
The Emotional Dimensions of Lesbian and Gay Demands for Hate Crime Reform

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“Hate crime” has become an important focus in contemporary lesbian and gay politics. This article explores an aspect of this resort to law that has not been addressed in the sexual politics of “hate crime”—the emotional investments that are being made in and through this demand for law. Recognition of the emotions underscoring a demand for law challenges the foundational assumption about the nature of law—that it is quintessentially associated with reason and rationality.

A key theme within the hate crime canon is the demand for enhanced penalties attached to existing offences when those offences are motivated by hatred proscribed by law. The author argues that the gay and lesbian demand for law reform feeds a law and order politics of retribution and revenge that may be implicated in the promotion, institutionalization, and legitimation of hate. The author does not intend, however, to dismiss the turn to “hate” or “bias” crimes on the basis that they will be ineffective or destructive of social cohesion. Instead, he hopes to draw attention to the complex and contradictory nature of the relationship between sexuality, state, and violence in order to contribute to a debate that will query the alliance that lesbians and gay men are making with law and order.

Le «crime haineux» est devenu un enjeu d'importance pour la politique gaie et lesbienne contemporaine. Cet article explore un aspect de ce recours au droit non abordé par la «politique sexuelle» du «crime haineux», à savoir les investissements émotifs faits dans et à travers cette revendication juridique. La reconnaissance des émotions qui sous-tendent une revendication juridique défie un postulat fondamental quant à la nature du droit, à savoir qu'il est foncièrement lié à la raison et à la rationalité.

Un thème central du principe du crime haineux est la revendication de peines plus sévères pour des infractions déjà prévues par la loi lorsque celles-ci sont motivées par une haine interdite. L'auteur soutient que cette revendication des gais et lesbiennes nourrit une politique de «loi et d'ordre» punitive et revancharde à laquelle pourrait être attribuée la promotion, l'institutionnalisation et la légitimation de la haine. Cependant, l'auteur n'a pas l'intention de rejeter le recours à la «haine» ou au «préjugé» au motif qu'ils seraient inefficaces ou préjudiciables à la cohésion sociale. Il espère plutôt attirer l'attention sur la nature complexe et contradictoire de la relation entre la sexualité, l'État et la violence pour contribuer à un débat questionnant l'alliance que sont en train de forger les gais et lesbiennes avec la loi et l'ordre.

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Introduction

“Hate crime” has become an important focus in contemporary lesbian and gay politics not only in the US, its place of origin,¹ but also in other common law jurisdictions² such as Canada,³ Australia,⁴ and the UK.⁵ Commenting on government

¹ See e.g. Valerie Jenness & Kendal Broad, *Hate Crimes: New Social Movements and the Politics of Violence* (New York: Aldine De Gruyter, 1997); Valerie Jenness & Ryken Grattet, *Making Hate a Crime: From Social Movement to Law Enforcement* (New York: Russell Sage Foundation, 2001).

² “Hate crime” is also a term that has gained significance within sexual politics in other jurisdictional contexts such as South Africa. See e.g. Graeme Reid & Teresa Dirsuweit, “Understanding Systemic Violence: Homophobic Attacks in Johannesburg and Its Surrounds” *Urban Forum* 13 (2002) 99; “Hate Crimes Against Lesbians on the Rise” (5 May 2004), online: iOL <<http://www.iol.co.za/general/news>>. The Web site of the International Gay and Lesbian Human Rights Commission offers other examples from North Africa, South America, the Indian sub-continent and countries of the Pacific rim. See online: International Gay and Lesbian Human Rights Commission <<http://www.ighlrc.org/site/ighlrc/>>.

³ See e.g. Cynthia Petersen, “A Queer Response to Bashing: Legislating Against Hate” (1991) 16 *Queen’s L.J.* 237; Martha Shaffer “Criminal Responses to Hate-Motivated Violence: Is Bill C-41 Tough Enough?” (1995) 41 *McGill L.J.* 199.

⁴ See e.g. Gail Mason & Stephen Tomsen, eds., *Homophobic Violence* (Sydney: Hawkins Press, 1997); Gail Mason, *The Spectacle of Violence: Homophobia, Gender and Knowledge* (London: Routledge, 2002) [Mason, *Spectacle of Violence*].

⁵ In the UK, the phrase “hate crime” is a part of the common currency of the contemporary landscape of political activism around violence. In general, it has remained a political and bureaucratic category rather than a legislative term. While recent reforms like the *Crime and Disorder Act 1998* ((U.K.), c. 37) have introduced the idea of sentence enhancement as well as the creation of a new offence, the term used to name this new category of law is “aggravated violence”. The UK government has been reluctant to extend the term “hate crimes” beyond racial and ethnic violence. In 2003, sentence enhancement provisions were extended to include incidents of violence in relation to sexual orientation and disability. This reform only relates to the application of sentence enhancement in relation to parallel offences. Despite the absence of “hate crime” as a strict legal term in the UK, there is much evidence that it is already significant for policing with many local initiatives. An example comes from the policing guide produced by the Association of Chief Police Officers (“ACPO”), which seeks to set common standards for policing hate crimes: Association of Chief Police Officers, *Guide to Identifying and Combating Hate Crime: Breaking the Power of Fear and Hate* (London: ACPO, 2000). Under the heading “Prioritising Hate Crime by its Impact on the Victim”, the guide explains:

Hate crime can have a devastating effect on the quality of life of its victims and those who fear becoming its victims.

Hate crime victims feel the added trauma of knowing that the perpetrator’s motivation is an impersonal, group hatred, relating some feature that they share with others. A crime that might normally have a minor impact becomes, with the hate element, a very intimate and hurtful attack that can undermine the victim’s quality of life. ... In any close community, the impact of hate crime on quality of life extends to the victim’s family, broader circle of friends, acquaintances and the whole community. For every primary victim there are likely to be numerous secondary victims.

Beyond its impact on the individual, hate crime is a powerful poison to society. It emphasises and sensitises feelings of difference rather than focusing on what is shared

proposals to consider the extension of hate crime provisions in the UK to include homophobic violence, the editor of a London-based gay magazine observed, "Almost uniquely, the introduction of hate crimes has the support of all the major campaigning organisations."⁶ The phrase "hate crime" articulates the weight and urgency of a lesbian and gay politics of violence and safety by reference to "crisis" and "epidemic".⁷ Incidents of extreme violence, such as the brutal murder of Matthew Shepard in the US, Kenneth Zeller in Toronto, Canada, and George Duncan in South Australia, as well as the bombing of "The Admiral Duncan" (a gay pub in London's Soho), which resulted in several deaths, have been deployed as potent symbols of this "crisis".⁸ Its "epidemic" qualities are commonly represented in victim surveys arising out of lesbian and gay community activism devoted to generating data that not only seeks to map the prevalence of that violence over a person's lifetime but also to represent its everyday quality. Jacobs and Potter remark that "[s]pokespersons for lesbians and gays have been among the most vocal proponents of the hate crime epidemic theory."⁹ The collection of data about these largely unreported incidents of violence draws attention to the continued failure of the state, in particular the police as key state officials, and the criminal justice system more generally, to take homophobic violence seriously.¹⁰ As

in common. It breeds suspicion, mistrust, alienation and fear. It promotes isolation and exclusion and sets up barriers to communication (at 4-5).

⁶ Chris Morris, "Debate: More Equal Than Others" *Outcast* (November 1999) 13. This article presents arguments for and against the inclusion of sexual orientation in English hate crime law. *Outcast* is a free lesbian and gay weekly magazine published in the UK.

⁷ Petersen, *supra* note 3.

⁸ On the murder of Matthew Shepard, see Beth Loffreda, *Losing Matt Shepard: Life and Politics in the Aftermath of Anti-Gay Murder* (New York: Columbia University Press, 2000). On high profile gay murders in Canada, see Petersen, *supra* note 3. On the murder of George Duncan in South Australia, see Barbara Baird, "Putting Police on Notice: A South Australian Case Study" in Mason & Tomsen, eds., *supra* note 4, 27. On the bombing of "The Admiral Duncan", see Martin Bowley, "A Cancer at the Heart of Society" (2000) 150 *New L.J.* 1203. Victor Janoff raises a note of caution suggesting that many gay related murders attract little public concern or attention. In Canada in the 1990s, over 80 such murders took place attracting little gay or straight media attention. See Victor Janoff, "Homocide: Queer Killings Across Canada", online: American Society of Criminology <<http://www.asc41.com/www/2000/abstm026.htm>>.

⁹ James B. Jacobs & Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (New York: Oxford University Press, 1998) at 46.

¹⁰ See e.g. Greater Manchester Lesbian and Gay Policing Initiative, *Lesbians' Experiences of Violence and Harassment* (Manchester: Greater Manchester Lesbian and Gay Policing Initiative, 1999); Neil Jarman & Alex Tennant, *An Acceptable Prejudice?: Homophobic Harassment in Northern Ireland* (Belfast: Institute for Conflict Research, 2003); Kristen Kuehnle & Anne Sullivan, "Patterns of Anti-Gay Violence: An Analysis of Incident Characteristics and Victim Reporting" (2001) 16 *J. of Interpersonal Violence* 928; Angela Mason & Anya Palmer, *Queer Bashing: A National Survey of Hate Crimes Against Lesbians and Gay Men* (London: Stonewall, 1996); I. Wake et al., *Breaking the Chain of Hate: A National Survey Examining the Level of Homophobic Crime and Community Confidence Towards the Police Service* (Manchester: National Advisory Group, 1999); National Coalition of Anti Violence Programmes, *Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2001: A Report of the National Coalition of Anti-Violence Programs* (New York: National Coalition of Anti Violence Programmes, 2002), online: vawnet <<http://www.avp.org/>

such, this also highlights the failure of the state to carry out one of its core functions—providing for the safety and security of its citizens.¹¹ Common to this politics of violence and safety, Stanko and Curry argue,¹² is the recourse to a “crime paradigm”. Others have drawn attention to another dominant feature of this politics, the central role of law.¹³ Only through the adoption of new law, Jenness and Broad suggest, can hate “become a meaningful term and the victimization associated with the problem of hate crime [be] rendered apparent and clearly defined.”¹⁴ A key feature of this particular turn to law is not the creation of new offences but the introduction of new, enhanced punishments, creating “parallel offences” where “hate” is the motivating factor.¹⁵ The objective of this paper is to explore one aspect of this resort to law that has not been addressed in the sexual politics of “hate crime”, the emotional investments that are being made in and through this demand for law.

It is a project that addresses a fundamental issue: the place of emotions in law. Attempting to bring the emotional dimensions of law into the frame of analysis challenges a foundational assumption about the nature of law; that law is quintessentially a phenomenon and a social practice associated with reason and rationality. In this scheme, emotions, characterized as the “non-rational” or “irrational”, necessarily have no place in law and the analysis of law. A growing body of work has begun to question this assumption, documenting and analyzing the nature and significance of human passions and emotions in law.¹⁶ In some respects, the

publications/reports/2001ncavpbiasrpt.pdf>; Colin Morrison & Andrew Mackay, *The Experience of Violence and Harassment of Gay Men in the City of Edinburgh* (Edinburgh: Scottish Executive Central Research Unit, 2000); New South Wales, *Out of the Blue: A Police Survey of Violence and Harassment Against Gay Men and Lesbians* (Sydney: New South Wales Police Services, 1995); Anti-Discrimination or Board of New South Wales, *Final Report of the Streetwatch Implementation Advisory Committee* (Sydney: Streetwatch Implementation Advisory Committee, 1994).

¹¹ Shane Phelan argues that violence against gays and lesbians, and the state’s failure to take that violence seriously, is perhaps the clearest manifestation of the denial of sexual citizenship. In this model of the relations between the individual and the state, the state is the ultimate provider and guarantor of individual and collective safety and security. This safety and security is provided in exchange for obedience to the law. As Phelan points out, the present institutional hetero-sexism of the state and the law makes citizenship problematic and, more specifically, makes access to safety and security in and through the state, at best, difficult and, at worst, impossible for lesbians and gay men. See Shane Phelan, *Sexual Strangers: Gays, Lesbians and Dilemmas of Citizenship* (Philadelphia: Temple University Press, 2001).

¹² Elizabeth A. Stanko & Paul Curry, “Homophobic Violence and the Self ‘at Risk’” (1997) *Social & Leg. Stud.* 513 (this article appeared in a special issue entitled “Legal Perversions”).

¹³ See Jenness & Broad, *supra* note 1; Jenness & Grattet, *supra* note 1.

¹⁴ See Jenness & Broad, *ibid.* at 172.

¹⁵ Jacobs & Potter, *supra* note 9, c. 3.

¹⁶ See Susan A. Bandes, ed., *The Passions of Law* (New York: New York University Press, 1999); Lionel Bently & Leo Flynn, eds., *Law and the Senses: Sensational Jurisprudence* (London: Pluto Press, 1996); Mary Douglas, “Emotion and Culture in Theories of Justice” (1993) 22 *Econ. & Soc’y* 501; Susanne Karstedt, “Emotions and Criminal Justice” (2002) 6 *Theoretical Criminology* 299; Murray Lee, “The Genesis of ‘Fear of Crime’” (2001) 5 *Theoretical Criminology* 467; Claire Valier, “Punishment, Border Crossings and the Powers of Horror” (2002) *Theoretical Criminology* 319;

fundamental separation of law and emotions is more difficult to sustain in the context of hate crime law. To date, much of the work on the emotional dimensions of law has occurred in relation to criminal law and criminal justice. This focus is not surprising as Willem De Haan and Ian Loader explain:

Intuitively, one is bound to think of [the relationship between human emotions and crime, punishment, and social control] as a close one. States of emotional arousal—pleasure, anger, fear, sadness, disgust, remorse, resentment, shame, guilt and so forth—seem somehow deeply and intimately implicated in [crime].¹⁷

Furthermore, Laster and O'Malley suggest that in the recent past, it is in the context of criminal law and criminal justice that emotions have not only played an important role in law reform but, through that reform, have been embedded in law and in the mechanisms of its administration.¹⁸ The appearance of "hate" in the name of the new legal category, "hate crime", appears to be an example of a law that gives a certain prominence to emotions. "Hate", the *Oxford English Dictionary* explains, is "an emotion of extreme dislike or aversion; detestation or abhorrence ..."¹⁹ It would, however, be premature to conclude that the appearance of "hate" in this new legal category fundamentally challenges the continued significance of the foundational assumption about the separation of law and emotions.

In lesbian and gay activism around hate crime reform, in the first instance, "hate" is overwhelmingly represented as being antithetical to law. It is an important dimension of the problem; of the violence that is taken to be a sign of disorder, threatening not only the individual but also the immediate and wider community. I will argue that this is a partial picture of the emotional dimensions of hate crime law reform. Murphy and Hampton suggest that criminal law provides a vehicle whereby "certain *feelings of anger, resentment and even hatred* ... typically directed towards wrong doers, especially if we are the victims of those wrong doers" are institutionalized in the law.²⁰ Murphy and Hampton's reference to "hate" is of particular interest. Contrary to the belief that in "hate crime" emotions in general, and "hate" in particular, may be limited to their association with violence and social disorder, Murphy and Hampton's observations suggest that "hate" may be an emotion associated with law and with good order. This raises the possibility that lesbian and

Alison Young, "Aesthetic Vertigo and the Jurisprudence of Disgust" (2001) 11 L. & Critique 241. On horror and law, see Leslie J. Moran, "Gothic Law" (2001) 10:2 Griffith L.R. 75; Leslie J. Moran, "Law and the Gothic Imagination" in Fred Botting, ed., *Essays and Studies 2001: The Gothic* (London: D.S. Brewer, 2001) 87; Leslie J. Moran, "Law's Diabolical Romance" in Michael Freeman, ed., *Current Legal Issues: Law and Popular Culture* [forthcoming].

¹⁷ Willem de Haan & Ian Loader, "On the Emotions of Crime, Punishment and Social Control" (2002) 6 Theoretical Criminology 243 at 243.

¹⁸ Kathy Laster & Pat O'Malley, "Sensitive New-Age Laws: The Reassertion of Emotionality in Law" (1996) 24 Int'l J. Soc. L. 21.

¹⁹ *The Compact Oxford English Dictionary*, 2d ed., s.v. "hate".

²⁰ Jean Hampton, "Forgiveness, Resentment and Hatred" in Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988) c. 2 at 63 [emphasis added].

gay law reform, which seeks to outlaw hate, may be implicated in the promotion, institutionalization, and legitimation of hate (albeit a different hate).²¹ My interest in this state of affairs echoes concerns raised by Wendy Brown, reflecting on the experience of feminist engagements with the state. She poses a question that is at the heart of my focus upon the emotional dimensions of law in general, and in relation to lesbian and gay engagements with hate crime reform initiatives in particular. She asks, “What kind of attachments to unfreedom can be discerned in contemporary political formations ostensibly concerned with emancipation?”²² The question gives a critical analysis of the emotional investments being made in and through the sexual politics of hate crime reform a particular urgency.

In my attempt to explore the emotional investments being made in and through hate crime reform it is not my intention to undertake a detailed historical or contemporary survey of the development or deployment of the various dimensions of the hate crime canon²³ within a lesbian and gay context, either in a specific jurisdiction or across a wider range of locations. Existing general studies of the development of hate crime social movements, such as work by Jenness and Broad and Jenness and Grattet focusing on the US,²⁴ offer preliminary data and an exemplary analysis of their deployment in this context. Detailed empirical work must remain an important and urgent sociological and socio-legal project for others to undertake.

My points of departure and resources drawn from contemporary sexual politics are modest. My experience of being a member of the lesbian, gay, bisexual, and transgender (“LGBT”) advisory group of London’s Metropolitan police service has provided me with one context in which to experience lesbian and gay advocacy of hate crime reform. The priority given to hate crime reform and the importance of enhanced punishment for crimes of homophobic violence have both been notable features of the going encounter between the police and the LGBT participants of the advisory group. Another point of departure is the writings of lesbian and gay activists and scholars in various different jurisdictional contexts who have advocated hate crime reform as the favoured response to homophobic violence. For example, in the UK, a key response to the deaths arising out of bombing of the gay bar, “The Admiral Duncan” in London’s Soho, was the demand for hate crime reform.²⁵ Stonewall, the

²¹ AnnJanette Rosga, “Deadly Words: State Power and the Entanglement of Speech and Violence in Hate Crime” (2001) 12 L. & Critique 223.

²² Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995) at xii [Brown, *States of Injury*]; see also Wendy Brown, “Wounded Attachments: Late Modern Oppositional Political Formations” in John Rajchman, ed., *The Identity in Question* (New York: Routledge, 1995) 199 [Brown, “Wounded Attachments”].

²³ See Valerie Jenness, “The Hate Crime Canon and Beyond: A Critical Assessment” (2001) 12 L. & Critique 279.

²⁴ *Supra* note 1.

²⁵ See Bowley, *supra* note 8.

UK's premier lesbian and gay parliamentary lobby group,²⁶ and leading activists, such as Peter Tatchell,²⁷ have in general argued for the incorporation of sexual orientation into hate crime reform initiatives and have, in particular, given their enthusiastic support to sentence enhancement provisions. Lydia Teller, a lesbian activist in the UK, made the following comments in support of the reform of UK hate crime laws to include homophobic violence: "The case for introducing hate crimes is so obvious that it's impossible to argue." She continues:

Now I'm in my thirties I look back on my teenage years and wish there had been legislation around then to protect me. It may not be liberal or politically correct, but neither are the bullies who beat us up for our sexual orientation. They don't want to play fair, so to protect ourselves we have to come down on them hard.²⁸

US activist and scholar, AnnJanette Rosga, reflecting on her experience working in the field of violence against lesbians and gay men observed that she found phrases such as "hate crime" and "bias-related violence" were crucial to the success of developing the contours and raising the visibility of homophobic violence.²⁹ Her experience was that they offered a dramatic narrative that was the "easiest and most effective tool with which to unsettle and persuade audiences."³⁰ Here, Rosga offers an example of her willingness to mobilize "hate crime" for a lesbian and gay politics of violence and safety. A third and final point of departure is the successful incorporation of "sexual orientation" into hate crime laws. Jenness and Grattet note that a key dimension of attempts to extend hate crime provisions to include sexual orientation has been comparison; applying the hate crime orthodoxy and its assumptions to other individuals and groups. As Jenness and Grattet note, in many instances this has not been a simple task or an easy struggle. In most jurisdictional contexts attempts to deploy the orthodoxy of hate crime in general and sentence enhancement in particular to sexual orientation have involved long hard battles.³¹ Again, Rosga offers a pertinent

²⁶ Stonewall's most recent working paper on hate crime reform was produced in response to a government working party in Scotland. See Stonewall, "Hate Crime: Consultation Response to the Working Group's Report" (Scotland: Stonewall, 2004), online: Stonewall: Equality & Justice for Lesbians, Gay Men & Bisexuals <<http://www.stonewall.org.uk>>.

²⁷ Peter Thatchell, "Some People are More Equal than Others" in Paul Iganski, ed., *The Hate Debate: Should Hate Be Punished as a Crime?* (London: Institute for Jewish Policy Research, 2002) 54 at 58.

²⁸ Lydia Teller, "Debate: More Equal Than Others" *Outcast* (November 1999) 13.

²⁹ AnnJanette Rosga, "Policing the State" (1999-2000) 1 *Geo. J. Gender & L.* 145 at 148.

³⁰ *Ibid.* at 150.

³¹ The incorporation of sexual orientation differs from that of race, religion, and ethnicity, which, Jenness and Grattet note, are the "anchoring provisions of all hate crime" (*supra* note 1 at 159) These are already "legitimated subjects". Bias and hate associated with these distinctions has already been challenged in many jurisdictions as evidenced in earlier anti-discrimination provisions. In contrast, bias or hate focusing upon a person's sexual orientation remains legitimate and unchallenged in many interpersonal and institutional contexts. Thus, most attempts to deploy the orthodoxy of hate crime in general and sentence enhancement in particular to sexual orientation also involve the creation of lesbians and gays as legitimate subjects.

reflection on the significance of comparison and analogy. “Establishing ... analogies” she explains, “was crucial.” She continues:

“[H]ate crime” and “bias related violence” out-performed “anti-gay violence” in establishing conceptual similarities between racism, anti-Semitism, and homophobia. ... [I]t was nothing less than a profound rearticulation of reality to correlate this violence with racist and anti-Semitic violence.³²

It is with the emotional investments being made in and through these analogies and the resort to a now well-established rationale for hate crime reform that my analysis begins. Placing this orthodoxy in the wider contemporary landscape of law and order politics provides an opportunity to highlight some of the key emotions—specifically, hate and revenge—that are articulated and valorized in demands for enhanced punishment. An analysis of the fate of these emotions in law follows. The focus then returns to hate crime reform to examine the fate of these emotions in that specific context. Finally, the paper reflects on the encounter between sexual identity and “hate crime” and expresses a note of caution prior to drawing some conclusions.

I. Enhanced Punishment

A key theme within the hate crime canon is the demand for enhanced penalties attached to existing offences when those offences are motivated by hatred proscribed by law.³³ Originating in the context of campaigns for the introduction of crimes of “hate” associated with race, ethnicity, and civil rights,³⁴ a set of arguments legitimating these demands has rapidly been established. The organizing principle of this orthodoxy is that “hate” or “bias” crime is a *more* damaging and dangerous form of violence.³⁵ Hate crimes are said to be more damaging for the individual in various ways: some have suggested that hate violence is frequently physically more extreme

³² *Supra* note 29 at 148.

³³ This is a crude portrait of hate crime legislation. As Jacobs and Potter note, a range of statutory definitions have been invented to name the relation between hate and the act of violence. See *supra* note 9, c. 3.

³⁴ Jacobs & Potter, *supra* note 9; Jenness & Broad, *supra* note 1; Jenness & Grattet, *supra* note 1; Shaffer, *supra* note 3.

³⁵ See Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law* (Cambridge: Harvard University Press, 1999) for a classic exposition of this position; see Jack Levin & Jack McDevitt, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed* (New York: Plenum Publishing Corporation, 1993); Paul Iganski, “Why Make ‘Hate’ a Crime?” (1999) 19 *Critical Social Policy* 386 (illustrating the use of “hate crimes” in a UK context) [Iganski, “Hate a Crime”]. Jacobs and Potter (*supra* note 9) offer the most sustained, albeit problematic, critique of this orthodoxy. They question the veracity, not of the claims of harm per se, but of the claims of exceptional harm. Associated with this is the challenge to suggestions that violence motivated by hate or bias is an exceptional problem; an epidemic of violence. They suggest that the enactment of special hate crimes will itself promote harm, arguing that rather than offering a solution that prevents community fragmentation, the very category of hate crime further institutionalizes the very distinctions that promote fragmentation and institutionalize conflict.

and more brutal.³⁶ Extra damage also takes a psychological form as it generates added trauma. One dimension of this is explained in terms of the particular nature of the act of violence, which is seen to have a strong impersonal dimension: the perpetrator acts on the basis of his perception of the victim's membership in a social category. The UK's police manual on hate crime explains the extra damage by reference to the impersonal nature of this violence, which focuses on a person's perceived identity, making the violence "very personal" (identity being the very essence of that person) and thereby of more damaging effect.³⁷ Another argument in support of enhanced punishment is the extraordinary impact of hate violence on the wider community. In the first instance this wider impact is upon the immediate identity community. Some have characterized the extreme nature of the threat as a state of "terror"³⁸ in which members of the community live in constant fear and isolation. This violence also has a wider impact as the perpetrator's perception of the victim's membership in a particular vilified group has a certain arbitrary quality. All who are perceived by perpetrators to be members of that community are vulnerable. It is not limited to victims who self-identify with a particular community. A much wider group of persons are therefore seen to be at risk of this form of violence. Finally, the extraordinary nature of this violence is associated with damage to culture and respectable "society" more generally. In this understanding, the violence is said to violate fundamental values, such as "equality" and "multiculturalism", threatening to fracture the community and the very possibility of social order. These arguments work to characterize hate-motivated violence as exceptional.

Making an event exceptional is a technique of making a claim on the nation that relates to the wider contemporary restructuring of national personhood.³⁹ Berlant shows how the exceptional and the traumatic have come to be the major methods for people in the US (and I would add, other Western liberal democracies) to tell their relationship to the state and thereby be entitled to state belonging and protection. "Telling" has to be novel and exceptional rather than mundane and everyday, it has to make an impact and it should be a transformative event (trauma should transport from one life to another through its power as exceptional). By eclipsing tales of everyday suffering and structural inequality, exceptional trauma enables a more powerful moral position to be taken and therefore a greater claim to be made. The trauma generated through violence is a powerful form of exceptional personhood, legitimating greater claims for enhanced punishment.

³⁶ See Brian Levin, "Hate Crimes: Worse by Definition" (1999) 15 J. Contemp. Crim. Justice 6; Iganski, "Hate a Crime", *ibid.*

³⁷ ACPO, *supra* note 5.

³⁸ See James Weinstein, "First Amendment Challenges to Hate Crime Legislation: Where's the Speech?" (1992) 11:2 Criminal Justice Ethics 6.

³⁹ See Lauren Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham: Duke University Press, 1997); Lauren Berlant, "The Subject of True Feeling: Pain, Privacy, Politics" in Sara Ahmed *et al.*, eds., *Transformations: Thinking Through Feminism* (London: Routledge, 2000) 33; L. Berlant, "Trauma and Ineloquence" (2001) 5 Cultural Values 41.

Lesbian and gay politics of violence and safety seek to figure homophobic violence as the exceptional. For example, the exceptional is figured in the suggestion that this violence represents a “crisis” and an “epidemic”. “Epidemic” stands for novelty. This is not so much the novelty of the appearance of homophobic violence, but the novelty of its characterization as disorder, and the novelty of an awareness of the scale of this violence. “Exceptional” also resonates with a perception, promoted by contemporary law and order politics, that violent crime is a growing problem and a sign of an escalating social crisis. This focus on novelty threatens to transform the past (and present) of systematic and everyday homophobic violence legitimated both in and through the state institutions of safety and security into the exceptional.⁴⁰ The exceptional is also figured in assumptions about the nature of homophobic violence, which is predominately imagined to be stranger violence; random acts committed in public places by someone who is not known to the victim. The random nature of this violence and the nature of the perpetrator (figured here as the “stranger”, the one who is least known or knowable) both symbolize the extreme qualities of this violence.⁴¹

⁴⁰ See Barbara Perry, *In the Name of Hate: Understanding Hate Crime* (New York: Routledge, 2001). Amnesty International’s reports on the violence of state institutions toward lesbians and gay men provides ample contemporary documentation of its widespread operation. See Amnesty International, *Crimes of Hate, Conspiracy of Silence: Torture and the Ill-Treatment Based on Sexual Identity* (London: Amnesty International Publications, 2001).

⁴¹ Petersen raised doubts about the validity of this model of the nature of homophobic violence in particular suggesting that it did not represent the experience of lesbians (*supra* note 3 at 238-42). In the UK, a study of the police records of the London Metropolitan Police undertaken by the Understanding and Responding to Hate Crime Team (see Metropolitan Police, “Understanding and Responding to Hate Crime Factsheets: Homophobic Violence”, online: Metropolitan Police <<http://www.met.police.uk/urhc/ho-fact6.pdf>>; Elizabeth A. Stanko, “Re-conceptualising the Policing of Hatred: Confessions and Worrying Dilemmas of a Consultant” (2001) 12 L. & Critique 309) found that in over 60 per cent of police reports of homophobic incidents no relationship between victim and perpetrator was recorded. Upon undertaking a detailed qualitative analysis of incidents reported in January a rather different picture emerged from the police data. Almost 40 per cent of perpetrators were known to the victims as neighbours, partners, ex-partners, family, business associates, and others. A further 28 per cent were locals and local youths. Strangers accounted for only 16 per cent of perpetrators. In a study of allegations of racial and homophobic harassment recorded by the London Police between January and June 2001, Gail Mason found that in over 80 per cent of the reported homophobic incidents, the perpetrator was a neighbour: Gail Mason, *A Study of Allegations of Racial and Homophobic Harassment recorded by the London Metropolitan Police Service, January-June 2001* (2003) [unpublished].

An important feature of both the URHC findings and Mason’s work on homophobic incidents is that it challenges the common presumption that hate crime in general and homophobic crime in particular takes the form of random attacks by a stranger upon a stranger. As Mason points out, “The assertion that it is random is dependant upon the assumption that the conduct is committed by someone who is not known to the victim ...” (*ibid.* at 24). Developing a more complex set of categories of perpetrator/victim relations enabled the UHRC project to challenge this presumption, providing valuable new insights into experiences of homophobic violence. See also Leslie J. Moran, Susan Paterson & Tor Docherty, *Count Me in!: A Report on the Bexley and Greenwich Homophobic Crime Survey* (2004) [unpublished]. In that survey two out of three respondents who had experienced homophobic violence in the last 12 months, reported that they knew the perpetrators. This group

Through the exceptional, the sexual politics that expose the ordinariness of homophobic violence resonates with the politics of enhanced punishment.

Frederick Lawrence suggests that two main themes connect the orthodoxy of a more dangerous and damaging violence to the demands for enhanced punishment.⁴² The first is “retribution” and the second has a “utilitarian/consequentialist” focus. The latter is characterized by Lawrence as a set of themes that orient punishment toward a welfare objective, which has both an individual and community focus with an explicit crime reduction agenda. As a symbol, the new punishment functions at the level of moral education; purporting to give out a message to individuals and society that “hate crime” is no longer tolerated and is now being taken seriously.

Retribution explains and fashions demands for enhanced punishment in terms of just deserts: “an eye for an eye”, “that the punishment fit the crime”, et cetera. Others have described punishment as a form of “debt” paid to the State/Society, the “creditor”.⁴³ The image of retribution as a relation of credit and debt is at the heart of what Shane Phelan has described as legal or “negative” citizenship.⁴⁴ In this formulation, the state as the provider and guarantor of security takes the role of creditor to the citizen-debtor. The original “credit” takes the form of the state’s provision of privileges, in particular, safety and security. The citizen’s debt is paid as individual obedience to the laws and institutions that produce and sustain this social order of safety and security. A violation of law by the citizen interrupts the satisfaction of the ongoing debt. Punishment is the means whereby the state calls in the debt and extracts the outstanding value.

A reflection on punishment by Nietzsche offers an illustration of various dimensions of punishment organized by way of the metaphor of credit and debt. He describes the outstanding debt and the process of its repayment in the following terms:

Hence [the criminal] is not only stripped of his advantages as is only just, but drastically reminded what these advantages are worth. The rage of the defrauded creditor, the community, returns him to the wild and outlawed condition from which heretofore he had been protected. It rejects him, and henceforth every kind of hostility may vent itself upon him. Punishment at this level of morality simply mimics the normal attitude toward a hated enemy who

includes partners and ex-partners, family and household members, neighbours, and colleagues at work, school, and college. When partners and ex-partners were taken out of the data, over 50 per cent of perpetrators still fell in the categories of persons known to the victim.

The challenge raised here is how to make the violence that is everyday (a violence that is largely ignored) “exceptional”, that is, a violence that is to be taken seriously.

⁴² Lawrence, *supra* note 35, c. 3.

⁴³ Robert C. Solomon, “Justice v. Vengeance: On Law and the Satisfaction of Emotion” in Susan Bandes, ed., *The Passions of Law* (New York: New York University Press, 1999) 123.

⁴⁴ Phelan, *supra* note 11 at 23.

has been conquered and disarmed, who forfeits not only every right to protection but all mercy as well.⁴⁵

In order to demonstrate the full value of the unpaid debt, the debtor is purged from the domain of law and given an experience of “the wild”, as an outlaw. In this way, retribution is connected to purification of the community. Once outside, the one who has failed to obey the law is in the position of the “enemy”. In this position as debtor he or she is not only outside law’s order and security, but is also subject to the full unmediated force of law’s violence.⁴⁶ The duration and degree of suffering signifies the value due as well as its payment. A popular contemporary manifestation of this logic of punishment is to be found in references to various “wars” on crime. Against an enemy of the law (and the law-abiding citizen) the state’s resort to the full force of law becomes a legitimate practice. This relation of credit and debt offers an extended metaphor that makes punishment intelligible in particular ways: it provides a scheme of valorization and offers a way of making sense of the violence of the law as a phenomenon that is managed and administered, that is based on reason. Furthermore, this extended metaphor makes punishment an economy that works with themes of equality, balance, harmony, and stability.⁴⁷

⁴⁵ F. Nietzsche, *The Genealogy of Morals* (New York: Double Day Anchor Books, 1956) Book 2, IX, 203-204.

⁴⁶ Throughout this analysis I draw upon the work of Robert Cover, which explores the relation between law and violence. For Cover the relationship between law and violence is a necessary relationship. As Cover explains, “Legal interpretation takes place in a field of pain and death” (Robert Cover, “Violence and the Word” (1986) 95 Yale L.J. 1601 at 1601). This observation points to the link between law as rule and reason and law as violence. Via interpretation, the text of law—the rule (language and reason)—is turned into an action, a practice. The “legal” context of interpretation gives that transformation a specific institutional context; it is violence realized through a specific institutional ensemble. The institutions of the administration of law connect the act of practical understanding to the physical acts of violence and coercion of others (who carry out the judicial decision), “in a predictable, though not logically necessary way” (*ibid.* at 1611). This violence takes many different forms including the execution of an individual, the termination of a person’s liberty and freedom, the removal or denial of property, and the cessation or prohibition of particular social relations. Criminal law and the institutions of its administration, policing in particular and criminal justice more generally, offer perhaps the clearest instance of the violence of law. Criminal justice is a manifestation of law, not so much as an absence of violence (in opposition to violence) but more as a particular *institutional practice of good violence*. In the guise of criminal law and criminal justice law is a violence associated with order, safety, and security rather than with disorder, danger, and insecurity. It is a good or legitimate violence over and against bad violence. The violence that flows from an application of the criminal law is perhaps most readily apparent in those jurisdictions that retain the death penalty. The violence of the law is, however, neither confined to that particular act of official violence, nor is it a quality of law limited to those particular legal systems. Law’s violence produces and enforces the everyday exclusions from belonging, from access to the entitlements of the state. For a more extended analysis of the alignment of lesbian and gay politics with the good violence of law, see Leslie Moran & Beverley Skeggs, *Sexuality and the Politics of Violence and Safety* (London: Routledge, 2003).

⁴⁷ See Solomon, *supra* note 43.

The logic of debt and credit has particular significance in the context of established arguments about enhanced punishment as the required response to “hate”. A more damaging form of violence demands a more severe punishment. The metaphor of credit/debt has a particular resonance with “retribution”.

But what of the fate of the utilitarian/consequentialist position in this context? It is important to note that it can *also* be associated with the credit/debt themes that inform demands for enhanced punishment. The exceptional danger demands extended incapacitation as a symbolic response to the specific nature of that danger. Rehabilitation, a rationale associated with the utilitarian approach, may also be used to support arguments for longer and more severe punishment.

While it is important to recognize the plurality of rationales for sentence enhancement and to note their differences, particular attention needs to be paid to their contemporary social and cultural resonances, as this will affect the manner of their incorporation into the wider context. When refracted through the dominant law and order politics, the various themes that rationalize sentence enhancement will be subject to reinterpretation, revalorization, and rearrangement. Nietzsche suggests that, in this process, some of the meaning and purposes will be re-imagined, obscured, or even lost. So what are the key characteristics of the wider social and cultural context? It is to these matters that I now turn.

II. The Emotional Landscape of Contemporary Law and Order Politics

Many scholars have commented upon the growing importance of the law and order and crime control agenda, connecting them to experiences of insecurity and disorder generated by wider economic, social, and cultural transformations taking place within Western liberal capitalist democracies informed by new shapes of state formation.⁴⁸ Crime and fear of crime has become a key sign of disorder and insecurity standing metonymically and metaphorically as a sign of these other experiences of economic, social, and cultural disruptions and transformations. Policing and criminal justice gain particular political importance as the solution to social problems when crime is the sign of those wider social ills. The turn to institutions of policing and criminal justice reflects the fact that in this epoch of modernity these are the social institutions that have been particularly associated with internal security and good order.⁴⁹ It is by way of crime and fear of crime that disorder and insecurity may

⁴⁸ Zygmunt Bauman, *Postmodernity and its Discontents* (New York: New York University Press, 1997); Zygmunt Bauman, “Violence in the Age of Uncertainty” in Adam Crawford, ed., *Crime and Insecurity: The Governance of Safety in Europe* (Cullompton: Willan Publishing, 2002) 52; Ian Taylor, *Crime in Context: A Critical Criminology of Market Societies* (Cambridge: Polity Press, 1999); Jock Young, *Exclusive Society: Social Exclusion, Crime and Difference in Late Modernity* (London: Sage Publications, 1994).

⁴⁹ See Mark Neocleous, *The Fabrication of Social Order: A Critical Theory of Police Power* (London: Pluto Press, 2000).

become embedded in everyday life, through what David Garland identifies as a “criminology of everyday life.”⁵⁰

Garland suggests that an important paradox has emerged within this contemporary landscape of law and order politics. On the one hand, there is the centrality of crime control that emphasizes the role of the “Sovereign State” as guarantor of safety and security. At the same time, there is an increasing identification of the limits of the state to provide this safety and security. This, he argues, has given rise to a renewed emphasis upon the punitive aspects of criminal law and criminal justice. In this rise of “punitive segregation”, the objective of the traditional state institutions of crime control are retribution, revenge, and segregation. Rehabilitation and the welfare of wrongdoers decline in significance.

Contemporary law and order politics connects individual and collective well-being with enhanced punishment, selective social exclusion, and confinement. “Punitive segregation” involves the promotion of more severe state violence, which takes various forms, including demands for earlier resort to imprisonment over other non-custodial sentences, longer terms of imprisonment, and more brutal regimes of punishment. “Punitive segregation” takes different forms in different location, as it is shaped by the history of nation-formation. In its most extreme forms it produces mass imprisonment⁵¹ and includes demands for the death penalty. Scholars in the US have described the move to punitive segregation as a turn toward punishment as an institutional form of vengeance⁵² and a practice more akin to institutionalized cruelty.⁵³ Fear, anger, hate, retribution, and revenge are central and connecting emotional themes associated with this development. It is in this context that the demands for hate crime reform in general, and sentence enhancement in particular, have been developed and have taken institutional form.

III. Emotional Attachments to Good Violence

In this section, I will explore in more detail the emotional attachments that may be forged in the context of punishments. First, I want to return to Murphy and Hampton’s comments about the emotions associated with criminal law:

⁵⁰ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001) at 16. See also David Garland, “The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society” (1996) 36 *British J. Criminology* 445.

⁵¹ See David Garland, ed., *Mass Imprisonment: Social Causes and Consequences* (London: Sage, 2001).

⁵² See A. Sarat, “Vengeance, Victims and the Identities of Law” (1997) 6 *Social & Leg. Stud.* 163.

⁵³ Jonathan Simon, “‘Entitlement to Cruelty’: Neo-Liberalism and the Punitive Mentality in the United States” in Kevin Stenson & Robert R. Sullivan, eds., *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (Cullompton: Willan Publishing, 2001) 125; Jonathan Simon, “Fear & Loathing in Late Modernity: Reflections on the Cultural Sources of Mass Imprisonment” (2001) 3:1 *Punishment & Society* 21.

criminal law institutionalizes certain *feelings of anger, resentment and even hatred* that are typically directed towards wrong doers, especially if we are the victims of those wrong doers.⁵⁴

In this quotation, Murphy and Hampton point to certain emotions: “anger”, “resentment”, “hate”. More specifically, they suggest that criminal law institutionalizes these emotions.

The reflection on punishment by Nietzsche, referred to earlier, also makes reference to some of these emotions, in particular hatred and rage, which connote anger, ill will, and malice. He also adds others to this list in examining the role of fear and terror in punishment. The expression of some other emotions associated with punishment are more difficult to articulate and isolate as they are embarrassing and pushed underground. To reveal these, he suggests, “Let us ask once more: in what sense could pain constitute repayment of a debt?”⁵⁵ In reply, he concludes that the satisfaction of an outstanding debt connects pain to the creditor’s “supreme pleasure”. He explains: “In exchange for damage he had incurred, including his displeasure, the creditor received an extraordinary amount of pleasure; something he prized the more highly the more it disaccorded with his social rank.”⁵⁶ The pleasure arising out of inflicting punishment is another of the emotions (but one that is rarely talked about).⁵⁷

Another emotion commonly associated with retribution is vengeance.⁵⁸ Solomon explains the resistance to recognizing vengeance as a feature of law by reference to the general hostility to “emotions” in relation to law. It is in this context that Solomon’s critical analysis of the fate of vengeance as an emotion has particular significance. Using Solomon’s work on vengeance, I want to examine the fate of emotional attachments made in and through the law.

IV. The Fate of Emotional Attachments in Law

As an “emotion”, Solomon notes, vengeance is understood in a particular way: as an untempered, immediate, impulsive (irrational), unruly, and uncontrolled response to wrongdoing. In addition, others draw attention to the way in which the characterization of vengeance as “emotion” tends to individualize, personalize, and pathologize vengeance.⁵⁹ In contrast to this, punishment as a law-bound practice, is celebrated as impersonal, tempered, calibrated, measured, and reasonable: an institution that is a rule-bound, a quintessentially reasoned response to wrong. In this view, vengeance (as an emotion) has no place in punishment through law. As an

⁵⁴ Murphy & Hampton, *supra* note 20 at 63 [emphasis added].

⁵⁵ Nietzsche, *supra* note 45 at 197.

⁵⁶ *Ibid.*

⁵⁷ See also Gilles Deleuze & Leopold von Sacher-Masoch, *Masochism: Coldness and Cruelty and Venus in Furs* (New York: Zone Books, 1991).

⁵⁸ See Solomon, *supra* note 43.

⁵⁹ See e.g. Trudy Govier, *Forgiveness and Revenge* (London: Routledge, 2002).

emotion, vengeance, as a legitimate form of punishment, is disavowed. Solomon challenges this by arguing that, “[v]engeance is both an intense emotion and a cool, calculating strategy.”⁶⁰

Shifting the focus of Solomon’s argument, we can add another dimension. Vengeance brings together the emotional dimensions of law and the reason of law’s violence. The importance of violence in the meaning of vengeance is illustrated in its definition as punishment that involves the infliction of injury, hurt, and harm. Vengeance is a characterization of punishment that highlights the violence of punishment and thereby the violence of law. It is in this context that the association between vengeance and emotion has particular significance. Emotion as a category of denigration, in its link with vengeance, works to disavow the place of vengeance/violence in punishment in particular and in law in general. Through emotion, the injury and harm that is vengeance is made “violence over” against punishment “made in” the image of the reason of law. Thereby the violence of the law is disavowed and displaced onto vengeance as a degraded category.⁶¹ Solomon’s analysis of vengeance as a cool and calculating strategy by which injury and harm may be inflicted offers not only to re-connect violence to law. More specifically, it makes that connection by making the violence of vengeance in the image of law: as an impassioned, rational, but also moral violence.

One context in which the rationality of vengeance is made is through the link between retribution and vengeance. Through this link the credit/debt metaphor of retribution is connected to the idea of vengeance. The “re” of revenge draws attention to the fact that vengeance is a response to, and the return of, a prior act: a repayment. This re-turn places vengeance in the frame of a potentially civilizing economy of violence: just deserts. The term “just deserts”, in turn, connotes equality, balance, harmony, and stability

This economy of return is presented as a problematic dimension of revenge. Revenge may give rise to another return, which may escalate into further acts of revenge. This is a problem particularly associated with revenge as a practice of individuals. This brings us to another dimension of the rationalization of vengeance in law.

In law, vengeance is a practice that takes place in the context of law’s monopoly of violence. In his analysis of law’s violence, Derrida notes that European law tends to prohibit individual violence. This is not, he suggests, because individual violence poses a threat to particular laws, but because it threatens the juridical order. Law, he concludes, has “an interest” in the monopoly of violence. This is not a monopoly at the service of any particular justice or legal ends but a monopoly that strives to protect

⁶⁰ Solomon, *supra* note 43 at 127.

⁶¹ See Austin Sarat & Thomas R. Kearns, “A Journey Through Forgetting: Towards a Jurisprudence of Violence” in Austin Sarat & Thomas R. Kearns, eds., *The Fate of Law* (Ann Arbor: University of Michigan Press, 1991) 209.

the law itself. It is an a priori of law.⁶² Law's monopoly of violence ensures that the relation of vengeance to revenge is not a relation that leads to a spiral of escalating violence. In fact, law's monopoly of vengeance ensures that this cycle is brought to an early end. René Girard's work on law's violence as a sacrificial economy offers one of the better known examples of the capacity of law's monopoly of vengeance to break the cycle of individual revenge.⁶³

At the same time, the institutionalization of vengeance in and through the law generates problematic effects. For example, Austin Sarat identifies the victim's perceived loss of agency in and through these state practices of vengeance.⁶⁴ Various initiatives, such as better police and prosecutorial relations with the victims, and the development of institutional settings within the criminal justice system for the victim to directly influence and inform the process, such as victim impact statements, are examples of attempts to address this state of affairs. Laster and O'Malley point to these as the contemporary sites in which the emotional investments associated with punitive segregation are being produced and institutionalized.⁶⁵ In this way, using violence as a resource to make a claim on the state becomes a way of gaining back the control that has been lost through violence itself.

It is in this context that the proximity of vengeance and retribution has particular significance. As an economy of credit to debt, vengeance is made in the image of a calculation: reason and resource. The emotional dimensions of vengeance are thereby civilized, legitimized, and made into a moral prerogative. Linking retribution to vengeance provides a means whereby the emotions and violence are reconnected to law. It is also a movement that makes law's violence into good violence and the irrationality of the emotions produced in the context of that violence into the reason of law.

It is at this point that we need to return to the other "emotions" of hate, anger, and malice. As emotions their place in law is frequently denied and disavowed. Solomon's analysis, and my take on the fate of vengeance as emotion and its rehabilitation, also has significance for these other "forbidden" emotions. The economy of retribution provides a means whereby their degraded status as emotions may be reinterpreted and overcome, rendered invisible. As dimensions of retribution, they become civilized by being made in the image of reason and rationality and are thereby made to disappear. Through this process they take their place as a part of law's legitimacy. The articulation of these emotions as a resource then becomes a matter of rational choice, a correct response to one's place (one's self) in front of law. In this section the fate of emotions in law has been explored at an abstract level. I now want to return to the

⁶² Jacques Derrida, "Force of Law, The Mystical Foundation of Authority" in Drucilla Cornell, Michel Rosenfeld & David Gray Carlson, *Deconstruction and the Possibility of Justice* (London: Routledge, 1992) 3.

⁶³ René Girard, *Violence and the Sacred* (Baltimore: Johns Hopkins University Press, 1989).

⁶⁴ Sarat & Kearns, *supra* note 61.

⁶⁵ Laster & O'Malley, *supra* note 18.

specific context of hate crime scholarship to explore the fate of the “forbidden” emotions in that context.

V. The Troubling Emotions of “Hate Crime”

As already noted, the appearance of “hate” in the name of the new legal category, “hate crime”, gives a certain prominence to emotions in law. Both ardent supporters of “hate crime” as a new category of wrongdoing, such as Frederick Lawrence, and enthusiastic critics, such as Jacobs and Potter, have found this use of “hate” problematic and questioned its use in this context. Both supporters and critics advocate the substitution of “bias” or “prejudice” for “hate”. We will examine how these substitutions are rationalized and what happens to the emotional resonance of “hate” in these substitutions.

Lawrence explains his preference for the term “bias” by suggesting that “hate crime” is a “popular term” that gives rise to a “key misconception”.⁶⁶ More specifically, “hate”, he argues, is too generous a term being a feature of many criminal acts beyond the specific acts that the phrase “hate crime” seeks to address, which are concerned with particular acts where the violence is motivated by legally proscribed categories of bias. “Bias crime”, he proposes is a more technical and, thereby, more precise phrase that can be used to successfully name a distinctive category of wrongdoing. Two aspects of this argument are of interest here. First, in the substitution of “bias” for “hate” the priority given to emotions in the phrase “hate crime” is displaced. “Bias” is defined not as an emotion per se but as a slanting, leaning, predisposition, or prejudice. The dictionary offers an extract from William Blackstone’s *Commentaries*, as an exemplar of its meaning, drawing attention to its juridical roots and significance. “The law will not suppose the possibility of bias or favour in a judge.”⁶⁷ “Slanting” or “leaning”, Blackstone suggests here, is contrary to judgment, which is the application of rule-based reason. In turn, “prejudice”, a term Lawrence readily substitutes for “bias”, also has strong juridical associations, being to injure through prejudgment, causing injury not only to the one prejudged but to judgment itself. Again prejudgment suggests judgment without the benefit of law. While the emotional connotations of “hate” have been diminished in this substitution, what remains is an alignment between its substitutes, “bias” and “prejudice”, and impulse, the unruly and the disorderly characteristics associated with the emotions. Also unchanged in this substitution is the allocation of bias and prejudice to the place associated with emotions; to the other side of law—wrongdoing and disorder.

That “hate” is a “popular” term (in the derogatory sense of “popular”) is not, in the first instance, explicitly about the location of emotions in relation to law. However, Lawrence’s deployment of the violent hierarchy of the “popular” (as the

⁶⁶ Lawrence, *supra* note 35.

⁶⁷ William Blackstone, *Commentaries on the Laws of England*, vol. 3, cited in *The Compact Oxford English Dictionary*, *supra* note 19.

negative) against the “technical” (as the positive), I would argue, is the assertion of a belief in, and a desire for, law as reason. For Lawrence, the popular connotes law as a phenomenon that is unstable and unruly (too widely drawn) in contrast to “the technical”, which connotes law as being capable of a fixed and stable meaning produced through precision, quintessentially capable of securing order. This alignment of hate (emotions) with unruly (popular) legal meanings works to reinforce the separation of emotions and good order. Together the substitution of “bias” or “prejudice” for “hate” and the characterization of law as a technical practice epitomizing the pure application of reason, both displaces the role of emotions in law *and* reinforces their separation from law.

Jacobs and Potter seem to echo concerns similar to those voiced by Lawrence—that “hate” lacks precision.⁶⁸ They do not, however, restrict their concerns to “hate”. “Bias or prejudice”, they complain, are also concepts that suffer from being “complicated, broad and cloudy ...”⁶⁹ They also differ from Lawrence in their characterization of the problems they associate with complexity, breadth, and opacity. For Jacobs and Potter, the turn to law and legality as a technical practice offers less potential for consolation.

In short, their concerns focus on the ambivalence of the terms bias and prejudice. Some prejudices, they explain, provoke censure, some are considered innocuous, and others are considered good. Some relate to hate and some to love.⁷⁰ Some are associated with fear and insecurity while others appear to generate self-esteem and security. Bias or prejudice are not only explained as terms that refer to “fantasy”, the “irrational”, and that which is “unconscious”, but *also* as terms that make reference to practices that have a certain legitimacy based upon experience, being part of consciousness. Also some prejudices may take the form of “established norms”, and may “amount to an ideology, a set of more or less elaborated assumptions, beliefs, and opinions that are espoused as a basis for policy or action.”⁷¹ Bias, prejudice, and hate may thus not be confined to the realms of disorder but may be aligned, embedded, legitimized, and elaborated as good order.

This conclusion would appear to echo Murphy and Hampton’s suggestion referred to above that (criminal) law provides a vehicle whereby “certain *feelings of anger, resentment and even hatred ...*” are institutionalized in the law.⁷² For Jacobs and Potter the matter then becomes one of politics or, more specifically, the problematic politics of identity. Whose anger, resentment, and hate gets into the law and with what effect? Their concern is that hate or bias crime is a new category that not only mobilizes new prejudice and the emotions associated with it but

⁶⁸ Jacobs & Potter, *supra* note 9 at 11-16.

⁶⁹ *Ibid.* at 11.

⁷⁰ See Gail Mason, “Not Our Kind of Hate Crime” (2001) 12 L. & Critique 253.

⁷¹ Jacobs & Potter, *supra* note 9 at 13.

⁷² *Supra* note 20 at 63 [emphasis added].

“exacerbate[s] rather than ameliorate[s] social schisms and conflicts.”⁷³ Their primary recommendation is to “repeal the new wave of hate crime laws and enforce generic criminal laws evenhandedly and without prejudice.”⁷⁴ In this understanding, the fate of the emotions is finally secured in the reduction of prejudice and bias to disorder. In part, this is surprising, having already identified the possibility of prejudice and bias being institutionalized in the name of good order. The emotional dimensions of the generic criminal law are erased and denied in the movement from hate crime to general criminal law. In this conclusion, Jacobs and Potter assign emotions to a now familiar place; one that is remote from the law.

A third and final example taken from contemporary hate crime scholarship offers something of a different point of departure. Nancy Rosenblum, in an essay that introduces a collection entitled *Breaking the Cycles of Hatred*,⁷⁵ explains:

Every injustice arouses anger, or should. A capacity to understand and feel injustice is the mark of moral maturity; a taste for oppression is the mark of moral deformation. ... of the many faces of injustice, violent hatred stands out. These crimes betray exceptional viciousness and inflict exceptional pain. They evoke especially strong feelings because they exhibit none of the randomness or misfortune of many forms of injury. ... [T]he injuries suffered ... provoke enduring bitterness. The response of victims ... is a particularly deep resentment—a moral anger.⁷⁶

In this view, justice is aligned with a series of emotions—anger, bitterness, and resentment. More specifically, these emotions play a positive role, being associated with maturity, and having a legitimate role in unearthing injustice. Maturity in this context connects the emotions with due deliberation and the lack of impulse. In turn, the emotions are connected to the severity of the punishment offering a rationale for enhanced punishment. The fate of these emotions ultimately takes a different turn:

Victims want more than to hold the perpetrators responsible; they want to cause them and their supporters suffering in turn. An unruly longing for revenge is validated by the vindictiveness of the crime. Certain crimes usher in that destructive dynamic: a cycle of hatred.⁷⁷

The phrase “[v]ictims want more” suggests that these emotions have another quality, a dangerous surplus. Here the emotions clearly take on a more familiar mantle; they become “unruly”, “destructive”, and disorderly. The phrase “cycle of hatred” connotes disorder in perpetuity. Much of the rest of the collection, *Breaking the Cycles of Hatred: Memory, Law and Repair*, is devoted to mapping instances, contexts, and mechanisms that promote and sustain cycles of hatred. No single

⁷³ *Ibid.* at 144.

⁷⁴ *Ibid.* at 145.

⁷⁵ Nancy L. Rosenblum, “Introduction: Memory Law and Repair” in Martha Minow, ed., *Breaking the Cycles of Hatred: Memory, Law and Repair* (Princeton: Princeton University Press, 2002) 1.

⁷⁶ *Ibid.* at 1.

⁷⁷ *Ibid.*

solution is offered, but the ambivalence of each is brought to light. Legal practices and the criminal trial provide a vehicle for memorializing violence, which is “essential to personal integrity”, repairing, and comforting, but also a thing that “fuels cycles of hatred.”⁷⁸ The already noted techniques of sacrificial victim and the role of the monopoly of violence, both of which offer mechanisms that might work to sustain the alignment of emotions with justice, are condemned on the basis that they “fuel dreams of revenge”. What is the fate of the emotions in Rosenblum’s argument? Perhaps, at worst, they take up a familiar position as being antithetical to order.

The fate of the emotions in both Lawrence and Jacobs and Potter is disappearance and denial. Lawrence’s suggestion that “bias” and “prejudice” offer more technical and thereby more precise terms, can be read as an attempt to reconfigure emotions according to a refined characterization of the law; as a technical practice. Here emotions are apparently made impersonal, tempered, calibrated, measured, and reasonable. Jacobs and Potter’s conclusion that the ordinary crime should prevail appears to forget the emotional investments already being made in that context. If Rosenblum differs from other hate crime scholars it is in drawing attention to the ambivalence of the emotional investments, being both a part of good order and antithetical to it. Rosenblum’s suggestion that an important task is to de-mythologize law is, at best, a call to take the emotional dimension of law more seriously, not to let it slip back into the reduction of emotions to disorder that her analysis ultimately threatens.

VI. Punitive Segregation and Lesbian and Gay Politics of Hate Crime: A Note of Caution

Hate crime would appear to offer considerable potential to generate and deploy a wide range of emotions in and through the law; hate, anger, fear, and pleasure to name but a few. It also appears as a discourse informed by dominant ideological assumptions about law and the emotions that displace and deny the significance of emotions in law. Lesbian and gay engagement with the discourse of hate crime offers much potential for the generation and investment of troubling emotions in that particular context and for their systematic erasure.

There is, however, a need for caution here. Writing in the early 1990’s, in a Canadian context and advocating the application of “hate crime” to homophobic violence, Cynthia Petersen noted the connection between “hate crimes” and “retributive justice”. It was, she argued, a connection that raised doubts about the politics of the lesbian and gay turn to “hate crime” as a response to the “epidemic” of homophobic violence. She argues, however, that the legitimacy of retribution need not be of concern for lesbians and gay men. As Petersen noted, deterrence offers a different credible rationale for enhanced punishment whose legitimacy at the time of her writing appears to have been less tainted than it perhaps is today. She concluded

⁷⁸ *Ibid.* at 4.

that enhanced punishments might be rationalized by reference to deterrence: “Deterrence must ultimately be our goal if we are to survive the epidemic.”⁷⁹ In the UK, activist Peter Tatchell’s advocacy of the expansion of sentence enhancement to all “vulnerable communities”, including lesbian and gay communities, resists any overt reference to revenge as a rationale for those changes. He highlights the importance of the educational role of law, which again is more associated with a deterrent model of punishment than that of punitive segregation. Both Paterson and Tatchell seek to directly and indirectly distance any resort to a tendency towards retribution in their sexual politics.

Other features of lesbian and gay engagements with the politics of hate crime also problematize the reduction of that political agenda to a conservative politics of law and order associated with revenge and retribution and the emotions of fear, hate, and anger commonly found in that context. Within a lesbian and gay context, many of the problematic emotional dimensions of punishment outlined above will not come as a surprise. The recent histories and, in many contexts, the contemporary experience of lesbians and gay men, involves being the object of these emotional investments made in and through law’s violence. Same-sex practices have long suffered the ignominy of being outlawed, characterized as monstrosity⁸⁰ and impurity,⁸¹ and treated as an immediate and potentially devastating threat to the individual, the immediate community, and the very state itself. Thus characterized, lesbians and gay men have been subjected to the full range of the emotional investments made in and through law’s violence. The expectation is that lesbian and gay attempts to name homophobic violence as bad violence (a violence associated with disorder rather than good order) offers to expose and challenge the awful past and present of the emotional attachments made within a politics of heterosexuality. Lesbian and gay demands for state violence for purposes of safety and security do not so much promote the status quo as offer a significant challenge to one of its key dimensions, hetero-normativity. At the same time, however, these demands for inclusion, produced within the parameters of “hate crime”, offer to reinforce a different status quo: the priority of a law and order politics that places violent crime as *the* problem of social disorder and a more brutal regime of criminal justice as *the* solution. The connection between retribution and criminal law that is being made in the context of a sexual politics of hate crime provides a means whereby problematic emotions might inform and infuse the law albeit in a different context for a different politics. While there may be no necessary connection between lesbian and gay demands for the particular state

⁷⁹ Petersen, *supra* note 3 at 248.

⁸⁰ See Edward J. Ingebretsen, *At Stake: Monsters and the Rhetoric of Fear in Public Culture* (Chicago: University of Chicago Press, 2003).

⁸¹ For an overview of the literature, see Leslie J. Moran, “Lesbian and Gay Bodies of Law” in Diane Richardson & Steven Seidman, eds., *Handbook of Lesbian and Gay Studies* (London: Sage, 2002) 291. See also Eve Kosovsky Sedgwick, *Epistemology of the Closet* (Hemel Hempstead: Harvester Wheatsheaf, 1991); Mason, *Spectacle of Violence*, *supra* note 4.

violence associated with punitive segregation, there may now be an asymmetrical historical alignment.

Petersen's suggestion that the legitimacy of retribution need not be questioned in that context is, I would suggest, no longer viable. In the wider contemporary context of law and order politics in which retribution (punitive segregation) has become the dominant position, it will be insufficient to highlight a lesbian and gay preference for deterrence. The separation between retribution and deterrence is also no longer a viable assumption. Their interconnection also needs to be considered. As noted earlier, particular attention needs to be paid to their contemporary social and cultural resonances, as this will effect the manner of their wider signification. Nor can it be assumed that retribution is not a distinct (albeit hidden) part of the sexual politics of hate crime.

It is not my intention to suggest that lesbian and gay resort to hate crime and, thereby, demands for access to state violence for safety and security is necessarily reducible to the conservative law and order politics of "punitive segregation" outlined above. Nor is it my intention to suggest that the emotional investments being made in and through this politics of law reform are confined to those of hatred, anger, cruelty, or revenge. Such a point of departure would be too crude and simplistic. However, when refracted through the dominant law and order politics of punitive segregation, the various themes that rationalize sentence enhancement by reference to deterrence or education will be subject to reinterpretation and rearrangement. At best, lesbian and gay alignments with deterrence may well be obscured, re-imagined, or even lost. Thus, while for Petersen the utilitarian/consequentialist rationale for punishment has the potential to legitimate and promote demands for rehabilitation, as much as promote longer and more severe incarceration, it is the latter aspects that will be taken to be the key rationale. It is in this context that the logic of lesbian and gay demands for state violence will have particular significance and influence as they resonate with the logic of enhanced punishment feeding the turn to punitive segregation.

Conclusion

The objective of this paper has been to add a new dimension to the analysis of lesbian and gay law and order politics of violence and safety. I have argued that the political demands being generated through this sexual politics feed a law and order politics of retribution and revenge. It is in this conjunction that a politics of sexual identity informed by a desire for recognition seems to be giving form to a "politics of recrimination and rancour", which, following Wendy Brown's critique, seems to "disdain freedom rather than practice it."⁸² My particular concern has been to explore

⁸² Brown, "Wounded Attachments", *supra* note 22 at 202.

some of the emotional attachments to unfreedom that “can be discerned in contemporary political formations ostensibly concerned with emancipation.”⁸³

It is in the guise of reason and civility that the lesbian and gay emotional attachments of hate, anger, malice, and revenge take shape through demands for access to state violence. At the same time, it is also in this form that these emotional attachments disappear, being disavowed in the name of law as reason and moral right. This disavowal offers to dignify the hate and malice that is connected to this sexual politics by naming it reason and justice. I would suggest that it is through these connections that attempts to turn the state against itself is always/already informed by the virtues and values that lesbians and gay men are seeking to challenge.

In drawing attention to the emotional investments that are being made in and through a lesbian and gay politics of law and order it is not my intention to follow in the footsteps of Jacobs and Potter to dismiss the turn to “hate” or “bias” crimes on the basis that they will be ineffective or destructive of social cohesion. Nor is it my intention to suggest that hate crime activism should be abandoned merely because it necessarily appears to generate a cycle of revenge. Maybe if heterosexual violence is to be taken seriously, as disorderly behaviour, and its everyday operation is to come to an end, then retribution and revenge in conjunction with law’s monopoly of violence have a part to play. Furthermore, it may be necessary to invoke retribution and revenge in the context of the most intimate and banal acts (the minor incivilities) through which that heterosexual order comes into being. The experiences of lesbians and gay men offer countless examples of their vigorous use in relation to the smallest and the most intimate details of same-sex relations in the production of (heterosexual) order. Social order appears to be generated by way of an obsessive concern with “minor” incivilities. It is problematic merely to criticize a well-established and legitimated use of law’s violence merely because it is being used to give birth to a new social order. This paper is a call to bring these investments into view so that the terms of a lesbian and gay commitment to hate, malice, and vengeance can be discussed and, if necessary, affirmed. It is also a call for the consideration of alternatives.

My objective is to provoke further debate on these issues. In disturbing the relationship between sexuality, state, and violence being forged in the context of a lesbian and gay politics of violence and safety, I seek to draw attention to the complex and contradictory nature of that relationship. My hope is that this paper may help contribute to a debate that will query the alliance that lesbians and gay men are making with law and order.

⁸³ Brown, *States of Injury*, *supra* note 22 at xii.