactment of certain civic attitudes—not of what those involved in the process might feel. Punishment, like the criminal trial, has an importantly ritual character: it constitutes a ritual of censure, reparation, apology and reconciliation.⁵⁰ As with all civic rituals, what matters is that the appropriate actions are undertaken: we do not (should not) inquire into the actual feelings of the participants—‘Do you really repent?’; ‘Do you really feel reconciled with the person who wronged you?’. In personal relationships, apologies may be of value only if sincere, but that is not true of this kind of civic ritual: what it aims to restore is not a personal relationship between offender and victim, but their formal, civic relationship as fellow citizens; for what a liberal republic demands of its members is that they conduct themselves appropriately, not that they entertain any particular kinds of thought or feeling.

We might hope, in more aspirational vein, that victims and offenders will want to achieve something more than this: that they will want to (re-)establish relationships of a closer kind, if not as friends, at least as neighbours. We might want to facilitate such efforts—for instance by offering the kinds of restorative justice programme that Walters advocates. This would be to encourage endeavours beyond civic duty towards civic virtue, but the crucial point is that a liberal polity should not go beyond such facilitation to *demand* such endeavours: these kinds of programme must not only remain distinct from the punishment the offender is required to undertake; they must be genuinely optional, as offers rather than requirements.

That is our modest response to Walters. Rather than seeing restorative justice approaches as better ways of pursuing the aims that criminal punishment fails to achieve, we should see the two kinds of process as pursuing different aims: punishment, understood as an enterprise continuous with the criminal trial, as a formal process of holding wrongdoers to account, is not an ineffective way of aiding the emotional repair or reconciliation of victims or offenders; it is a social ritual whose aim is to restore our formal, civic relationships. Perhaps, however (which is our second response to Walters) we should be more ambitious than this; perhaps criminal punishment should have a more ambitious aim.

Advocates of restorative justice often portray it as an alternative to punishment: we are to pursue ‘restorative’ *rather than* ‘retributive’ justice.⁵¹ One response to such claims is to deny their presupposition about the relationship between punishment (retribution) and restoration, and to argue that a requirement to undertake a specified restorative programme could itself constitute an appropriate punishment—something intentionally burdensome that the offender

⁴⁹ And it matters that punishments are typically to be undertaken, not merely undergone.

⁵⁰ For two versions of this view of punishment, see R A Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001); Christopher Bennett, *The Apology Ritual* (Cambridge: Cambridge University Press, 2008).

⁵¹ See further R A Duff, ‘Restoration and Retribution’, in A von Hirsch et al (eds), *Restorative Justice and Criminal Justice* (Oxford: Hart Publishing, 2003), 43.

is required to undertake as an appropriate response to his offence. The offender has a duty to confront and address his wrongdoing—to consider its character and implications, to work out how he can avoid repeating it; restorative justice programmes of the kind Walters describes could assist—indeed could partly constitute—this process. We should note, however, that if undertaking such a programme is to be required of the offender as punishment, its scope must be limited in the way that the criminal law itself is limited: it must be focused on the criminal conduct, and must not expand (as some kinds of ‘restorative’ programme threaten to expand) to examine other areas of the person’s life and relationships; it must constitute an opportunity for reflection and reconciliation. It is an opportunity that the offender is not allowed to refuse, as an opportunity; but he must remain free to refuse to make the use of it that we hope he will make.

We cannot pursue this possibility here, or any of the problems that it faces, including the issue of victims’ participation; our point is simply that if criminal punishment can take on this more ambitious character, we can see further reason to criminalize hate-wrongs.

To say that we have reason in principle to criminalize the enactment of civic hatred is not yet to say how we can in practice criminalize it: what kinds of offence could we legitimately and practicably define? We will tackle this question in s. 6, and face some of the obstacles—practical and definitional—that stand in the way of turning ‘in principle’ into ‘in practice’. First, however, we should note that our argument is not vulnerable to two familiar principled objections to criminalizing of hate wrongs; this will also help to make clear just what we are (and are not) arguing.

The first objection is directed against criminal laws that focus on hateful motivation: laws that, for instance, define such crimes as wounding or criminal damage as formally aggravated if they are motivated by ‘hatred’ of a protected group to which the victim belongs, and attach both distinctive labels and enhanced punishments to such crimes.⁵² But a liberal criminal law, critics argue, should attend to actions and choices, not motives; we should not punish people for their emotions (which are not really within their control), but only for what they choose to do.⁵³ There are plenty of persuasive replies to this objection,⁵⁴ but ours is simply that it does not apply to the kind of hate-crime for which we have been arguing. For one thing, even were we to favour statutes criminalizing conduct ‘motivated’ by hatred, this would not be to favour holding people criminally liable for feelings *as distinct from actions*: the law would still focus on actions—but actions as manifesting, and taking part of their wrongfulness from, particular motives. The more important point, however, is that on our account what matters is not what motivated the criminal action, but what attitudes it enacted—what it communicated to those at whom it was directed, or to others. To see how this makes actual motivation irrelevant, we need simply remind ourselves that I can enact an attitude without feeling the emotions that belong to it. I can enact appropriate grief at a funeral, although I feel nothing but boredom at the ceremony. I can enact hatred of another group in an attack on one of its members, even if what motivates me is just a desire to earn the money I have been promised, or to curry favour with a group to which I want to belong, and I feel uncomfortable about what I ‘have to’ do. To criminalize enactments of hatred is to criminalize actions that carry a certain meaning, not to criminalize thoughts, feelings or motives that lie behind the action.

⁵² See, again, ss. 28-32 of the Crime and Disorder Act 1998.

⁵³ See e.g. Hurd, ‘Why Liberals Should Hate “Hate Crime Legislation”’, Hurd and Moore, ‘Punishing Hatred and Prejudice’, n. 10 above.

⁵⁴ See, e.g., Mohamad Al-Hakim, ‘Making Room for Hate Crime Legislation in Liberal Societies’, *Criminal Law and Philosophy* 4 (2010): 341; Kahan, ‘Two Liberal Fallacies in the Hate Crimes Debate’, n. 45 above.

The second objection is directed against the criminalization of hate speech, and appeals to the central importance of freedom of speech in a liberal democracy. We argued earlier that speech which denies the membership, or civic standing, of a group's members constitutes a distinctive public wrong, even when that denial does not secure their material exclusion from the rights and benefits of membership.⁵⁵ We have reason to criminalize such speech, as we have reason to criminalize any public wrong. For the value of freedom of speech in the public realm lies in its centrality to the public discourse upon which a democratic polity depends: but while we may not therefore ban speech simply on grounds of its content, we have reason to ban speech that denies the equal right of others to engage in such discourse. One procedural imperative of democratic discourse is that all participants address each other as participants, who have a right to listen and to be heard: but hate speech, of the kind that concerns us here, denies that right: it refuses to recognize, or to treat, those against whom it is directed as equal participants in the polity's public discourse.

However, an argument like Heinze's against banning 'hate speech' might be better read as claiming not that we have *no* reason to ban such speech, but rather that we do not have good *enough* reason to do so—at least in 'long-standing, stable and prosperous democracies', in which the state maintains sufficient alternative means of combatting inequality.⁵⁶ Such speech does not, we would argue, merit the kind of protection that principles of free speech provide, since it does not share in the values that such principles embody: but, quite apart from worries about the chilling effect that bans could have on legitimate speech that merits protection, we might think that in such democracies, although hate speech is a public wrong, it is not one against which we ought to mobilize the criminal law. For members of such democracies would be ready to respond robustly to such speech; it would be unlikely to be taken seriously, or to cause further harm: thus the reason to criminalize might not be strong enough to justify the undoubted costs (material, civic and moral) of criminalization—unless, perhaps, the speech incites some 'material negation' of citizenship. We will say more about this possibility in s. 6.

We have argued so far that there is good reason to criminalize hate-wrongs of the kinds described in ss. 2-3: wrongs that enact an exclusionary civic attitude towards members of a vulnerable group. We have not yet said anything about just what we might then criminalize, in what terms. That is the task to which we must now turn; this will also bring out some of the ways in which a good reason to criminalize might not be a good *enough* reason, given the difficulties of formulating suitable offence definitions, and the countervailing considerations that militate against over-reliance on the criminal law as a response to public wrongs.

6. *How to Criminalize Hatred?*

Our existing laws do not typically criminalize *mere* enactments of hatred, either in words or in deeds:⁵⁷ it is not a crime merely to express my contemptuous, exclusionary view that the members of a particular group have no place in our polity; or to enact such a view in conduct that is not otherwise criminal, for instance in turning away from a member of that group who asks me for assistance. Instead, they typically criminalize hate speech only if it is intended or

⁵⁵ See at nn. 22-4, 28-9 above. See also Stanley Kleinberg, 'How Sacred is Free Speech?' in G Maher (ed.), *Freedom of Speech: Basis and Limits* (Stuttgart: Steiner, 1986), 37.

⁵⁶ See especially Heinze, *Hate Speech and Democratic Citizenship*, n. 4 above, chs. 4-5.

⁵⁷ For surveys of English and American legislation, see Law Commission, *Hate Crime: Should the Current Offences be Extended?* (London: Stationery Office, 2014) ch 2; Chara Bakalis, 'Legislating against Hatred: The Law Commission's Report on Hate Crime', *Criminal Law Review* (2015): 192; Walters, 'Conceptualizing "Hostility"' (n. 26 above); Valerie Jenness, 'The Hate Crime Canon and Beyond: A Critical Assessment', *Law and Critique* 12 (2001): 279.

(foreseeably) likely to have some further criminally significant effect—to ‘stir up’ hatred in others by the use of ‘threatening, abusive or insulting words’, for instance:⁵⁸ such ‘stirring up’ is criminally significant because it is likely to result in more materially forceful enactments of hatred, including attacks on members of the group. And they typically criminalize other kinds of enactment of hatred only when they are associated with conduct that is independently criminal, as ‘aggravating’ the offence with which they are associated: thus the Crime and Disorder Act 1998 created ‘racially aggravated’ versions of various crimes, including assault, criminal damage, various public order offences, and harassment;⁵⁹ ss. 145-6 of the Criminal Justice Act 2003 provided for an increase in sentence for any offence that was ‘racially or religiously aggravated’, or involved ‘aggravation related to disability or sexual orientation’.⁶⁰

Even so broad an offence as that of ‘assault[ing] the human dignity of others by insulting, maliciously maligning or defaming’ (members of) a protected group,⁶¹ requires that this be done ‘in a manner capable of disturbing the public peace’, and a similar limitation is explicit or implicit in English and Scottish offences involving sectarian or racist chanting by football fans.⁶² Even when the law creates an apparently self-standing offence of (as we would put it) enacting hatred, the enactment must be related to more material interference with the victim’s life. Thus § 422.6 of the California Penal Code makes it a crime

by force or threat of force, [to] willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any [constitutional or legal] right or privilege ... in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in [§ 422.55(a), defining ‘hate crime’].

The conduct that is thus criminalized might not always be already criminal, independently of this provision:⁶³ but it must involve some actual or threatened interference with its victim’s legally protected rights or privileges; other kinds of enactment of hatred are not criminal.

Our first question, then, is this. If the enactment of hatred, in words or in deeds, is a civic wrong, as we have argued, why should we not criminalize it in and by itself: why should we not define an independent offence of enacting hatred? A quick answer is that there are many civic wrongs that, for good reason, we do not criminalize: wrongs with which we should be able to deal adequately through informal social responses; wrongs that it would be hard to define with the concrete precision that a practicable criminal law requires; wrongs that might be better seen as matters of non-criminal incivility (which is not to say that they are trivial—incivilities can be serious). The criminal law is a clumsy, crude, expensive (both materially and morally) enterprise, which can easily become oppressive and unduly intrusive: we should be slow to expand its scope. Though this is not the place for a discussion of the proper scope and foundations of the criminal law, we can see good reason why hate crimes should require more than an enactment of the kind of hatred we have described—some connection, intended or actual, to other kinds of existing criminal wrong.

⁵⁸ See the English Public Order Act 1986, ss. 17-20, concerning conduct intended or likely to stir up ‘racial hatred’; conduct intended to stir up ‘religious hatred’ was criminalized by the Racial and Religious Hatred Act 2006, which was extended to cover ‘hatred on grounds of sexual orientation’ by the Criminal Justice and Immigration Act 2008 (s. 74).

⁵⁹ Crime and Disorder Act 1998 ss. 28-32; the Anti-terrorism, Crime and Security Act 2001 (s. 39) broadened the law’s scope to cover ‘religiously aggravated’ offences.

⁶⁰ For similar American laws, see e.g. 18 USCA § 249; California Penal Code §§ 422.55, 422.75; New York Penal Law §§ 240.30, 485.10; Wisconsin Criminal Code § 939.645.

⁶¹ German Criminal Code s. 130.

⁶² See Football Offences Act 1991, s. 3; Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, s. 1.

⁶³ See Walters, *Hate Crime and Restorative Justice* (n. 14 above), 13.

Two qualifications should at once be noted. First, even when the creation of hate crimes does not formally expand the scope of the criminal law, as when they consist in aggravated versions of existing crimes, it might in practice do so, since it might guide prosecutors and police officers in the exercise of their discretion about which cases to investigate, with what assiduity, or which to prosecute: this might be appropriate, since we might have better reason to prosecute assaults which also involve the distinctive wrong of enacting hatred than we do to pursue otherwise similar assaults that lack that extra dimension.

Second, the criminal law is not the only available legal response to enactments of hatred; we can also make use of civil procedures.⁶⁴ We cannot discuss here the proper relationship, and division of labour, between criminal law and civil law, save to note that two important features of criminal law are its focus on determining whether the defendant should be held culpably responsible, i.e. censured, for a wrong, and the fact that the case is brought not by the alleged victim but by the whole polity:⁶⁵ but we should note that we can take formal legal notice of, and provide a formal response to, some enactments of hatred not by criminalizing them, but by giving their victims the power to bring a non-criminal case against the enacter.

Our suggestion so far is that whilst we have good reason in principle to criminalize every kind of enactment of civic hatred, as public wrongs, we have better countervailing reasons to use the criminal law much more sparingly: more specifically, to criminalize such enactments only if they are suitably related to other kinds of already criminal conduct. Our existing laws exemplify the two obvious kinds of relationship that might ground hate crimes: that between hate speech and the kinds of conduct that it might incite or encourage; and that between civic hatred and crimes (such as assault or criminal damage) that enact it. We will say a little about each of these ways of criminalizing hate.

The two central questions about this way of criminalizing hate speech are, first, whether we should criminalize only conduct that is intended to ‘stir up’ hatred, or also conduct that is in fact likely to do so; and second, just what it is that should be incited or encouraged. As to the first question,⁶⁶ the paradigm of the criminal wrong must be the attempt to stir up hatred—speech that is *intended* to do so, whether or not it succeeds—since that constitutes a direct attack on those against whom the speech is directed. In this as in other contexts, however, we might also see reason to extend the law to cover conduct that creates a danger of the relevant effect, even if it is not intended to produce it, though one question now concerns the reality and extent of that danger, when the speech is not intended to stir up hatred.⁶⁷

As to the second, trickier, question, English law and English courts have been reluctant to say anything about the meaning of ‘hatred’ in this or cognate contexts, relying instead, as so often, on jurors’ grasp of the term’s ‘ordinary meaning’: but such a reliance is ill-advised,⁶⁸ given the particular kind of ‘hatred’ with which the criminal law is, on our account, properly concerned. Given the argument so far, we can say that what should be intended or expected to be ‘stirred up’ must be the enactment of civic hatred; and that for such enactment to concern

⁶⁴ See, e.g., the English Equality Act 2010, and the range of ‘enforcement’ provisions and remedies contained in Part 9 of the Act.

⁶⁵ But see further R A Duff, ‘Torts, Crimes and Vindication: Whose Wrong is it?’, in M Dyson (ed.), *Unravelling Tort and Crime* (Cambridge: Cambridge University Press, 2014), 146.

⁶⁶ On English law’s confusions, see Walters, ‘Conceptualizing “Hostility”’ (n. 26 above); Kay Goodall, ‘Incitement to Religious Hatred: All Talk and No Substance?’, *Modern Law Review* 70 (2007): 89; Law Commission, *Hate Crime* (n. 57 above), ch. 2.

⁶⁷ See Heinze, *Hate Speech* (n. 4 above), ch. 5; and on the distinction between attack and endangerment, see Duff, *Answering for Crime* (n. 33 above), ch. 7.

⁶⁸ See Goodall, ‘Incitement to Religious Hatred’, at 100-01; also Walters, ‘Conceptualizing “Hostility”’ (n. 26 above), 48-9, on ‘hostility’.

the criminal law, it must take the form either of attacking members of the ‘hated’ group, or of preventing them from exercising their ordinary civic rights.⁶⁹ The next question, to which we return below, is then whether the law can define such ‘hatred’, in ways that will make the law sufficiently clear *ex ante* and applicable by courts and juries *ex post*. (A further question is whether ‘hatred’ is an appropriate term to use in this context: but the account of civic hatred offered above should have shown that it can be used to pick out the relevant kind of wrong.)

Turning to the other way of criminalizing hatred, through aggravated versions of existing offences, we face some familiar questions. In particular, how should ‘hatred’ be defined; and should the offence definition reflect an ‘animus’ or a ‘discriminatory selection’ model?⁷⁰ The ‘discriminatory selection’ model focuses on whether the victim was selected for ill treatment on the basis of his (supposed) membership of a protected group; the ‘animus model’ focuses on whether the commission of the offence was animated by ‘hatred’ (we will say more below about what ‘animated’ should mean).

It should be clear from what has gone before that our account favours some version of the ‘animus’ model: the offence must enact the relevant attitude of civic hatred, and, as critics of the ‘discriminatory selection’ model point out, a perpetrator’s reasons for selecting a member of the protected group need not reflect such an attitude. But which version? One version asks whether the commission of the crime was (wholly or partly) ‘motivated’ by hatred; the other whether the perpetrator ‘demonstrated’ hatred when committing the offence.⁷¹ Our account does not favour a ‘motivation’ test: my conduct can be motivated by a particular emotion or attitude without enacting it, and can enact it without being motivated by it. What matters is, we can say, whether the conduct ‘demonstrates’ the relevant attitude: but the attitude must be demonstrated precisely in and by the commission of the offence. What aggravates the offence is that it enacts hatred: but the hatred must therefore be enacted in the very commission of the offence; it is not enough that the perpetrator displays hatred at the same time as (or before or after) the commission of the offence.⁷²

Just what is it, however, that must be demonstrated or enacted? We return to the question of how ‘hatred’ (if that is to be the key term) should be defined or understood, or how else the relevant attitude should be defined. As we suggested, it cannot be left to jurors to apply the term’s ‘ordinary meaning’; nor will it do to give the kind of guidance suggested by the Crown Prosecution Service: ‘[h]atred is a very strong emotion. Stirring up racial tension, opposition, even hostility may not necessarily be enough to amount to an offence’.⁷³ We cannot pursue this question in detail here, save to make two points.

First, we do not suppose that it is possible to provide a clear, concise, statutory definition of the attitude (‘civic hatred’) that such aggravated offences enact. The best we can perhaps do is to find a non-misleading statutory term, for instance ‘animus’ (which does not carry too

⁶⁹ In countries with working constitutions, in which the ‘rights and privileges’ of citizenship can be identified, a version of § 422.6 of the California Penal Code (quoted before n. 63 above) might be useful here.

⁷⁰ See Frederick Lawrence, *Punishing Hate: Bias Crimes under American Law* (Cambridge, Mass.: Harvard University Press, 1999), 29-34, 73-9; also Kay Goodall, ‘Conceptualising “Racism” in Criminal Law’, *Legal Studies* 33 (2013): 215, 222-31, for pertinent critique of the ‘discriminatory selection’ model.

⁷¹ The Crime and Disorder Act 1998 (s. 28) specifies both of these as alternative types of ‘aggravation’.

⁷² Which is all that English law requires: Crime and Disorder Act 1998 s. 28(1)(a); compare Goodall, ‘Conceptualising “Racism”’, 235-7, on ‘constitutive animus’.

⁷³ See Crown Prosecution Service, *Racist and Religious Crime—CPS prosecution policy*, quoted by the Law Commission, *Hate Crime* (n. 57 above), para. 2.41. See also the CPS’s *Legal Guidance, Disability Hate Crime* on ‘ordinary dictionary definitions’ of ‘hostility’, which ‘include ill-will, ill-feeling, spite, contempt, prejudice, unfriendliness, antagonism, resentment, and dislike’ (cited by Law Commission, *Hate Crime*, para. 2.7): the Crime and Disorder Act 1998 (s. 28(1)(a)) defines aggravation by ‘hostility’.

many misleading accretions from ordinary discourse), and look to the prosecution service (in England, the Director of Public Prosecutions and the Crown Prosecution Service) to provide more discursive guidelines on how that term should be interpreted. The formulation of such guidelines would be a difficult enterprise, best pursued through discussion both with judges and with the wider public: they might talk, for instance, of contempt or odium, of a denial that members of the victim's group are equal members of the polity, or of 'subordination'.⁷⁴ There might also be a role for something like a discriminatory selection model here: not as a key criterion, but as an indicator that the crime enacted the appropriate attitude.⁷⁵

Second, this strategy of looking to the prosecution service to publish guidelines about the interpretation of the law raises larger questions about the proper division of legislative labour between the legislature and other officials. This is another topic that we cannot pursue here, save to note that officials will inevitably have discretion in interpreting and applying this and other criminal laws, which in effect makes them subordinate legislators: the task should not be to eliminate such discretion in the interests of 'democracy', but to find ways of making it democratically accountable. Laws in this area will predictably have to be formulated in terms that either require further interpretation, or are on their face far too wide accurately to capture the mischief at which the law is aimed: if we are to have such laws at all (some might see this as another reason against them), we must be able to rely on the democratically accountable use of such official discretion.

Our discussion so far suggests that we have reason to limit the criminalization of hate to conduct that is already criminal: to speech that is intended or expected to 'stir up' hatred that is enacted in criminal attacks on the hated group's members, which thus falls within the scope of existing doctrines of inciting or encouraging crime;⁷⁶ to the commission of existing crimes in ways that enact hatred. Even if this is right, we still have good reasons, of the kind noted above,⁷⁷ to define these as distinct crimes, in order to highlight the distinctive civic character of the wrongs committed.

It might be thought that a further reason for defining them as new crimes is to provide for harsher punishments—as is suggested by the way in which the demonstration or enactment of hatred is currently treated as an 'aggravating' factor. We have, however, suggested that it is misleading to define the relevance of hatred in this way,⁷⁸ and do not assume that a criminal attack which enacts civic hatred is always more serious than a similar attack that does not enact hatred—in which case we need to rethink the way in which the law describes this kind of offence. Instead of convicting the defendant whose act of assault or of criminal damage enacted hatred of 'aggravated' assault or criminal damage, the law could convict him of, for instance, 'hatred-demonstrating' assault or criminal damage.⁷⁹ The sentence range might be the same as for the underlying offence, but we can expect that when the underlying offence, taken by itself, would be sentenced towards the lower end of the range, the fact that it enacted hatred would normally serve to increase the sentence: not because that fact necessarily makes the offence more serious in relation to the individual victim, but because the way in which the offence also attacked the polity's basic terms of association is now relatively more salient.⁸⁰

⁷⁴ See at n. 26 above (but we do not adopt Baehr's focus on 'violent subordination': see Al-Hakim and Dimock, 'Hate as an Aggravating Factor in Sentencing' (n 41 above), 594-5).

⁷⁵ See Walters, 'Conceptualizing "Hostility"', n. 26 above.

⁷⁶ On which see, for English law, David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (14th ed.; Oxford: Oxford University Press, 2015), 526-47.

⁷⁷ See at n. 31 above.

⁷⁸ See at nn. 40-45 above.

⁷⁹ And this should cover all offences, not just a limited range: see at nn. 61-2 above.

⁸⁰ Compare Al-Hakim and Dimock, 'Hate as an Aggravating Factor in Sentencing' (n. 41 above), 600-605.

There is more to be said about how such offences of enacting hatred, in words or deeds, should be defined, but we have space here only to comment briefly on two issues. The first concerns the *mens rea* of these offences. One whose speech enacts hatred and encourages or is likely to ‘stir up’ hatred, or whose criminal conduct enacts hatred, might neither intend nor realize this: enactment is a matter of the public meaning of what I do or say—and we might not always realize what our words or actions mean. However, whilst we agree with Walters and Goodall that the offences should not require an *intention* to enact or to stir up hatred,⁸¹ as a matter of justice enactors of hatred should be criminally liable for the enactment only if they realized that their conduct had, or would be perceived to have, this meaning.

The second issue concerns the identification of the groups to be protected by such laws.⁸² There are two questions here. One is: which defining features should bring a group within the law’s protection? We currently criminalize enacted hatred directed at people’s race, religion, gender, sexual orientation, or disability:⁸³ but why these, and only these, groups? We have suggested that the wrong of an enacted denial of civic fellowship is distinctively serious only when it is committed against a group that is itself vulnerable to such denials—a group whose membership of the polity is not (or might reasonably not feel) wholly secure, in terms of how its members are and have been treated by the state and their fellow citizens: but which groups fit that description is a contingent matter, even if particular groups (for instance those defined by race, religion, or sexual orientation) fit that description in many societies. Mason suggests that we should also limit protection to those whose defining features ‘have a justifiable claim to affirmation, equality and respect’; thus we should not, for instance, include paedophiles as a protected group:⁸⁴ but we think her reasoning is wrong. Those who commit paedophiliac offences deserve formal censure and punishment, but (given the inclusive view of citizenship that we suggested should characterize a liberal republic) they do not deserve to be excluded from the polity, or reduced to a lower status: crimes that enact civic hatred of paedophiles are thus wrongs of the same kind as other such enactments. The more difficult question is how we should decide, in any given society at any given time, which groups to protect in this way, given the claims that might be made by many groups whose members feel themselves to be victims of discriminatory and exclusionary hatred;⁸⁵ and whether we can draw lines without leaving some groups with a justified grievance against their non-inclusion.

There is, however, a further problem: existing laws do not protect only *vulnerable* groups against attacks on their civic standing. Imagine (which is hardly difficult) a society in which members of one racial group, *As*, have historically been subordinated and excluded in various ways, and are still vulnerable to such exclusion; while members of the dominant racial group, *Bs*, suffer no such collective vulnerability or insecurity. Our existing hate crime laws would treat a crime committed by an *A* against a *B* in the same way as one committed by a *B* against an *A*: if the crime demonstrated civic hatred of the other group and its members, both would be guilty of the aggravated offence (or of an offence of inciting hatred).⁸⁶ This seems at odds with the rationale we have offered for criminalizing hate.

⁸¹ See Goodall, ‘Conceptualising “Racism”’, n. 70 above, 235-6; Walters, ‘Conceptualizing “Hostility”’, n. 26 above, 71-2; and at n. 66 above.

⁸² See M Blake, ‘Geeks and Monsters: Bias Crimes and Social Identity’, *Law and Philosophy* (2001) 20: 121; Gail Mason, ‘Victim Attributes in Hate Crime Law’, *British Journal of Criminology* 54 (2014): 161; Law Commission, *Hate Crime* (n. 57 above).

⁸³ Though not consistently: see Law Commission, *Hate Crime* (n. 57 above), paras. 1.3-1.6; California Penal Code § 422.55.

⁸⁴ Mason, ‘Victim Attributes’, n. 82 above.

⁸⁵ See Blake, ‘Geeks and Monsters’ (n. 82 above).

⁸⁶ See Jenness, ‘The Hate Crime Canon’ (n. 57 above), 293-4.

To some extent, this problem is not real. Enacted hatred, of the kind we have described, enacts an attitude that portrays the other either as having no place in the polity, or as having at best a subordinate place: but whatever ‘hatred’ of the dominant group the crime committed by an *A* enacts, it is unlikely to be this kind of hatred—it will rather be an attitude informed by the person’s awareness of the greater, confident, security of *Bs* as members of the polity, and of the exclusion with which he, as an *A*, is threatened. If it is sometimes a real problem, however; if the law cannot be formulated so that, explicitly or by implication, it covers only conduct directed against vulnerable groups and their members: we will need again to rely on the (accountable) exercise of discretion by those who administer the law to prosecute only in cases that do involve the mischief at which the law is directed.

We have, as we are painfully aware, left all too many questions unanswered, and all too many of our suggestions under-developed, despite the length of this chapter. We hope that we have, however, done enough to identify the distinctive kind of civic wrong that can be captured by the idea of enacting a particular attitude of civic hatred; and to show how we might set about deciding which kinds of such wrong ought to be criminalized, and in what terms. Given the various problems of appropriate offence definition noted in this section, we are by no means confident that criminalization is, ultimately, a practicably appropriate response to this kind of wrong: but we hope both to have shown why we have good reason in principle to criminalize such civic wrongs, and to have clarified some of the obstacles that lie in the way of turning ‘good reason in principle’ into ‘good enough reason in practice’.