

Essay

On Hate and Equality

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Bias crime legislation—or, as it is sometimes called, hate crime legislation—enhances the punishment of crimes that are carried out because of the victim's race, gender, religion, or sexual orientation. Since its inception, bias crime legislation has sparked substantial political controversy and scholarly discussion. This debate was recently rekindled by the horrendous murder of Matthew Shepard, which shocked our society and prompted President Clinton to speak to the issue in this year's State of the Union Address.¹ The academic community, however, remains deeply divided over the need for and desirability of such legislation.²

The disagreement about bias crime is due in large part to the fact that existing justifications for bias crime legislation proceed from the premise that the rationale supporting bias crime legislation must be found either in

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1. "Discrimination or violence because of race or religion, ancestry or gender, disability or sexual orientation, is wrong, and it ought to be illegal. Therefore, I ask Congress to make the 'Employment Non-Discrimination Act' and the 'Hate Crimes Prevention Act' the law of the land." Address Before a Joint Session of the Congress on the State of the Union, 35 WEEKLY COMP. PRES. DOC. 78, 87 (Jan. 19, 1999).

2. Compare Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 358-79 (1991) (arguing that penalty-enhancement statutes violate the First Amendment), with Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 35 ("[T]he motive underlying—as opposed to the message expressed by—either public or private conduct quite often is a legitimate factor to consider in deciding how our polity should treat that conduct.").

the greater gravity of the wrongdoing involved in such crimes or in the perpetrator's greater degree of culpability.³ Advocates of bias crime legislation strive to demonstrate that bias crimes are more wrongful than identical crimes not motivated by bias,⁴ or that bias crimes implicate a greater degree of culpability on the part of the perpetrator of the crime.⁵ Equally committed to this premise, opponents of bias crime legislation purport to show that bias crimes are not more wrongful than identical crimes not motivated by hate and that they do not involve greater culpability on the part of the perpetrator.⁶ Thus, the discussion of the desirability and necessity of bias crime legislation has focused almost exclusively on the wrongfulness of the act and on the moral blameworthiness of the perpetrator of the crime, assuming that these constitute the only grounds upon which penalty enhancement for bias crimes can be justified.

This premise is grounded in a more comprehensive theory that dominates the non-utilitarian discourse of criminal law—that the only two grounds that may justify disparate treatment of offenses in the context of criminal law are the wrongfulness of the act or the culpability of the perpetrator.⁷ Despite its semblance of fairness, this wrongfulness-culpability paradigm is heavily biased in favor of criminal offenders. Because the criminal offender controls, to a large extent, both her conduct and her mental state, the wrongfulness-culpability paradigm confers upon the criminal offender the power to dictate the content of criminal prohibitions and the sanctions imposed for violating them. The wrongfulness-culpability paradigm assigns no independent importance to the crime victim. Under this paradigm, the harm to the victim is merely one factor out of many that may affect the wrongfulness of the act.

3. See, e.g., FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 161-75 (1999) (arguing that bias crimes ought to be punished more severely than parallel crimes because of the greater harm caused and the greater culpability of the criminal); Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015, 1019 (1997) (“[T]he penalties imposed by a criminal justice system, at a minimum, must be deserved by those they are inflicted on and . . . desert, in turn, is a function of (1) the gravity of the wrongdoing involved and (2) the wrongdoer's degree of culpability for that wrongdoing.”).

4. See LAWRENCE, *supra* note 3, at 61 (arguing that bias crimes are more wrongful than otherwise motivated crimes because of their impact on the individual victim, her community, and society at large).

5. See *id.* at 58-61 (discussing the centrality of the concept of culpability to criminal law and arguing that perpetrators of bias crimes have greater culpability than those of parallel crimes).

6. See Dillof, *supra* note 3, at 1036-80 (rebutting the claims that hate crimes are more wrongful and that the perpetrators of hate crimes are more culpable).

7. See, e.g., R.A. DUFF, *INTENTION, AGENCY AND CRIMINAL LIABILITY* 103 (1990); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* §§ 6.6 to 6.6.1, at 454-59 (1978); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363-97 (1981); Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 237-38 (1994).

This Essay challenges this paradigm and proposes an alternative theory in support of bias crime legislation. The primary flaw of the wrongfulness-culpability paradigm is the exclusive role it assigns to factors that are intrinsic to the criminal encounter in determining the content of the prohibitions of criminal law and the severity of its sanctions. It neglects, therefore, broad societal concerns that are extrinsic to the criminal encounter, such as the relative vulnerability of potential crime victims and their likelihood of being attacked. Furthermore, it completely ignores society's duty to provide equal protection from crime to different potential victims. This limited prism allows the wrongfulness-culpability paradigm to take into account the actual harm inflicted on crime victims, but it precludes it from considering the relative vulnerability to crime of various victims in determining criminal punishment. Hence, the wrongfulness-culpability paradigm provides no basis for fair distribution of protection against crime to various potential victims.

The inability of the wrongfulness-culpability paradigm to give sufficient weight to the interests of victims calls into question its dominance in criminal law theory. By challenging the exclusivity of the wrongfulness-culpability paradigm, this Essay challenges some of the conventional normative foundations that underlie discourse about criminal law. Specifically, this Essay argues that acknowledging the role of the victim is essential in understanding bias crime legislation and its normative roots. To accommodate broader societal concerns, the Essay develops an alternative to the wrongfulness-culpability paradigm, which we call the "fair protection paradigm." The fair protection paradigm is predicated on the proposition that the criminal law is a principal means by which society provides protection against crime to potential victims. On this view, protection against crime is a good produced by the criminal justice system, which, like many other state-produced goods, should be distributed in an egalitarian manner.⁸ Accordingly, the fair protection paradigm requires the state to take into account disparities among individuals in vulnerability to crime when determining their entitlement to protection. Thus, under the fair protection paradigm, victims who are particularly vulnerable to crime may have a legitimate claim on fairness grounds to greater protection against crime. Bias crime legislation, on this view, is aimed at protecting individuals who are particularly vulnerable to crime because of prevailing prejudices against them.

An individual's vulnerability to crime can be defined as the expected harm from crime for that individual—that is, the probability of harm multiplied by its magnitude. Individuals may be particularly vulnerable to

8. See Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1200-08 (1994).

crime for two different reasons: a greater sensitivity to harm and a greater likelihood of becoming a victim. Individuals who fall into the former category may be labeled “extra-sensitive victims,” and individuals who belong to the latter may be called “high-risk victims.”

A state may address the problem of vulnerable victims in one of two ways. First, it may impose harsher sanctions on those who commit crimes against vulnerable victims. Second, it may devote more resources to identifying and prosecuting individuals who attack such victims. While both strategies are likely to discourage attacks on vulnerable victims and thereby to provide them with greater protection, the latter strategy may sometimes be infeasible or too costly. Therefore, equalizing protection through the imposition of harsher sanctions may sometimes be the only way by which the state can provide vulnerable victims with more protection and consequently equalize their vulnerability to that of other potential victims.

Yet the principle of equalizing protection against crime should be constrained in certain ways. The fair distribution of protection does not require absolute equality of the expected costs of crime. Under a radical interpretation, equal protection against crime might be understood to require the state to equalize the expected costs of crime for all potential victims. This view of equality would imply a duty on the part of the state to address any vulnerability to crime, regardless of its source or reason, and to place all of its citizens on equal footing in terms of their exposure to crime. But such a radically egalitarian view cannot provide a solid basis for understanding the nature of criminal law; nor can it be morally justified. Vulnerability to crime is a function of myriad factors such as wealth, age, attitude toward risk, life experience, and physical and intellectual prowess. Not all of these factors should be taken into account by the state. Some disparities in the vulnerability to crime depend on the investment in precautions by the victim herself. Other disparities may be grounded in luck and other factors that do not mandate interference by the state. The state cannot be reasonably expected to annul all of the disparities in the vulnerability of different potential victims of crime.

The implausibility of the radical egalitarian view should not, however, prod one to endorse the radically inegalitarian view, namely, the view that the state should be blind to differences in vulnerability among victims. In fact, the state’s failure to redress some of the differences in the expected costs of crime among different potential victims is intolerable and unjust. This Essay argues, therefore, for an intermediate position, one which requires the state to annul certain disparities in the vulnerability of different victims while allowing other disparities to remain. More specifically, we take the position that, at a minimum, a liberal state must redress disparities in vulnerability to crime that result from certain immutable personal characteristics of the victim.

The duty of the state to annul differences in vulnerability among different potential victims does not depend on the magnitude of the disparity in the vulnerability of different victims, but rather on the reasons underlying the greater vulnerability of some victims. Thus, even slight differences in vulnerability attributable to racial factors may justify punishment-enhancing legislation, while greater differences attributable, for instance, to the victim's choices require no action on the part of the state.

To be sure, opponents of bias crime legislation may criticize our analysis on the ground that distributive justice theories, like the one we proffer, are alien to criminal law. But such criticism would be misguided. In fact, the "fair protection paradigm" provides a theoretical basis for many of the doctrines of criminal law, and its explanatory power ranges beyond the context of bias crimes. The fair protection paradigm can explain, for instance, why crimes directed against extra-sensitive victims are often punished more severely than crimes directed against less vulnerable ones.

Properly understood, therefore, bias crime legislation is part of a larger scheme of providing fair protection against crime. Recognizing the interest of victims makes it clear that bias crime legislation is consonant with the goals of criminal law. Bias crime legislation is merely one essential step toward a more egalitarian provision of protection against crime—a step that coheres with the broader goals of the criminal law system.

This Essay consists of three Parts. Part I explores traditional justifications for bias crime legislation—in particular, those that rest on the wrongfulness-culpability paradigm. It demonstrates that the wrongfulness-culpability paradigm fails to provide an adequate justification for bias-crime legislation. Part II develops the fair protection paradigm. It illustrates that the principle of fair protection is not merely normatively compelling, but also provides a powerful justification for otherwise inexplicable sentencing practices. Part III applies the fair protection paradigm to bias-crime legislation and demonstrates that the fair protection paradigm can explain the contemporary logic underlying bias crime legislation.

I. TRADITIONAL JUSTIFICATIONS FOR BIAS CRIME LEGISLATION: THE WRONGFULNESS-CULPABILITY FRAMEWORK

As a rule, criminal law disregards motives. Criminal law regulates conduct by punishing socially undesirable behavior. The severity of the punishment is calibrated to the undesirability of the behavior; motives are largely irrelevant.⁹ Bias crime laws constitute an important exception to the

9. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 3.6, at 227 (2d ed. 1986) ("[M]otive, if narrowly defined to exclude recognized defenses and the 'specific intent' requirements of some crimes, is not relevant on the substantive side of the criminal law."); Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past*

general rule. The motive of the perpetrator is the focal point of bias crime laws. Unlike other criminal legislation, bias crimes enhance the punishment of ordinary crimes that have been motivated by a racial, ethnic, sexual, or religious prejudice. The departure of bias crime laws from the general scheme of criminal law calls for justification. After all, it is not self-evident that an assault motivated by prejudice is worse than an assault otherwise motivated. Yet, the former, being a bias crime, may be punished two or three times more severely.¹⁰

Various rationales have been proffered to justify bias crime laws. The most frequently invoked rationales for bias crime laws focus either on the culpability of bias crime offenders or on the wrongfulness of the act as reflected in its impact on the victim and third parties.¹¹ While these rationales are not based on a single theory or principle, they share the premise that the distinctiveness of bias crimes inheres in the very nature of the acts—be it their moral culpability or their impact.

This Part presents the arguments in favor of bias crime legislation in greater detail, examines them critically, and explains why they fail to provide an adequate theoretical foundation for bias crime legislation. Section A explores the claim that perpetrators of bias crimes are more culpable than perpetrators of similar crimes who are not motivated by hatred. Section B evaluates the claim that bias crimes are more wrongful than other crimes, either because they impose greater harms on their victims or because of the special harms that they impose on third parties. Section C critically examines the wrongfulness-culpability paradigm's traditional justification for bias crime legislation.

A. *The Greater Culpability Justification*

Culpability has always been a key element in our system of criminal law. In determining punishment, criminal law often does not confine itself to conduct; it considers moral blameworthiness as well.¹² Identical unlawful

and Present, 1993 UTAH L. REV. 635 (contending that motives do not and should not play a role at the level of offense definition in criminal law and that they are only relevant for asserting defenses).

10. See JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES 147 (1998). *But see* D.C. CODE ANN. § 22-4003 (1981 & Supp. 1999) (authorizing the court to sentence a bias crime offender to no more than one and one-half times the maximum imprisonment and fine allowed by the underlying offense).

11. See Dillof, *supra* note 3, at 1019.

12. American criminal law is based on the principle of blameworthiness or culpability. Section 2.02 of the Model Penal Code provides general rules of criminal liability by creating four mental states that represent four degrees of culpability: purpose, knowledge, recklessness, and negligence. See MODEL PENAL CODE § 2.02(2)(a)-(d) (Proposed Official Draft 1962). Its drafter explained that “only four concepts are needed to prescribe the minimal requirements and lay the basis for distinctions that may usefully be drawn.” Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1436 (1968). This

acts may carry radically divergent punishments due to the culpability of their perpetrators. For example, the punishments of homicide offenders vary dramatically depending upon whether they acted negligently, recklessly, knowingly, or intentionally. Consequently, proponents of bias crime laws argue that offenders who act out of hate or prejudice are more blameworthy than otherwise motivated offenders and therefore deserve more severe punishment.¹³ On this view, crimes motivated by prejudice are, by their very nature, morally worse than similar crimes not motivated by prejudice, and the punishment for such crimes must reflect their heinous nature.

The weakness of this justification is that it depends on the premise that prejudice is more morally reprehensible than all other criminal motives. But this premise does not withstand scrutiny. Unlike *mens rea*, motives cannot be readily ranked by their degree of culpability. While no one disputes that a defendant who intentionally killed a person is more blameworthy than a defendant who negligently brought about the same result, and should therefore be punished more severely, many would question the proposition that an offender motivated by prejudice is more culpable than one motivated by greed, spite, or pure sadism.¹⁴ Indeed, it is not at all clear that a racially motivated assault is more morally reprehensible than an assault on an elderly person in order to steal her subsistence allowance. The reason why people have differing views regarding the culpability of various criminal motives is that, at some level, motives appear to be incommensurable. As Jeffrie Murphy suggests, “[P]erhaps almost all assaults, whether racially motivated or not, involve motives of humiliation and are thus evil to the same degree.”¹⁵ At the end of the day, the project of correlating motives to moral culpability seems hopelessly unfruitful, and, consequently, so is the attempt to justify bias crime legislation on the ground that bias-motivated offenses are morally worse than all other offenses.¹⁶

articulation of the *mens rea* requirement is its most important achievement. See Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 815-21 (1980) (describing the distinctions among the Code's culpability terms and their importance). Moreover, section 2.02 may be considered representative of the modern American culpability scheme, as it exerted a major influence on criminal law reform in 36 of the 38 jurisdictions where reform has occurred since its formulation. See Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 691-92 (1983).

13. See, e.g., Lawrence Crocker, *Hate Crime Statutes: Just? Constitutional? Wise?*, 1992-1993 ANN. SURV. AM. L. 485, 491-94.

14. See, e.g., JACOBS & POTTER, *supra* note 10, at 80.

15. Jeffrie G. Murphy, *Bias Crimes: What Do Haters Deserve?*, 11 CRIM. JUST. ETHICS 23 (1992).

16. For more general arguments against culpability theory, see Dillof, *supra* note 3, at 1063-80.

B. *The Greater Wrong Justification*

1. *Greater Wrong to the Victim*

One of the more influential arguments for bias crime legislation is that bias crimes are more harmful to the victim. Citing this principle, proponents of bias crime laws have asserted that bias crimes consistently inflict a more severe harm on the victim and thus are more wrongful than otherwise similar crimes.¹⁷ There are three types of arguments that fall into this category: the greater physical harm, the greater mental harm, and the discriminatory treatment.

It is often argued that bias crimes tend to be excessively brutal.¹⁸ Despite its popularity, the “excessive brutality” justification suffers from two major flaws that cast serious doubt on its validity. First, it lacks empirical support. The only empirical finding Jack Levin and Jack McDevitt use to support their claim that bias crimes are excessively brutal is that, relative to other crimes, they are more likely to result in some physical injury to the victim.¹⁹ This, however, does not suggest that bias crimes are inherently more brutal than other comparable crimes. All it proves is that, relative to other crimes, a disproportionately large number of bias crimes consist of assaults. It provides no basis for inferring that the brutality of bias-motivated assaults exceeds that of assaults not motivated by hatred.

Second, the “excessive brutality” justification does not explain the need to enhance the sanction for bias crimes as opposed to the need to enhance the sanction for brutal crimes. Even if bias crimes are indeed more brutal, standard criminal law can take that into account by punishing brutal offenders more severely, irrespective of their motives. The availability of a wide range of punishments for each category of offenses gives judges the power to mete out greater punishments to brutal crime offenders. Brutality is a factor easily established evidentially, certainly more easily than motive. Thus, the alleged tendency of bias crimes to be excessively brutal does not provide an adequate justification for the enactment of bias crime laws.

17. See, e.g., LAWRENCE, *supra* note 3, at 39 (“[Bias] crimes are far more likely to be violent than are other crimes.”).

18. For a study supporting this view, see JACK LEVIN & JACK MCDEVITT, *HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED* 11 (1993). This conviction is disputed in a recent book on hate crimes. See JACOBS & POTTER, *supra* note 10, at 81-82 (citing LEVIN & MCDEVITT, *supra*, at 11); see also Joan C. Weiss, *Ethnoviolence: Impact Upon and Response of Victims and the Community*, in *BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES* 176 (Robert J. Kelly ed., 1993) (discussing the impact of bias crimes).

19. See LEVIN & MCDEVITT, *supra* note 18, at 11. This finding is based on a study of the records of the Boston police from the years 1983 to 1987.

A somewhat related justification that focuses on the impact of bias crimes on victims emphasizes the psychological injury suffered by bias crime victims. This rationale originated in the celebrated case of *Wisconsin v. Mitchell*,²⁰ in which the Supreme Court stated that bias crimes are “more likely to . . . inflict distinct emotional harms on their victims.”²¹ Although the Supreme Court cited no evidence, this statement won immediate favor with various scholars in the field, who scurried to provide the missing empirical data. Elaborating on the Supreme Court’s statement, Steven Bennett Weisburd and Brian Levin wrote that “[b]ecause the violence [involved in bias crimes] is so brutal, the degradation so complete and the vulnerability so omnipresent, bias crime victims exhibit greater psychological trauma than non-bias victims.”²² Weisburd and Levin developed their theory based on two studies of bias crime victims conducted by the National Institute Against Prejudice and Violence (NIAPV) in 1986 and 1989. These studies reported the harsh psychological and emotional effects bias crime had on victims, but failed to compare them to those experienced by victims of other crimes. This comparison was not made until 1994 when Arnold Barnes and Paul Ephross conducted a comparative study that surveyed the psychological and emotional injuries of all crime victims. They found that the psychological and emotional injuries suffered by bias crime victims were virtually identical to those suffered by other victims, with one minor difference: Bias crime victims did not suffer from low self-esteem.²³

Finally, some scholars maintain that the primary harm of bias crimes inheres in the discriminatory treatment of the victim. On this view, the victim of bias crime is harmed beyond the general right not to be physically injured because she is treated discriminatorily. That is, she is not merely subjected to violence, but subjected to violence *because of her race, sexual orientation, or other characteristic*.²⁴

Yet, as Anthony Dillof shows, this discriminatory treatment does not exacerbate the wrong committed by the perpetrator of the crime. Under Dillof’s view, in order to establish a protectable interest, a person must show that a matter she is concerned with is properly *her concern* rather than

20. 508 U.S. 476 (1993).

21. *Id.* at 488.

22. Steven Bennett Weisburd & Brian Levin, “On the Basis of Sex”: Recognizing Gender-Based Bias Crimes, 5 STAN. L. & POL’Y REV. 21, 25 (1994).

23. See Arnold Barnes & Paul H. Ephross, *The Impact of Hate Violence on Victims: Emotional and Behavioral Responses to Attacks*, 39 SOC. WORK 247, 250 (1994). Jacobs and Potter note, however, that certain “low-level” expressive offenses, such as the drawing of offensive graffiti and vandalism, may be carried out only against certain religious, ethnic, and otherwise marginalized groups, and thus in this context “greater harm arguments” may have some merit. JACOBS & POTTER, *supra* note 10, at 84-85.

24. For a good discussion and rebuttal of this type of argument, see Dillof, *supra* note 3, at 1036-49.

someone else's. Recognizing the discriminatory treatment as an additional wrong disassociated from the wrong of the violent crime itself is an acknowledgment that the victim has a protectable interest in the perpetrator's thoughts.²⁵ While members of minorities are often justifiably concerned about other people's thoughts, their concerns do not amount to protectable interests and should not be regarded as such.²⁶

2. *The Impact of Bias Crime on Third Parties*

Another justification for bias crime legislation focuses on the external effects of these crimes on third parties, both within and outside the victim's community. According to this justification, bias crimes have a unique impact on the broader community, an impact which warrants the harsher punishments meted out to bias crime offenders. Kent Greenawalt, for example, points out that bias crimes "can frighten and humiliate other members of the community" and "reinforce social divisions and hatred."²⁷ Echoing this view, James Weinstein remarks that hate-driven violence "can inflict damage above and beyond the physical injury caused by a garden-variety assault, both to the immediate victim and to other members of the group to which the victim belongs."²⁸

While bias crime invariably affects individuals removed from the immediate victim, it is not unique in this sense. As Jacobs and Potter observe, "Many crimes, whatever their motivation, have repercussions beyond the immediate victim and his or her family and friends."²⁹ Jacobs and Potter list child abduction and murder as typical examples of crimes that strike fear in the hearts and minds of entire communities and often have a nationwide impact.³⁰ In fact, the list could be extended to include all violent crime. Public opinion polls reveal that Americans perceive crime as one of the nation's top problems.³¹ Others have proposed that the two most important factors that determine the impact of criminal activity may be visibility and proximity.³² For example, the highly visible near-murder of a Central Park jogger in 1996 inspired terror in a very large number of New

25. *See id.* at 1039-40.

26. *See id.* at 1043-45.

27. Kent Greenawalt, *Reflections on Justifications for Defining Crimes by the Category of Victim*, 1992-1993 ANN. SURV. AM. L. 617, 627.

28. James Weinstein, *First Amendment Challenges to Hate Crime Legislation: Where's the Speech?*, 11 CRIM. JUST. ETHICS 6, 10 (1992).

29. JACOBS & POTTER, *supra* note 10, at 87.

30. *See id.*

31. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1994, at 140 tbl.2.1 (Kathleen Maguire & Ann L. Pastore eds., 1995).

32. *See, e.g.*, Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER CERTAINTY: HEURISTICS AND BIASES 463 (Daniel Kahneman et al. eds., 1982).

Yorkers and drove many of them away from the park.³³ Likewise, random street violence and gang-related crimes have a profoundly negative effect on inner-city dwellers, who are frequently exposed to these forms of criminal activity.³⁴ It is fair to conclude from the existing data that third parties tend to be affected more by the brutality and frequency of crimes than by the motives of the offender.

A variant of the previous justification, also centering on the third-party effects of bias crimes, defends punishing bias crimes more severely on the ground that such crimes may trigger retaliation and spark further violence. In essence, this view maintains that criminal sanctions must take into account not only the actual harm caused by the offender but also the potential for future harms that are causally linked to her act. Whatever merit this utilitarian justification may have as a general theory of punishment, it suffers from three serious flaws as an explanation for bias crime legislation. First, bias crime legislation encompasses many offenses that do not give rise to the risk of retaliation. As Jacobs and Potter point out, "Retaliation arises mostly in the context of race and ethnic conflicts and rarely in the context of gay-bashing, anti-Semitic incidents, anti-Asian violence, and violence against women."³⁵ Yet all bias crimes are equally punishable under the law. Second, bias crimes are by no means the only offenses that carry potential for retaliation. Inter-gang violence and conflicts between organized crime groups also present a greater risk of retaliation. But such incidents of violence are dealt with by generic criminal law. Finally, and perhaps most importantly, the "possible retaliation" justification is at odds with longstanding principles of sentencing and fundamental notions of fairness. Imposing more severe punishments on offenders whose conduct sparked, or might have sparked, further violence would motivate offenders to direct their attacks at the weakest and most marginalized groups in the hope that such groups would be unable or unwilling to retaliate. Correspondingly, it would induce otherwise peace-seeking communities to resort to violence in order to deter bias crime offenders from preying on their members. Thus, the net effect of correlating punishment to actual or potential retaliation would be to render the communities most vulnerable to bias crime even more vulnerable, and to trigger retaliatory violence on the part of bias crime victims.

In the final tally, none of the existing justifications provides a solid basis for bias crime laws. The leading theories rely on dubious factual assumptions that have been discredited by various empirical studies. The failure of existing theorizing to justify bias crime laws has rendered the

33. See JACOBS & POTTER, *supra* note 10, at 87.

34. See *id.*

35. *Id.* at 88.

laws a constant target for criticism and has spurred calls for their repeal.³⁶ This failure reflects, in our view, the inherent limits of the wrongfulness-culpability framework.

A brief restatement of the reasons for the failure of the wrongfulness-culpability paradigm to justify bias crime legislation: The wrongfulness-culpability paradigm supports differential sanctions for perpetrators of crime only so long as the behavior of one perpetrator is shown to be either more wrongful or more culpable than that of the others. Thus, under this paradigm, the enhancement of sanctions for bias crimes requires a showing that bias crimes are either more wrongful or more culpable than identical crimes not motivated by bias.³⁷ For the reasons elaborated above, neither of these claims can be substantiated. The next Section examines and challenges the dominance of the wrongfulness-culpability framework as a unifying theory of criminal law and develops an alternative theory that explains many essential features of criminal law: the fair protection paradigm.

C. *The Limits of the Wrongfulness-Culpability Framework*

Traditionally, the primary concern of criminal law scholars has been to ensure fair treatment to criminal offenders. Under the prevailing view, fairness to criminal offenders demands proportionality between the seriousness of the crime and the severity of the penalty.³⁸ The seriousness of the crime is determined by two factors: the wrongfulness of the act (that is, the moral quality of the act itself) and the culpability or accountability of the perpetrator. The wrongfulness element denotes the moral quality of the act, and the culpability element denotes the degree of moral responsibility of the perpetrator of the act.³⁹ Adherents to this view believe that wrongfulness and culpability are the only two legitimate factors that courts should consider in meting out punishment to criminal offenders or, as one champion of this view stated, “[t]o ask what punishment someone deserves is to ask how much wrong they did, and with what culpability they did that wrong.”⁴⁰ Under this view, no factor should influence sentencing unless it can be shown to influence either the wrongfulness of the act or the culpability of the act’s perpetrator.⁴¹

36. For a powerful attack on bias crime legislation, see *id.* at 145-53.

37. See Dillof, *supra* note 3, at 1019 (“[A]ll justifications for the increased penalties imposed by bias crime statutes can be analyzed as taking bias to be relevant to either gravity of wrongdoing or degree of culpability.”).

38. See ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 90 (1976).

39. For an analysis of these concepts, see FLETCHER, *supra* note 7, § 6.6, at 454-91.

40. Moore, *supra* note 7, at 237.

41. Wrongfulness and culpability may be used in two different ways: in a foundational manner and in a derivative manner. A utilitarian can also use terms such as wrongfulness or

The wrongfulness-culpability paradigm consists of three distinct claims. First, it consists of a negative claim: that in determining the criminal sanction one should exclude all factors that do not bear upon the wrongfulness of the act or the culpability of the perpetrator.⁴² The considerations excluded by this principle are often grounded in important values, which the state has a legitimate interest in promoting; yet, under the wrongfulness-culpability paradigm, it is illegitimate to take these considerations into account in determining criminal sanctions. Second, the wrongfulness-culpability paradigm consists of a positive claim: that the decisionmaker must take into account all the considerations that bear upon the wrongfulness of the act or the culpability of the perpetrator.⁴³ Third, the wrongfulness-culpability paradigm employs a set of rules to assign weight to each of the relevant factors and calibrates the criminal sanction to reflect the cumulative weight of these considerations.⁴⁴

The wrongfulness-culpability paradigm is not a complete theory of sentencing; instead, it can be best characterized as a *framework* for determining the appropriate sentence. Its classification as a framework is based on the fact that it provides no guidelines as to which factors determine the wrongfulness of an act or the culpability of the perpetrator. Hence, the wrongfulness-culpability paradigm needs to be supplemented by independent theories of wrongfulness and culpability.

The primary appeal of the wrongfulness-culpability paradigm is the fact that it rests on the moral intuition that only aspects intrinsic to the crime itself should determine the magnitude and severity of criminal punishment. Taking other considerations into account violates the Kantian principle that the criminal perpetrator must not be used as a means to promote societal ends. This appeal is magnified by the fact that the wrongfulness-culpability

culpability to mediate between utility and legal responsibility. A person who endorses this utilitarian view could even argue that wrongfulness and culpability are the only considerations that should determine the criminal sanction. But by making this claim, the utilitarian does not join the wrongfulness-culpability camp, because the meanings of the concepts "wrongfulness" and "culpability" are derivative. For the purpose of this Essay, the wrongfulness-culpability framework expresses a theory about the foundational values underlying sentencing.

42. In the classification developed by Joseph Raz, the negative claim is an exclusionary reason—a reason that requires that the decisionmaker not act on the basis of considerations that do not bear on the wrongfulness of the act or the culpability of the perpetrator. For a discussion of exclusionary reasons, see JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 35-39 (1975).

43. There are, however, disputes as to the positive claim. Everybody seems to agree that culpability is necessary to justify the imposition of a criminal sanction. Most scholars also argue that wrongfulness is also a necessary condition for inflicting a criminal sanction. See, e.g., FLETCHER, *supra* note 7, § 6.6.3, at 466-69; George P. Fletcher, *What Is Punishment Imposed for?*, 5 J. CONTEMP. LEGAL ISSUES 101 (1994). Others believe that wrongfulness is not a necessary condition, although it can influence how much punishment is deserved. See, e.g., Moore, *supra* note 7, at 238. The most extreme view is held by Douglas Husak, who believes that criminal liability does not require wrongdoing. See Douglas Husak, *Does Criminal Liability Require an Act?*, in *PHILOSOPHY AND THE CRIMINAL LAW* 60 (Anthony Duff ed., 1998).

44. For an articulation of such a theory, see FLETCHER, *supra* note 7, §§ 6.6 to 6.7, at 454-504.

paradigm is capable of accommodating different theories of punishment with radically different understandings of the concepts of culpability and wrongfulness.⁴⁵ Most importantly, its dual character seems to facilitate a dual concern for both the perpetrator of the crime (via its emphasis on culpability) and the victim (via its emphasis on wrongfulness). The culpability element focuses primarily on the moral responsibility of the perpetrator of the crime and thus facilitates exoneration of the “innocent” (inculpable) perpetrators of wrongs.⁴⁶ The wrongfulness element concerns itself with the moral quality of the criminal conduct; in assessing the moral quality of different criminal acts, the wrongfulness element enables one to take into account the actual harm inflicted on the victim and society as a whole.⁴⁷ Thus, the wrongfulness-culpability paradigm seems to provide a comprehensive framework for sentencing, a framework flexible enough to accommodate the concerns of both victims and perpetrators of crime, and to ensure fairness to both.

Naturally, the wrongfulness-culpability framework is not infinitely flexible. It cannot accommodate utilitarian theories of punishment, for instance. The utilitarian conviction that sentencing should maximize utility cannot plausibly be articulated in terms of wrongfulness or culpability.⁴⁸ But given its ability to accommodate both the concerns of crime perpetrators and of victims, the wrongfulness-culpability framework seems

45. Examining the diversity of theories that fall into this framework illustrates the flexibility of the wrongfulness-culpability paradigm. Subjectivist theories interpret wrongdoing by focusing on the actor's attitude toward the wrongdoing. The view that wrongfulness is grounded in the act itself rather than in its external results fits this paradigm. *See id.* § 6.6.5, at 475. Objectivist theories, in contrast, evaluate the wrongdoing in objective terms. The view that wrongfulness is grounded in results fits this position. *See id.* The debate, therefore, between objectivists and subjectivists is a debate within the wrongfulness-culpability paradigm—a debate about the nature of wrongfulness, not about the validity of the wrongfulness-culpability paradigm itself.

46. *See id.* § 6.6, at 455 (“[N]o one may be properly punished for a wrongful act (an act of wrongdoing) unless the act is attributable to him.”).

47. The wrongfulness of an act has been interpreted differently by different theorists. Some regard wrongfulness in wholly objective terms, while others believe that the wrongfulness of an act must be assessed by examining the beliefs of the perpetrator of the act. For a classification of the different theories of wrongfulness, see *id.* § 6.6.5, at 474-76. The great advantage of the objective theories of wrongfulness is their ability to accommodate the concern for the victims of crime. Arthur Ripstein has recently developed this argument. *See* ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY AND THE LAW 141 (1999) (“Punishment is scaled to the seriousness of the wrong rather than the expected advantage of the crime because it treats the denial of the victim's rights as the measure of the wrongdoer's gain.”).

48. Thus, Benn and Peters, in developing a utilitarian theory of punishment, argue:

The retributivist's difficulty is that he wants the crime itself to indicate the amount of punishment, which it cannot do unless we first assume a scale of crimes and penalties. But on what principles is the scale to be constructed, and how are new offences to be fitted into it? These difficulties admit of no solution unless we agree to examine the consequences to be expected from penalties of different degrees of severity; i.e. unless we adopt a utilitarian approach.

S.I. BENN & R.S. PETERS, THE PRINCIPLES OF POLITICAL THOUGHT 219 (1965).

to constitute a comprehensive theory of punishment that can accommodate all fairness-based concerns.

Yet a closer examination reveals that the wrongfulness-culpability paradigm cannot accommodate *all* fairness-based concerns. Undoubtedly, the wrongfulness-culpability paradigm can accommodate concerns of fairness toward the perpetrator of a crime. The culpability element ensures fairness to the perpetrator of a crime by tying her sanction to her responsibility. Furthermore, through the wrongfulness element, which considers the actual harm to the victim, the wrongfulness-culpability paradigm accommodates, to some extent, the concerns of crime victims.

But the wrongfulness-culpability paradigm cannot accommodate *victim-related* fairness concerns that are not directly associated with the criminal act. Specifically, it cannot accommodate a concern for fair distribution of protection against crime among potential victims. The societal distribution of protection among potential victims is not, under the wrongfulness-culpability paradigm, a relevant consideration in determining the sentence. The concern for fair distribution of protection is related neither to the wrongfulness of any particular act nor to the culpability of any particular offender. Under the wrongfulness-culpability paradigm, an offender is responsible for the wrong she committed if the wrong can justifiably be attributed to her. But no particular offender is responsible for the fact that the victim was particularly susceptible to crime due to the disposition of *other* criminals to prey on her.

The case of high-risk victims poses a problem for the wrongfulness-culpability paradigm since it resides beyond the purview of the wrongfulness-culpability inquiry. To appreciate the problem of high-risk victims, one has to look beyond the specific relations between the perpetrator of crime and the victim, and to examine instead the inter-relations among victims as a group in light of their relative status in society. But since the inquiry under the wrongfulness-culpability paradigm does not cover such factors, it cannot address the problem of high-risk victims.

One can challenge this claim by arguing that a high-risk victim is more vulnerable and, consequently, that a crime directed toward such an individual is more wrongful than a crime against a less vulnerable individual. Committing a crime against a person who is more likely to be a victim (and therefore in greater need of protection) is more wrongful than committing a crime against a person who is less likely to be a victim (and therefore less in need of protection).

We believe that this argument fails because it does not take seriously the distinction between extra-sensitive victims and high-risk victims. A person who is a high-risk victim does not suffer a special harm if a crime is committed against her. Committing a crime against a high-risk individual does not impose a greater physical or mental harm on her, nor does it

diminish her overall well-being more than it would for a person who is a low-risk victim. It seems arbitrary, therefore, to insist that it is more wrongful to commit a crime against a high-risk victim than it is to commit a crime against a low-risk victim.⁴⁹

The motivation to incorporate fair protection considerations into the concept of wrongfulness is not difficult to detect. This motivation is based on the belief that fair protection considerations can be part of criminal law only if it is shown that they can be integrated into our understanding of the concept of wrongfulness. Under this view, if acts *A* and *B* are equally wrongful and are committed by equally culpable persons, there could be no reason to punish the perpetrator of *A* more than the perpetrator of *B*. Hence, without finding some way of incorporating fair protection concerns into the very concept of wrongfulness, such concerns cannot be integrated at all into the system of criminal law.

It is not difficult to find examples that run counter to this view. Harming my child is not more wrongful than harming someone else's child. Yet I may have weightier reasons to protect my child than to protect someone else's child. It is possible, therefore, that an agent, such as a parent, may have a stronger obligation to prevent wrongful acts committed against *X*, her son, than wrongful acts committed against *Y*, someone else's child. Another example that is more relevant to our context is the greater obligation of the state to prevent wrongs committed against its citizens than to prevent identical wrongs committed against noncitizens.

An advocate of the wrongfulness-culpability paradigm may concede this point but argue that despite this conceptual possibility, it is indeed more wrongful to commit a crime against a high-risk victim. But such an expansive understanding of the concept of wrongfulness undermines the theory. In particular, it is imperative for such a theory to demonstrate the greater wrongfulness of a crime directed at a high-risk victim without relying in any way on the premise that the state has a greater obligation toward these victims.

We do not deny the possibility that, in principle, one could develop a theory of wrongfulness that would incorporate fair protection concerns. Yet incorporating fair protection into the wrongfulness-culpability paradigm would radically transform the wrongfulness-culpability paradigm. It would require an expansion of the concept of wrongfulness far beyond its traditional boundaries. If our arguments motivate the advocates of the

49. Naturally, being a high-risk victim may be correlated with greater fear on the part of the victim and excessive precautions that disrupt her life. An actual crime committed against a high-risk victim may cause her greater harm due to her acute awareness of her special vulnerability. Committing a crime against a high-risk victim of this type is indeed particularly wrongful. This conclusion, however, is due not to the fact that the victim is at high risk, but to other factors that may be causally related to her vulnerability, such as her fear and the disruption of her life.

wrongfulness-culpability paradigm to integrate fair protection considerations into the concept of wrongfulness, this result merely demonstrates the compelling normative force of fair protection, currently neglected by criminal law theorists.

In sum, fair protection considerations cannot be readily incorporated into the wrongfulness-culpability paradigm. Importing them into the concept of wrongfulness would stretch the notion of wrongfulness well beyond its conventional meaning.

But should the greater vulnerability of victims affect sentencing practices? Do high-risk victims really have a right to greater protection? And if they do, can this right justify the imposition of differential sanctions according to the vulnerability of the victims? The next Part illustrates that such a right actually exists and that, consequently, one of the primary deficiencies of the wrongfulness-culpability paradigm is its failure to address the special concerns of vulnerable victims.

II. CRIMINAL LAW AND THE FAIR PROTECTION PARADIGM

The fair protection paradigm is premised on the insight that one of the primary aims of criminal law should be to distribute protection in an egalitarian manner. Consequently, it maintains that criminal sanctions should be crafted in accordance with this goal.

The principle of equality enjoys pride of place in moral and political philosophy. Yet there is a wide disagreement among philosophers about the role of equality as an independent value and the ramifications it has for shaping political and social institutions. Some contemporary moral philosophers believe that equality is a fundamental principle of a just society and that disagreements about the nature of justice are essentially disagreements about the concept of equality. Dworkin regards equality as a foundational value,⁵⁰ and his position has been very influential among political theorists. Likewise, Rawls's theory of justice regards equality as a fundamental value.⁵¹

Other philosophers, however, reject this view. Most notably, Raz believes that equality is not an independent value at all and that while enhancing equality can promote justice in various legal contexts, it can do so not because inequality is evil but because the pursuit of equality helps satisfy the greater needs of people who are worse off.⁵² Thus, even those

50. See RONALD DWORKIN, *What Rights Do We Have?*, in *TAKING RIGHTS SERIOUSLY* 266 (1977); Ronald Dworkin, *In Defense of Equality*, 1 *SOC. PHIL. & POL.* 24 (1983).

51. See JOHN RAWLS, *A THEORY OF JUSTICE* 504-12 (1972).

52. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 217-44 (1986); see also Harry Frankfurt, *Equality as a Moral Ideal*, 98 *ETHICS* 21 (1987), reprinted in HARRY FRANKFURT, *THE IMPORTANCE OF WHAT WE CARE ABOUT* 134, 149 (1988) ("The fundamental error of

who ascribe no independent value to equality do not advocate a political system indifferent to disparities in wealth or other goods. Instead, they maintain that the reduction of wealth or other disparities is merely a byproduct of the state's fulfilling its obligations to its citizens.

A simple example may help elucidate this view. If *A* is on the verge of starvation while *B* is only mildly hungry, the greater and more urgent need of *A*, rather than a desire to promote equality between *A* and *B*, provides a reason to help *A* before helping *B*. The greater need of *A* generates a strong reason to give the bread to *A*. The lesser need of *B* generates a weak reason to provide *B* with the bread. Consequently, the reason to provide *A* with the bread overrides the reason to provide *B* with the bread, and a person who acts in accordance with reason is required to provide *A* with the bread. Satisfying more urgent individual needs would often result in a more egalitarian distribution of resources, but it is the needs of each individual that determine what she deserves—not the duty to minimize disparity among different individuals.

This Essay is neutral with respect to this central philosophical debate concerning equality. While our analysis is phrased in terms of equality of protection, it does not presuppose that equality of protection is a foundational value. The fair protection paradigm can be grounded in the value of providing equality of protection against crime to victims. But it could also be interpreted as granting priority to the greater need for protection of vulnerable victims. This enables us to remain neutral as to whether the primary justification for such a policy is grounded in the aspiration to eliminate the inherent evils of inequality or, rather, in the desire to satisfy the greater needs of particularly vulnerable victims.

Our defense of the fair protection paradigm proceeds as follows: Section A develops a fairness-based account of criminal law, which we call “the fair protection paradigm.” That Section espouses the view that fairness in distribution of protection against crime entitles particularly vulnerable individuals to a greater degree of protection. It also demonstrates that the fair protection paradigm actually forms a theoretical basis for many of the accepted practices of the criminal justice system. Section B demonstrates that the fair protection paradigm is grounded in current sentencing practices.

A. *The Fair Protection Paradigm*

The fair protection paradigm requires the state to distribute protection in a fair manner to potential crime victims. The fair protection paradigm is

egalitarianism lies in supposing that it is morally important whether one person has less than another regardless of how much one of them has.”).

premised on the understanding that criminal law is a means of providing a good—protection against crime—and, therefore, that it is crucial to guarantee that the good produced by criminal law be distributed fairly. This Section demonstrates that fair protection is a compelling normative principle that has important ramifications for understanding many of the prevailing practices of criminal law. Yet the meaning of fairness is far from settled. Theories of distributive justice differ radically in defining what constitutes a fair distribution of goods and, in particular, what a fair distribution of protection from crime would entail.

Under one possible interpretation, fairness requires that the state not discriminate between criminal offenders on the basis of the victims' identities.⁵³ Equality, on this view, means treating all perpetrators of crimes identically regardless of their victims' special needs and vulnerability to crime. Thus, if the criminal law equally punishes crimes against African Americans and crimes against whites, it respects the demands of equality in two ways. First, it treats criminals equally by insisting that people who are equally culpable and who have committed equally wrongful acts be equally punished. Second, it protects victims equally because imposing differential sanctions on criminals who have committed similar acts violates the rights of different victims to be treated equally. Let us explore each of these arguments.

Under the first argument, the wrongfulness-culpability paradigm guarantees equality to the perpetrators of crime. Equality is guaranteed under this view because meting out different punishments to equally culpable perpetrators of equally wrongful criminal acts arguably discriminates on irrelevant grounds and, consequently, violates the requirement that the state treat criminal offenders fairly.

Yet this analysis is subject to serious objections. First, it fails to explain prevailing sentencing practices. The possibility of rehabilitation is often considered an important factor in sentencing. Yet, if one takes seriously the argument that equally culpable perpetrators of equally wrongful crimes should be subjected to identical sanctions, it is illegitimate to consider the possibility of rehabilitation. Second, the argument presupposes what it purports to prove. It is implicitly based on the premise that differential sanctions are discriminatory unless they are grounded in differences in the culpability of the perpetrator or the wrongfulness of the act. Yet it is precisely this premise that the fair protection paradigm challenges. Under the fair protection paradigm, differential sanctions do not discriminate between equally situated criminals. Instead, they reflect the differential

53. This follows from the "parity requirement," namely, the requirement that individuals who commit similar crimes should not be subjected to different punishments. See VON HIRSCH, *supra* note 38, at 72-73.

obligations on the part of the state to protect victims who differ in their vulnerability to crime. Just as the greater obligation of the parent to protect her child should not be perceived as discriminatory, so too the greater obligation of the state to protect its more vulnerable members should not be described as such. The wrongfulness-culpability paradigm cannot account for these concerns because the concept of equality upon which it is predicated is ill-equipped to capture the complexity of human interaction.

Under the second argument, the wrongfulness-culpability framework protects victims equally. It distributes protection in a just manner because meting out different punishments to offenders because of the identity of their victims runs afoul of the idea of equality of victims. Punishing identical criminal acts against different victims differently would convey the message that certain citizens are more worthy than others, or at least that crimes committed against certain victims are less condemnable and therefore more “legitimate” than others. Thus, both the requirement to treat victims equally and the requirement to treat perpetrators of crime equally requires punishment in accordance with the wrongfulness-culpability paradigm.

In order to rebut these arguments, imagine a society in which both smoking and drinking are prohibited. The society is divided into a group of smokers who inflict harm on the drinkers and a group of drinkers who inflict harm on smokers. Assume further that there is much more illegal drinking in public than illegal smoking and that, consequently, smokers are much more exposed to illegal drinking than drinkers to illegal smoking. The disparity in the amount of protection actually afforded to smokers suggests that the system is unfair to the smokers, and one could persuasively argue that the disparity in the protection granted to smokers and drinkers is a cause for concern. Under a plausible interpretation of the fair protection paradigm, the disparity between drinkers and smokers may provide a sufficient reason for imposing harsher sanctions on illegal drinking than on illegal smoking.

In order to implement the fair protection paradigm, one needs a way of comparing the degree of protection granted to different potential victims. For the purpose of this Essay, we use a simple measure based on the concept of vulnerability. The vulnerability of a person to crime depends on the expected costs of crime for this person. The greater an individual's expected costs of crime, the more vulnerable she is.⁵⁴ The expected costs of crime can be calculated by multiplying the probability of a crime by the size of the harm caused by the crime.

54. For an attempt to explore the view that the expected costs of crime should be equalized among different victims, see Harel, *supra* note 8, at 1204-07.

This characterization of the concept of vulnerability is not as scientific as it may seem. The magnitude of the harm is often a vague concept. The harm may involve a violation of the dignitary interests of the victim or the violation of her autonomy, and any evaluation of the magnitude of those harms is inevitably controversial. Moreover, the concept of probability of harm is also less well-defined than it may seem. Should probability be measured with respect to aggregate exposure to all types of crime, or should it be measured separately for every individual offense? What is the relevant time frame for measuring it? Rather than provide a full-fledged measure for vulnerability, our discussion presents a framework for such an enterprise. Such a framework is sufficient because this Essay is concerned merely with establishing the fundamental contours of the fair protection paradigm rather than with its precise implementation.

Once one establishes the basic means of measuring the degree of vulnerability to crime, it is necessary to design a principle of distributive justice to guide the fair distribution of protection among potential victims of crime. To this end, we will compare two contrasting views of the principle governing the distribution of protection.

Under one radically egalitarian view, fair distribution of protection against crime would require the state to equalize the expected costs of crime for all potential victims. This view would imply a duty on the part of the state to address any vulnerability to crime, regardless of its source, and to place all its citizens on an equal footing in terms of their exposure to crime. For the reasons articulated earlier, however, such a radically egalitarian view cannot be sustained.

We argued that vulnerability to crime is a function of myriad factors such as wealth, age, attitude toward risk, life experience, and physical and intellectual prowess. Some of these factors, such as the willingness of the victim to take precautions against crime, do not justify intervention by the state. The state cannot reasonably be expected to annul all the disparities in the vulnerability of different potential crime victims.

The implausibility of the radical egalitarian view does not, however, necessitate a radically inegalitarian view, namely, the view that the state should be blind to differences in vulnerability to crime among victims. In fact, the state's failure to redress some of the disparities in the expected costs of crime among different potential victims is inherently unjust. Hence, the only viable position is the intermediate view presented in this Essay—that the state should annul certain disparities in the vulnerability of different victims while allowing other disparities to remain.

One of the primary tasks of a theory of criminal law, under the fair protection paradigm, is to explain which factors influencing vulnerability to

crime should be annulled by the state and which factors should not.⁵⁵ Often, greater vulnerability could be attributed to several factors, some of which justify interference on the part of the state while others do not. Complying under these circumstances with the demands of equality may often prove very challenging. To see why, it is useful to return to our fanciful society of drinkers and smokers.

Assume now that both drinking and smoking are prohibited and that both prohibitions are enforced. However, the drinkers are less law-abiding than the smokers. Thus, there is a lot more illegal drinking than illegal smoking. Moreover, smokers share an inclination to subject themselves voluntarily to the risks of illegal drinking because they like to tease and harass drinkers. Thus, they tend to congregate around drinkers, and, consequently, they suffer from greater harms inflicted upon them by illegal drinking. In this case, the disparate harm to smokers is attributable to two factors: the behavior of the illegal drinkers and the smokers' inclination to be around them.

It seems reasonable that the disparity in vulnerability attributable to the greater inclination of drinkers to violate the law should be annulled, while the disparity attributable to the greater inclination of smokers to subject themselves to the risks of illegal drinking should not be annulled by the state. If this normative premise is adopted by the society, then the principle of fair protection requires the legal system to make a special effort to remedy the portion of the harm that stems from the illegal behavior of the drinkers, but leave the portion of the harm that stems from the idiosyncratic

55. Under one possible view, the state has an obligation to annul those disparities not attributable to the victim's own choices. Yet the conclusion that the state has no obligation to annul any disparities attributable to a person's choices is false. If the greater vulnerability to crime is attributable to socially valuable activities, one may justifiably insist that those who perform these activities be guaranteed a high degree of protection despite their voluntary decision to expose themselves to crime. Thus, we insist on granting full protection to individuals who use their First Amendment rights in a way that provokes a hostile reaction, even if by doing so they voluntarily expose themselves to severe risks. The so-called "Heckler's Veto" doctrine requires that police use available resources to protect a speaker who inflames a hostile audience because of the special importance of freedom of expression, despite the voluntary nature of the speech that generates the risks. *See, e.g., Terminiello v. City of Chicago*, 337 U.S. 1 (1949); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-10, at 853-55 (2d ed. 1988). Another example can be used to illustrate this point. Some owners of factories or stores decide, for ideological or commercial reasons, to place their businesses in a depressed, high-crime area. Such commercial activity is socially valuable because it provides economic opportunity to the disadvantaged. Hence, it seems justified to devote more public resources to the protection of those businesses, despite the voluntary exposure of those businesses to the risks of crime. Thus, the fact that disparity in the vulnerability of different victims is attributable to their own choices does not entail that the state has no obligation to annul it. For a full discussion, see Harel, *supra* note 8, at 1204-05.

Similarly, the fact that disparity in the vulnerability of different victims cannot be attributed to their own choices does not entail that the state has an obligation to annul it. Naïvete may increase one's vulnerability to crime, yet it does not necessarily justify greater efforts on the part of the state to annul the disparity in the vulnerability of naïve and sophisticated victims.

preferences of the smokers unaddressed. To accomplish this, the society must either assign the harm to the smokers in proportion to its causes or diminish the frequency of illegal drinking to the point at which it would have been if drinkers had been as law-abiding as smokers. One way to accomplish the latter is to increase the sanction on illegal drinking, in order to reduce the frequency of this behavior to the level at which it would have been had drinkers been law-abiding citizens. It bears emphasizing that the imposition of harsher sanctions in such cases is not intended to reflect the greater wrongfulness of the act or the greater culpability of the actor, but rather to equalize the distribution of protection by deterring offenders from committing crimes against certain victims.⁵⁶

The primary challenge for the fair protection paradigm is to determine which differences in the vulnerability of different victims are relevant to the distribution of protection against crime and which are not. A comprehensive treatment of this challenge is beyond the scope of this Essay. Yet, once the principle of fair protection is accepted, and once it is used to enhance the sanctions inflicted upon criminals who commit crimes against vulnerable victims, it is intuitively plausible to argue that vulnerability attributable to race, gender, or sexual orientation justifies interference on the part of the state. A more complete defense of this view will be articulated in Part III. The next Section demonstrates that the fair protection paradigm has a powerful explanatory force. It illustrates that some contemporary practices of criminal law can be explained only as aimed at fair protection of potential victims of crime.

B. The Fair Protection Paradigm and Contemporary Sentencing Practices

Some sentencing practices embedded in the Sentencing Guidelines should be interpreted as reflecting a concern for fair protection of potential victims of crime. Section 3A1.1(b) of the Sentencing Guidelines states: "If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels."⁵⁷ The provision's commentary offers some examples to illustrate when the provision should be used. It states, for example, that enhancement of the sanction would apply in a "fraud case where the

56. It should not be inferred from our discussion that we are committed to the view that the disparity between drinkers and smokers should be redressed by the state. This example illustrates, however, the potentially general applicability of the fair protection paradigm to issues less controversial than bias crime.

57. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (1998).

defendant marketed an ineffective cure to cancer patients or in a robbery where the defendant targeted a handicapped victim.”⁵⁸

The traditional interpretation of this provision maintains that it was enacted to enhance the sanction of the more criminally depraved.⁵⁹ Under this interpretation, this provision fits into the wrongfulness-culpability paradigm, as it inflicts harsher sanctions on those who are more culpable. Yet courts often use this provision to enhance the sanctions of offenders who attack vulnerable victims on the theory that such victims are less able to defend themselves.⁶⁰ This practice seems to comport better with the fair protection paradigm.

Interestingly, courts often claim that the fact that a criminal chose a victim who cannot defend herself indicates a greater depravity on his behalf.⁶¹ Yet the premise that the willingness of the criminal perpetrator to exploit such a weakness makes him particularly culpable is not self-evident. A willingness to cause a greater wrong to a victim indicates greater depravity. But the harm inflicted by a crime against a vulnerable victim is not necessarily greater than the harm inflicted by a crime against a less vulnerable victim. In fact, in some cases the harm inflicted on vulnerable (high-risk) victims is less serious than the harm inflicted on less vulnerable (low-risk) victims. The inability to defend oneself increases one's probability of becoming a crime victim. Yet such a person need not be a particularly sensitive victim. Sometimes, the very factor that makes a person a high-risk victim may also make her a low-sensitivity victim.⁶²

One might, nevertheless, argue that crime directed at high-risk victims is morally worse than crime directed at low-risk victims. Under this view, which relies on the concept of fair play, it is simply particularly heinous to prey on a high-risk victim because the victim does not have a fair

58. *Id.* § 3A1.1 commentary, discussed in Jay Dyckman, Note, *Brightening the Line: Properly Identifying a Vulnerable Victim for Purposes of Section 3A1.1 of the Federal Sentencing Guidelines*, 98 COLUM. L. REV. 1960, 1969-70 (1998).

59. See Dyckman, *supra* note 58, at 1974-75 (citing case law in seven circuits).

60. See, e.g., *United States v. Shumway*, 112 F.3d 1413, 1423 (10th Cir. 1997) (“[T]he ‘vulnerable victim’ is someone who is unable to protect himself or herself from criminal conduct, and is therefore in need of greater societal protection than the average citizen.”).

61. See *supra* notes 59-60.

62. Consider the following example. A group of youngsters attacks a mentally disabled individual. The aggression is meant primarily to humiliate the person rather than to cause pain. The mentally challenged individual is a high-risk victim because of his deficiency. Yet, because of his limited mental ability, the person is not capable of comprehending the humiliation he goes through, and consequently does not suffer the same emotional trauma that another person would suffer under these circumstances.

Courts often apply the vulnerable victim enhancement of section 3A1.1 to victims who are high-risk but not highly sensitive. Such a reading is advanced by several circuits. The Fifth Circuit found that women desperate for romance were unusually vulnerable to a fraudulent scam that targeted victims through personal advertisements. See *United States v. Scurlock*, 52 F.3d 531, 541-42 (5th Cir. 1995). Similarly, the Third Circuit upheld an enhancement of a stockbroker who used his relationship with his girlfriend to pressure her parents into investing in his fraudulent scheme. See *United States v. Astorri*, 923 F.2d 1052, 1055 (3d Cir. 1991).

opportunity to defend herself. This view is supported by the fact that many courts have stated that section 3A1.1 of the Sentencing Guidelines is particularly relevant to cases in which the victim cannot defend herself.⁶³

But this view is premised on an analogy between criminality and sportsmanship—a dubious analogy, at best.⁶⁴ The ability or inability of the victim to defend herself is perceived as relevant to sentencing only because of the victim's greater need for protection. It is not surprising, therefore, that courts often slip from rhetoric that fits the wrongfulness-culpability paradigm to rhetoric that better fits the fair protection paradigm.⁶⁵ From the vantage point of the fair protection paradigm, the primary justification for enhancing the punishment of criminals who assault vulnerable victims is the greater need for protection of these victims and the greater responsibility of society to invest in protecting victims who face greater risks.

The enactment of section 3A1.1 raised numerous disputes among courts concerning the nature of the vulnerability that justifies enhancement of criminal sanctions. Some courts have interpreted the provision broadly, while others have interpreted it narrowly. Advocates of the narrow view have stressed the need to limit the provision to cases in which the victim is uniquely vulnerable.⁶⁶ Proponents of the broad view, on the other hand, have argued that any vulnerability justifies use of section 3A1.1.

The fair protection paradigm interprets the concept of vulnerability in section 3A1.1 in a way familiar to philosophers who write about distributive justice. Some philosophers believe that disparities among

63. See, e.g., *United States v. O'Neil*, 118 F.3d 65, 75 (2d Cir. 1997), *cert. denied sub nom. Saia v. United States*, 118 S. Ct. 728 (1998) ("In determining vulnerability, we focus not on the likelihood or extent of harm to the individual if the crime is successful, but on the extent of the individual's ability to protect himself from the crime."); *United States v. Gill*, 99 F.3d 484, 486 (1st Cir. 1996) ("[T]he vulnerable victim guideline is primarily concerned with the impaired capacity of the victim to detect or prevent the crime."); *United States v. Blake*, 81 F.3d 498, 504 (4th Cir. 1996) (holding that the defendant's robbery attempts aimed at the elderly, "who, by virtue of their age, were less physically able to defend themselves," satisfied section 3A1.1's criteria); *United States v. Lallemand*, 989 F.2d 936, 940 (7th Cir. 1993) (holding that "[a] vulnerable or susceptible victim is (1) less likely to defend himself, (2) less likely perhaps to be aware that he is a victim of crime, (3) less likely to complain"); *United States v. White*, 903 F.2d 457, 463 (7th Cir. 1990) (upholding an enhancement for a defendant who kidnapped a 60-year-old gas station attendant who had respiratory problems, and agreeing with the government's position that "[the defendant] would have had a far more difficult time and may have in fact been unable to successfully kidnap a younger or healthier individual who might have been able to run and successfully flee from the knife-wielding [defendant]"); see also RICHARD G. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* 86 (1979) ("[C]riminals who knowingly select victims who are incapable of defending themselves are more morally blameworthy than others.").

64. This view is misguided, for it focuses exclusively on the perpetrator of the crime while neglecting the victim's perspective. A victim-oriented perspective would reject, therefore, the attempt to explain the Sentencing Guidelines in terms of the wrongfulness or the culpability of the perpetrator of the crime.

65. See *supra* notes 59-60.

66. For a thorough discussion, see Dyckman, *supra* note 58.

individuals can be justified when they can be attributed to their choices.⁶⁷ Others believe that disparities among individuals can be justified if they can be attributed to their preferences, irrespective of whether they could have chosen otherwise.⁶⁸ One's view as to whether the state should annul the disparity in the vulnerability of different victims depends, therefore, on one's convictions as to which kinds of disparities the state has an obligation to annul.

Can the punishment of bias crimes be interpreted as a mechanism to provide equal protection to potential victims? Do these statutes reduce disparity in the protection of different victims?

III. BIAS CRIMES AND FAIR PROTECTION

This Part examines whether the fair protection paradigm can justify bias crime legislation. Section A provides arguments favoring such a rationale. Section B addresses potential objections to this explanation.

A. *Can the Fair Protection Paradigm Justify Bias Crime Legislation?*

Bias crimes are crimes committed because of the race, color, religion, or sexual orientation of the victim. Bias crime legislation enhances the sanctions imposed on such crimes, relative to the sanctions imposed on similar crimes not motivated by bias. By imposing harsher sanctions on bias crimes, such legislation does not simply reduce the frequency of bias crimes; it also reduces the exposure of the members of different groups to bias crime in a differential manner. The neutral language employed in bias crime statutes should not lead one to the erroneous conclusion that such statutes have an identical effect on all groups. One should not confuse neutral language with neutral impact. The greater the group's exposure to bias crimes, the greater its benefit from bias crime legislation.

In fact, the neutral language of bias crime statutes is virtuous in an important sense: It allows social reality to determine the practical effects of bias crime legislation. More specifically, it ensures that the group most in need of greater protection at any given time will actually receive it. For example, if African Americans are attacked more frequently on racial grounds, effective bias crime legislation will benefit African Americans more than it does whites. If, in the future, a different group becomes more

67. See, e.g., Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77 (1989); G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906, 922 (1989).

68. See, e.g., Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 291-304 (1981).

vulnerable to crime, the existing scheme will automatically provide it with more protection.

Moreover, the fair protection paradigm explains some of the more salient features of bias crime legislation that cannot be explained by the wrongfulness-culpability paradigm. Some bias crime statutes define bias crimes as those committed because of the race, gender, religion, or sexual orientation of the victim.⁶⁹ However, not all bias crime statutes require “racial” or “other” animus toward the victims. As Frederick Lawrence points out, bias crime statutes can be divided into two models: a “racial animus model” and a “discriminatory selection model.”⁷⁰ The racial animus model requires hostility toward the victim group as a constitutive element of bias crime. The discriminatory selection model does not pose any such requirement. All that is required under the discriminatory model is that the race of the victim should somehow figure into the offender’s decision to act against her.

The discriminatory model of bias crime has proven to be especially problematic for champions of the wrongfulness-culpability framework. The following case suggested by Dillof illustrates the difficulty: “Mike is a mugger who mugs blacks simply because he believes that the police are less likely to vigorously investigate muggings of blacks. Mike feels no animus toward blacks, but Mike’s belief concerning blacks has played a role in the reasoning that led to his intention to assault blacks.”⁷¹

Dillof correctly points out that the wrongfulness-culpability paradigm provides no reason to punish Mike more harshly in the case of his apprehension. Admittedly, Mike selected his victims because of their race, but he did so only to lower the probability of his arrest. Mike’s motive was purely prudential; he did not act out of hostility or animosity toward his victims, and thus no special culpability should attach to Mike.

Dillof’s argument presents no difficulty whatsoever to the fair protection paradigm. Taking the perspective of the victim, the fair protection paradigm provides ample reason why offenders like Mike should be subjected to a greater sanction. Mike, in the above hypothetical example,

69. See Dillof, *supra* note 3, at 1023.

70. LAWRENCE, *supra* note 3, at 29-39. Yet Lawrence himself admits that [t]he landscape of state bias crime law thus consists of a few statutes falling clearly within the discriminatory selection model or the racial animus model and a substantial number of bias crime laws that are ambiguous as to what they punish. Several states including Wisconsin have adopted an explicit discriminatory selection statute governing bias crimes against a person, although virtually all state institutional vandalism laws are of this model. Several states have explicitly adopted the racial animus model. But the majority of states with bias crime laws are not clear as to which models they employ.

Id. at 38. For our purposes, it is important to note that the constitutionality of the discriminatory selection model was affirmed by *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

71. Dillof, *supra* note 3, at 1076.

sought to take advantage of the enhanced vulnerability to crime of the black population, which resulted from the reluctance of the police to investigate crimes against them. This enhanced vulnerability of blacks made them desirable targets to offenders like Mike as well as to other offenders who, unlike Mike, may be motivated by racial animus. Thus, enhancing the sanction for offenders who act against blacks was necessary in this case to equalize the vulnerability of blacks to crime. The greater deterrence provided by the increased sanction compensates in this case, and in many others, for the initially higher vulnerability of blacks.

An even more troubling case for the adherents of the wrongfulness-culpability paradigm is that of the "Violent Show-Off."⁷² Frederick Lawrence describes the "Violent Show-Off" phenomenon as follows:

The Violent Show-Off's purpose is to assault a victim in a manner that will impress his friends. To him, it is of no importance that the manner itself calls for the discriminatory selection of a victim. Although the racially discriminatory dimension of the Violent Show-Off's act is unconnected to the *purpose* of his conduct, he does act with *knowledge* of his friends' prejudice.⁷³

Peer pressure and the desire to please others may indeed prompt attacks on members of certain racial, religious, or gay groups, but champions of the wrongfulness-culpability theory staunchly insist that such attacks should not be considered bias crimes, since the offender lacked racial animus toward the victim. As Fredrick Lawrence concludes, "[T]he Violent Show-Off still must meet the elements of a racial animus model statute. If he is separated from the racial animus of his friends—if he had neither knowledge of their animus nor reasonable basis to suspect it, then he . . . is not guilty of a bias crime."⁷⁴

Yet the fair protection paradigm recognizes that "Violent Show-Offs" pose an additional risk to minorities' safety: the risk of being attacked by people who do not necessarily hate minorities but who assault them nevertheless to impress their friends. Thus, the possibility of being attacked by a Violent Show-Off increases certain victims' need for protection. The fair protection paradigm would grant such victims greater protection in order to equalize their vulnerability to that of other potential victims.

72. The "Violent Show-Off" example originated in a hypothetical proposed by the Attorney General of Wisconsin during the oral argument to the Supreme Court in *Wisconsin v. Mitchell*. See Transcript of Oral Argument at 9-10, *Wisconsin v. Mitchell*, 508 U.S. 476 (No. 92-515), discussed in LAWRENCE, *supra* note 3, at 74.

73. LAWRENCE, *supra* note 3, at 75.

74. *Id.* at 78.

B. *Objections to the Fair Protection Paradigm*

The fair protection paradigm gives rise to several objections. The most powerful objection is that, although bias crime legislation promotes the objective of reducing the disparity in the vulnerability of different victims, that is not the primary intention of the legislation. In order to present this objection, let us examine carefully the differences between section 3A1.1 of the Sentencing Guidelines, which enhances the sanctions for those who commit crimes against vulnerable victims, and bias crime legislation.

There are two primary differences between bias crime legislation and legislation protecting vulnerable victims. First, bias crime legislation requires that the victim be selected because of her gender, race, religion, or sexual orientation,⁷⁵ while section 3A1.1 of the Sentencing Guidelines applies to any case in which the victim belongs to the vulnerable group.⁷⁶ Second, bias crime legislation applies to crimes committed because of race, gender, sexual orientation, or religion, irrespective of whether the victim belongs to a more vulnerable group. Bias crime legislation enhances the punishment of those who commit crimes against members of more vulnerable groups as well as those who commit crimes against members of less vulnerable groups. A racially motivated attack by an African American on a white person is no less a bias crime than a similarly motivated attack by a white against an African American.

For these two reasons, it may be argued that bias crime legislation cannot effectively reduce inequality of protection. If the primary aim of bias crime legislation had been to promote equality of protection against crime, it would enhance only the sanctions of perpetrators of crime who attacked vulnerable groups, irrespective of the motives underlying the attack. Likewise, if the aim of bias crime legislation had been to reduce disparity in the vulnerability of different victims, it would enhance punishment only for those who directed their violence at members of a particularly vulnerable group. Such legislation would be analogous to legislation that protects other vulnerable groups, such as section 3A1.1 of the Sentencing Guidelines.⁷⁷

However, an important difference between the goal of section 3A1.1 and the goal of bias crime legislation may justify the different drafting techniques. The vulnerability with which the Sentencing Guidelines deals does not depend on cultural prejudices and beliefs. In contrast, bias crime is rooted in cultural prejudices that change over time and space. Although race

75. On the complexity of the concept of causality, see JACOBS & POTTER, *supra* note 10, ch. 2.

76. In fact, some might suggest that crimes motivated by hatred toward the majority should be excluded from the definition of hate crimes. Yet such a view could possibly violate the Fourteenth Amendment's Equal Protection Clause. See *id.* at 17.

77. See *supra* Section II.B.

is a primary and persistent source of tension in our society, the primary victims of racial hostility may not always be identified in advance. A statute enhancing the sanctions of perpetrators of crimes against any specific racial group may therefore fail to attain the goal of promoting equality of protection. Such legislation would be insensitive to the temporal and geographical diversity of racial prejudices. The attempt to protect only vulnerable groups is bound to fail in a diverse and dynamic society. Instead, such a society needs to use legislation that is flexible enough to accommodate varying prejudices and consequently better equipped to promote equality of protection in a changing environment.

Moreover, the centrality of motives to bias crime highlights the societal concern for disparities in the vulnerability of victims that are attributable to race or sexual orientation, but not disparities in the vulnerability of victims that are attributable to other factors such as wealth inequality. Bias crime legislation is intended to cancel out only certain disparities in the vulnerability of different victims: those that are attributable to race, religion, or sexual orientation. It is not intended to annul disparities in vulnerability that are not attributable to these factors. Consequently, bias crime legislation must employ motivation in order to address the disparities that it intends to annul.

This explanation raises an additional problem. Arguably, our model requires the state to prevent crimes that are attributable to race, religion, or sexual orientation, but not those that are attributable to other factors such as poverty.

This objection requires investigation. Identifying all the cases that justify intervention on the part of the state is beyond the scope of this Essay. But it must be acknowledged that there are limits to the degree to which the legal system could provide equal protection against crime. All we claim is that such intervention is justified when increased vulnerability stems from a certain personal characteristic of the victim, such as race, gender, religion or sexual orientation. While bias crime legislation reduces the disparity in vulnerability to crime, it does not eliminate it altogether. It is possible that bias crime legislation is insufficient and that further efforts should be made to reduce other unjustifiable disparities in vulnerability to crime.

One can claim, of course, that differences in vulnerability to crime resulting from wealth disparities should also be eliminated. We do not deny this claim. Our Essay does not aim at exploring all the disparities that may justify state intervention. But even if one is convinced that the disparity in vulnerability to crime that stems from wealth inequality should be remedied, it is not necessarily the case that the best way to achieve this goal is by enhancing the sanctions on crimes directed at the poor.

There are two primary ways in which the state can remedy inequality in the vulnerability of different victims. First, the state can remedy such inequality by differentiating the sanctions imposed on the perpetrators of crimes on the basis of the identity of their victims. Perpetrators who attack more vulnerable victims could be subjected to harsher sanctions. Second, the state could vary its enforcement efforts in accordance with the identity of the victim. If this option is accepted, offenders who attack more vulnerable victims would face a higher probability of detection because of the differential efforts of the law-enforcement authorities.

The choice between these two strategies depends on various factors. It is relatively easy to remedy differential vulnerability attributable to wealth inequality by increasing enforcement efforts. Increased police presence in poor neighborhoods may constitute a more effective way to deter criminal activity than enhanced sanctions on crimes directed at poor victims. It is virtually impossible, however, to employ the same strategy when inequality in vulnerability to crime is attributable to racial factors. It would be futile on the part of the police to invest resources in detecting perpetrators of bias crimes, because it is only after the perpetrator of the crime is detected that one can discern her motives clearly. Thus, in the context of bias crime it is easier and more efficient to use differential sanctions than differential enforcement efforts to reduce disparity in victims' vulnerability.

Admittedly, these are tentative thoughts. Their purpose is not to show that disparities in the vulnerability of different victims attributable to racial factors should be reduced by differentiating sanctions, while disparities in the vulnerabilities of different victims attributable to wealth inequality should be reduced by differentiating enforcement efforts. The only purpose of these reflections is to show that disparities in the vulnerabilities of different victims may be remedied in different ways. Certain disparities may be remedied more effectively by differentiating criminal sanctions, while others may be addressed more efficiently by differentiating enforcement efforts.

Finally, we would like to address two objections that challenge not the fair protection paradigm itself or its application to bias crimes, but rather the way in which such a concern should be imported into the legal system. Arguably, enhanced sentencing for bias crimes should be implemented through the Sentencing Guidelines rather than through the criminal law. In Section II.B, we discussed the provisions enhancing the sanctions imposed for crimes directed against victims who are particularly susceptible to criminal conduct. Those provisions were interpreted as another example demonstrating the concern of the legal system to provide equal protection. Yet those provisions are part of the Sentencing Guidelines rather than the criminal law. Why is it that, in the case of bias crimes, the enhancement of

sanctions is achieved through special provisions of the criminal law rather than through the provisions of the Sentencing Guidelines?

In order to address this question fully, one would need to develop a theory of the conceptual difference between enhancement of sanctions through the criminal law and enhancement of sanctions through the sentencing guidelines. It is beyond the scope of this Essay to provide such a theory. Yet one justification for the current practice is to highlight the commitment of the legal system to equal protection. Criminal law is a much more politically visible scheme of regulation. Enhancing sanctions through the criminal law, therefore, guarantees greater visibility of equal protection concerns.⁷⁸

Finally, one might argue that the disparity in the vulnerability of potential victims attributable directly to racial hatred is not important enough to justify state intervention. After all, bias crimes constitute only a tiny fraction of the criminal activity in the United States. Blacks are clearly more vulnerable to crime than whites, but their greater vulnerability cannot be attributed only to bias crimes. The effect of bias crimes on the vulnerability of blacks is small relative to the effect that the disparity in wealth has on their vulnerability to crime.

While it is probably true that poverty affects vulnerability to crime more than any racial or other factor, this does not suggest that other sources of vulnerability should be overlooked, or even left untouched, until the problem of wealth inequality is addressed. The liberal state has a special commitment to reducing vulnerable victims' exposure to crime, and bias crime legislation may be a good way of achieving equality. The special obligation of the state to provide protection is governed by principles of equality. Bias crime legislation is simply an expression of the greater duty of the state to protect its vulnerable members.

CONCLUSION

By presenting and exploring the contours of the fair protection paradigm, this Essay seeks to accomplish two goals. First, it attempts to provide a sorely lacking theoretical justification for bias crime legislation. Second, it tries to demonstrate that bias crime legislation is congruous with other contemporary practices of the criminal law. This Essay argues, contrary to prevailing theories, that the wrongfulness of the criminal act and the culpability of the criminal perpetrator are not necessarily the only two factors that should determine the content of criminal prohibitions and the

78. This argument suggests that perhaps the provisions protecting victims who are particularly susceptible to criminal conduct should be part of the criminal law rather than the Sentencing Guidelines.

sanctions imposed for their violation. To substantiate this claim, this Essay establishes an important connection between criminal law and theories of distributive justice. Perceiving the criminal law as a system for distributing protection against crime has important descriptive and prescriptive ramifications. Descriptively, it helps explain certain salient features of the criminal justice system. Prescriptively, it allows consideration of important societal concerns in determining the content of the norms of the criminal law. Furthermore, it makes a demand upon the state to equalize the protection the state provides to potential crime victims and to consider differences between individuals in determining law enforcement and sentencing policies. To be sure, the fair protection paradigm needs to be further developed, and its contours require more precise delineation. The introduction of this principle in this Essay and its application to bias crimes constitute a first step in this direction.

