ARTICLES

The Law and Economics of Animus

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People sometimes want to harm other people. This truism points to a blind spot in law and economics scholarship, which generally assumes that people are indifferent to the effects of their actions on other people. Diverse areas of the law, such as hate-crime legislation and constitutional equal protection doctrine, reside in this blind spot because they are premised on the existence of animus. I argue that the assumption of indifference unnecessarily limits law and economics analysis and that it is both possible and fruitful to incorporate animus into law and economics. I show that doing so leads to new insights on criminal deterrence, including the underappreciated benefits of damages as a deterrent for hate crimes and the promise of community-based "solidarity" deterrence schemes. I also show that incorporating animus can extend law and economics into areas of constitutional law that it has neglected. I argue for an economic approach to equal protection analysis that is grounded in the motivations of government actors but that addresses some of the longstanding concerns with intent-based tests. The examples of criminal deterrence and equal protection analysis are illustrative of an agenda for law and economics analysis that more incorporates other-regarding motives more generally.

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INTRODUCTION

Animus seems to be everywhere. Seven thousand hate crimes were reported in the United States in 2017.[1] Violent racial, religious, and ethnic animus appeared in the sanctuary of Emanuel African Methodist Episcopal Church in 2015,[2] the streets of Charlottesville in the summer of 2017,[3] the Chabad of Poway synagogue,[4] the Al Noor Mosque,[5] and a Walmart in El Paso, Texas in 2019.[6] Less shocking, but of greater frequency, are the more

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1 CRIM. JUST. INFO. SERVS. DIV., *Incidents, Offenses, Victims, and Known Offenders by Bias Motivation, 2017*, FBI (2017), https://perma.cc/VM9Q-ATRE.

2 Jason Horowitz, Nick Corasaniti & Ashley Southall, *Nine Killed in Shooting at Black Church in Charleston*, N.Y. TIMES (June 17, 2015), https://perma.cc/9VK6-GQ7K ("'It's obvious that it's race,' [Tory Fields, a member of the Charleston County Ministers Conference] said. 'What else could it be?'").

3 Steve Almasy, Kwegyirba Croffie & Madison Park, *Teacher, Ex-classmate Describe Charlottesville Suspect as Nazi Sympathizer*, CNN (Aug. 15, 2017), https://perma.cc/ZRL4-QX4Z (quoting a former teacher describing the man later found guilty of murder during the riot as someone who "really bought into this white supremacist thing").

4 Shannon Van Sant, *Poway Shooting Latest in Series of Attacks on Places of Worship*, NPR (Apr. 28, 2019), https://perma.cc/6FDE-UX9P ("The shooting is being investigated as a homicide, hate crime and federal civil rights violation.").

5 Shannon Van Sant, *Accused Shooter in New Zealand Mosque Attacks Charged with Terrorism*, NPR (May 21, 2019), https://perma.cc/354T-M8RU (explaining that the shooter, "a self-described 'white supremacist,' wrote an anti-immigrant, anti-Muslim manifesto before the attacks").

6 Vanessa Romo, *El Paso Walmart Shooting Suspect Pleads Not Guilty*, NPR (Oct. 10, 2019), https://perma.cc/35GT-YR3U (reporting that "[l]ess than 20 minutes before the massacre began the suspected shooter is believed to have posted a racist, anti-immigrant screed").

quotidian expressions of our hostility toward each other, such as the California man who taunted his neighbor by hosting a party of naked mannequins on his front lawn because of a property dispute.[7] Recently, animus has also appeared in federal courtrooms. The specter of religious animus raised questions about the constitutionality of then-president Donald Trump's executive orders on immigration;[8] anti-religious animus was the focus of the Court's decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*;[9] and concerns about alienage animus have tainted proposed revisions to the decennial U.S. census.[10]

This depressing list serves as a reminder that animus is not only an empirical fact of individual psychology, affecting how people behave in the shadow of the law, but also an element of the law itself. In criminal and tort law, animus can be a predicate for legal liability.[11] And animus that motivates legal enactments can be a fatal constitutional defect.[12] And yet, despite its importance within the law, animus presents a host of complications. Because hate is a powerful motivator, and because the presence of animus is hard to prove, hate-crime legislation has had little success in deterring animus-based crimes.[13] In the constitutional law

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7 Adam Frisk, *Man Hosts Naked Mannequin 'Party' to Taunt Neighbour Who Complained About Fence Height*, GLOB. NEWS (Mar. 21, 2019), https://globalnews.ca/news/5080425/naked-mannequin-party-fence. For an analysis of spite in the property law context, see generally Nadav Shoked, *Two Hundred Years of Spite*, 110 NW. U. L. REV. 357 (2016).

8 Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018) (applying rational basis review to find that, "because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility," the Court need not interrogate whether the Trump administration's travel ban was motivated by animus).

9 138 S. Ct. 1719 (2018).

10 Dep't of Com. v. New York, 139 S. Ct. 2551, 2564 (2019) (stating that the district court found that the respondents had not shown that the secretary of commerce who proposed the census question was motivated by "discriminatory animus").

11 For example, to obtain punitive damages for a tort arising from contract in Maryland, a defendant needs to be "motivated by hatred or a deliberate desire to injure the plaintiff." Gary I. Strausberg, *A Roadmap Through Malice, Actual or Implied: Punitive Damages in Torts Arising out of Contract in Maryland*, 13 U. BALT. L. REV. 275, 275 (1984).

12 *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); Washington v. Davis, 426 U.S. 229, 240 (1976) (describing a "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose"). The presence of animus as a motivating factor may defeat the legitimacy of the law as well. Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, *in* POLITICAL LEGITIMACY: NOMOS LXI 201, 210 (Jack Knight & Melissa Schwartzberg eds., 2019).

13 *See infra* notes 97–102.

context, where the question at hand often centers on the actions of collective bodies such as legislatures, there is philosophical disagreement about whether legislative intent is normatively relevant, how it can be proven, and whether collective intentions even exist.[14]

Law and economics can help. Yet law and economics has left the topic of animus largely unaddressed. The primary reason for this neglect is that economic analysis traditionally and generally proceeds from the assumptions that individuals pursue their (narrowly construed) self-interest and are indifferent to the effects of their actions on the welfare of other people.[15] In a time of pervasive animus, would that it were so. The dismal science is not, apparently, dismal enough.

Notwithstanding the empirical, legal, and normative significance of animus, it is unsurprising that law and economics has given it short shrift because law and economics has tended to generally neglect the role of intentions. Thirty-six years ago, Judge Richard Posner noted that "one can read many books on economics without encountering a reference to 'intent.'"[16] This is as true now as it was then. Whereas noneconomic approaches to criminal law emphasize the importance of intentions for assigning culpability and blame, economics focuses on actions because consequentialism is its normative framework.[17] Judge Posner himself has made efforts to incorporate intentions into an economic account of the law.[18] Still, sustained attention to intentions—and to animus in particular—has been missing. At this moment, when animus is both at the forefront of scholarly discussions of

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[14] *See infra* Part III.D.

[15] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3–4 (Vicki Been et al. eds., 9th ed. 2014).

[16] Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1221 (1985).

[17] *See* Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 660 (2001) ("Economic analyses of law have tended to ignore intent doctrines, focusing on rules framed in terms of the actor's conduct."). *But see* Keith N. Hylton, *The Theory of Penalties and the Economics of Criminal Law*, 1 REV. L. & ECON. 175, 182–84 (2005); Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 430–37 (2007); Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 769–77 (1993); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1247–49 (1985). Professor Gary Becker suggests that intent may be relevant as a proxy for the elasticity of supply of crimes with respect to punishment. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 194 (1968).

[18] Posner, *supra* note 16, at 1221–25. Professor Louis Kaplow asserts that "understanding donors' motives is extremely important in formulating estate and gift tax policy." Louis Kaplow, *A Framework for Assessing Estate and Gift Taxation*, *in* RETHINKING ESTATE AND GIFT TAXATION 164–204, 176 (William G. Gale et al. eds., 2001).

constitutional doctrine and has a regrettably ubiquitous presence in the daily news, this lack of attention is conspicuous.[19]

In showing how fruitful a law and economics approach to intentions can be, I argue for a scholarly agenda that incorporates other-regarding motivations into law and economics analyses more generally. Although it is common to assume that only self-interest determines the "utility" of different choices for an individual, this assumption is not necessary for the law and economics approach. Indeed, the assumption of self-interest has been criticized from both within and without economics as providing an inaccurate description of human psychology.[20] These criticisms helped motivate the field of behavioral economics, which incorporates insights from psychology into economics.[21] Although some of these insights have migrated from the economics literature to law and economics scholarship, not all have.[22]

Behavioral economics has been most influential on legal scholarship through its studies about the mistakes people make in pursuing their goals. However, there is another branch of the behavioral economics literature that has received much less attention from legal scholars: the branch examining how individuals care about the effects of their actions on other people. Individuals with such other-regarding concerns are said to have "social preferences,"[23] such as a taste for altruism, animus, or an aversion to inequality.[24] Although this approach may at first appear to be

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[19] Economic models can incorporate a wide variety of motivations, such as a desire to fit into identity categories. *See* George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715, 727–32 (2000).

[20] *Cf.* Colin F. Camerer & George Loewenstein, *Behavioral Economics: Past, Present, Future*, *in* ADVANCES IN BEHAVIORAL ECONOMICS 3, 27–29 (Colin F. Camerer et al. eds., 2004).

[21] *See* Sendhil Mullainathan & Richard H. Thaler, *Behavioral Economics*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 437–42, 437 (James D. Wright ed., 2015).

[22] For an early argument in favor of behavioral law and economics, see generally Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

[23] Matthew Rabin, *The Experimental Study of Social Preferences*, 73 SOC. RSCH. 405, 414–19 (2006).

[24] *See* Camerer & Loewenstein, *supra* note 20, at 27. For an empirical approach to inequality aversion, see Dirk Engelmann & Martin Strobel, *Inequality Aversion, Efficiency, and Maximin Preferences in Simple Distribution Experiments*, 94 AM. ECON. REV. 857, 863–66 (2004). For an analysis of the effect of prosocial preferences on legal rules, see generally Michael D. Gilbert & Andrew T. Hayashi, *Do Good Citizens Need Good Laws? Economics and the Expressive Function*, 22 THEORETICAL INQUIRIES IN L. 153 (2021).

a radical departure from economic orthodoxy, in fact it retains the core apparatus of rational choice.[25]

In this Article, I apply simple models of social preferences to analyze the effects of animus and, in so doing, illustrate an approach for the economic analysis of intentions more generally.[26] I assume that an individual has the intent to bring about a consequence if that consequence is motivationally significant to her. Formally, this amounts to saying that the consequence gives her positive utility.[27] I will say more later about why it makes sense for my purposes to limit "intent" to cover only consequences that are motivationally significant, rather than those that are the natural and probable results of an action.[28] After all, the legal term "intent" often covers this second, larger set of consequences.[29] For now, I only note that the idea that a consequence is intended if it is motivationally significant corresponds to an intuitive and popular understanding.[30] Moreover, this definition is easily incorporated into economic models, which can facilitate its widespread adoption by other scholars working in this area. Adopting this formalism also makes it possible to compare my results with others in the law and economics literature because it is a definition consistent with those adopted by leading law and economics scholars Steven Shavell and Louis Kaplow.[31]

In Part I, I explain how to incorporate animus into law and economics. I highlight the thorny normative questions that arise for scholars devoted to welfarism. Specifically, the question of

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[25] The formal differences between models with and without social preferences are largely illusory. Joel Sobel, *Interdependent Preferences and Reciprocity*, 43 J. ECON. LITERATURE 392, 431 (2005).

[26] Judge Guido Calabresi has advocated for a research agenda that explores other-regarding concerns; this project is a contribution to that agenda. Guido Calabresi, *Of Altruism, Beneficience, and Not-for-Profit Institutions*, *in* THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION 90–116, 114 (2016).

[27] Another approach to modeling intentions comes from the literature on "psychological game theory." *See generally* Peter H. Huang & Ho-Mou Wu, *Emotional Responses in Litigation*, 12 INT'L REV. L. & ECON. 31 (1992). The social preferences approach preserves the separation of individuals' preferences and the institutional context and thereby facilitates an evaluation of the institutions themselves.

[28] *See infra* Part I.B.

[29] *See infra* note 53.

[30] *See generally* Kimberly Kessler Ferzan, *Beyond Intention*, 29 CARDOZO L. REV. 1147, 1152 (2008) (describing the "conventional view of intentions" as one that "identifies intended results by their motivational significance.").

[31] Kaplow, *supra* note 18, at 176–77. Shavell assumes that a party "desires" a result if it raises her utility; she "intends" a result if she desires it and acts in a way that she believes raises the probability of that result coming about. Shavell, *supra* note 17, at 1247.

how to account for animus-based utility is a vexing one.[32] In Part II, I revisit the law and economics of deterrence under the new assumption that actors are motivated by animus. The analysis reveals a surprisingly useful role for damages—rather than fines or hard treatment—as a deterrent. The analysis also suggests a novel deterrence scheme for hate crimes that I call "solidarity deterrence." In Part III, I turn my attention from the animus of private actors to the animus of public officials in the equal protection context. I show how courts can screen for improper motives on the part of public officials, and I offer a proposal for how public officials seeking to credibly convey the legitimate public purposes motivating their actions can do so. The solution involves bundling any action or legislation that burdens a vulnerable group with a form of compensation to the group that an actor with an animus motive would be unwilling to provide.[33] By focusing on actions actually taken by public officials, rather than assertions of intent, an economic approach sidesteps some of the most difficult concerns about the role of intent-based analyses in constitutional doctrine, allowing animus to play an ongoing role in constitutional law but placing it on more solid evidentiary footing.

I. ECONOMICS AND ANIMUS

In this Article, I argue that law and economics should direct more attention to animus and to other-regarding concerns more generally. This argument proceeds first by confronting methodological and normative concerns about moving beyond the traditional assumption of self-interest. The second step of the argument is to demonstrate how making even a small change to the set of motivations that people have can yield new insights into old problems and open new vistas for law and economics analysis.

A. Caring About Others

The notion that people care about the well-being of other people and sometimes take actions that are intended to help or hurt them—for reasons not ultimately reducible to self-interest—would hardly seem to need proving. Neither, one would think,

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[32] *See* Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211, 212 (2002) (noting that when the assumption of wealth maximization is "relaxed, analysis becomes more complicated, requiring value judgments about how much weight to give to preferences that have a controversial ethical footing and unclear social consequences").

[33] State legislation bundling a compensatory rider with the inequality-generating legislation could violate the "single subject rule." *See* Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 812 (2006).

would the proposition that other-regarding motives are important enough in social life to be taken into account by the law. Speaking of our social dispositions, Adam Smith wrote: "How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it."[34]

Yet other-regarding concerns have long been absent from economic analysis,[35] and it is primarily with the development of behavioral economics as a subdiscipline that economists have begun to study our interest in—and the utility we derive from—others' well-being.

Some of the earliest contributions to the theoretical literature on other-regarding preferences simply amended individuals' utility functions to account for the consumption enjoyed by other people.[36] To illustrate with an example, consider Maria, who has just won $1 million in a lottery, and her brother Juan. Predicting what she will do with her $1 million requires understanding what she values. If Maria cares only about her own consumption of material goods, then her preferences will depend only on her own wealth. We can represent Maria's preferences with a mathematical function—a utility function—given by $u(w)$, which takes on higher values as w increases but probably at a decreasing rate, so that each successive dollar of wealth is worth a little less to Maria than the dollar before. If these are her preferences, she will keep all the money for herself.

It might occur to Maria that her newfound wealth could make family gatherings a little awkward because of the yawning gap between her standard of living and her brother's. She might prefer that Juan be wealthier to ease that discomfort. In that case, her preferences might be represented in the following way, where w_M denotes Maria's wealth and w_J denotes Juan's wealth: $u(w_M) + \alpha w_J$. The variable α in this case reflects just how much Maria cares about Juan's wealth relative to her own. If α is positive, then Maria is happier as her brother gets richer and will be more likely to share some of her winnings with her brother. Conversely, if α is negative, then Maria would prefer that her brother

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[34] ADAM SMITH, THE THEORY OF MORAL SENTIMENTS part I, § I, ch. I, ¶ 1(Knud Haakonssen ed., Cambridge Univ. Press 2004) (1759).

[35] *See* Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 12 (1992).

[36] *See generally* Hugh Dalton, *The Measurement of the Inequality of Incomes*, 30 ECON. J. 348 (1920).

be made poorer, and we would expect that Maria will keep all her winnings for herself.

There are a variety of ways that Maria's preferences about Juan's wealth might vary with the circumstances. One possibility is that α is positive when Maria is wealthier than Juan but negative when Maria is poorer than Juan.[37] These preferences would be consistent with caring about equality. Moreover, it could be that the magnitude—and not only the sign—of α depends on whether Maria or Juan is wealthier. For example, Maria might have a stronger preference for redistribution between her brother and herself when she is the poor one rather than when he is.[38] Adding yet another wrinkle, it could be that Maria's interest in Juan's wealth depends on what she thinks Juan's preferences are. For example, she may want to see him made better-off only if she thinks that he wants to see her made better-off, in which case the α in Maria's utility function would depend on her beliefs about the value of α in Juan's utility function.[39] There is evidence that people feel this way. People are resistant to wealth redistribution when the beneficiary of the redistribution is made "better-off" only because she is envious and getting a bigger piece of the economic pie satisfies her envy.[40] Not all preferences, it appears, are viewed equally.

There are a number of implications of social preferences. For example, social preferences have been studied by economists for how they affect compensation in labor markets.[41] There is also a strand within the public economics literature studying other-regarding preferences and their effect on the efficiency of taxation and spending.[42] That literature has shown how the optimal system of tax and redistribution is affected both when individuals

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[37] *See, e.g.*, Gary Charness & Matthew Rabin, *Understanding Social Preferences with Simple Tests*, 117 Q.J. ECON. 817, 823 (2002) (discussing "difference aversion").

[38] *See id.* at 823–24. These preferences reflect a concern for relative wealth. Professor Richard McAdams discusses this phenomenon at length. *See generally* McAdams, *supra* note 35.

[39] For research on interdependent preference models, see generally Andrew Postlewaite, *The Social Basis of Interdependent Preferences*, 42 EUR. ECON. REV. 779 (1998).

[40] *See* Matthew Weinzierl, *Welfarism's Envy Problem Extends to Popular Judgments*, 108 AM. ECON. ASS'N PAPERS & PROC. 28, 30–31 (2018).

[41] For example, workers' satisfaction with their income depends on how it compares to other workers'. *See, e.g.*, David Card, Alexandre Mas, Enrico Moretti & Emmanuel Saez, *Inequality at Work: The Effect of Peer Salaries on Job Satisfaction*, 102 AM. ECON. REV. 2981, 2992–98 (2012).

[42] *See, e.g.*, LOUIS KAPLOW, THE THEORY OF TAXATION AND PUBLIC ECONOMICS 110 (2011).

derive utility from their *relative* consumption in society[43] and when they exhibit altruism or jealousy.

A good example of the fruitfulness of modeling these preferences is Professor Louis Kaplow's work on charitable giving, which has demonstrated that it remains optimal to subsidize charitable giving even when people are altruistic.[44] Professor Richard McAdams has written at length about "relative preferences," arguing that people often are motivated to position themselves in a particular place within certain social hierarchies, defined by reference to consumption or activity levels.[45] This "ladder climbing," done for its own sake, is socially wasteful because of its zero-sum nature.[46] Professor Ward Farnsworth has provided a nuanced analysis of enmity and whether it weighs in favor of damages rather than equitable remedies.[47] Ultimately, Farnsworth argues that although enmity can sometimes be a force for good, depending on its "origins and expression,"[48] it should be ignored by courts in fashioning remedies because of the practical difficulty in distinguishing between good and bad enmity.[49] Economists Tilman Klumpp and Hugo Mialon explore the implications of animus (which they call "hatred") on strategic interactions in a game-

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[43] *See* Michael J. Boskin & Eytan Sheshinski, *Optimal Redistributive Taxation When Individual Welfare Depends upon Relative Income*, 92 Q.J. ECON. 589, 599 (1978).

[44] Louis Kaplow, *A Note on Subsidizing Gifts*, 58 J. PUB. ECON. 469, 473 (1995).

[45] McAdams, *supra* note 35, at 48. Following this line of scholarship, see Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 773–94 (2008); and Lior Jacob Strahilevitz, *Absolute Preferences and Relative Preferences in Property Law*, 160 U. PA. L. REV. 2157, 2159–65 (2012).

[46] McAdams, *supra* note 35, at 55–59. Relative preferences can generate similar predictions to models of animus but are importantly different. McAdams distinguishes inherently conflicting relative preferences, which is the case with animus, with "relative preferences that do not conflict because one of the conditions of inherent conflict is absent." *Id.* at 49–55. On one particular kind of negative relative preference, envy, see Guido Calabresi, *An Exchange About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553, 556 (1980); and Gary S. Becker, *A Theory of Social Interactions*, 82 J. POL. ECON. 1063, 1088–90 (1974). Beginning with Gary Becker's seminal book, originally published in 1957, a very large economics literature on discrimination has developed. *See generally* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971).

[47] *See generally* Farnsworth, *supra* note 32. For other analyses of the relevance of emotions or hard feelings on negotiation, bargaining, and remedies, see Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 391–420 (1999); and Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 2006–10 (2001).

[48] Farnsworth, *supra* note 32, at 213. Enmity is generally regarded as an unconstitutional basis for public actions. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 69, 78–79 (1996).

[49] Farnsworth, *supra* note 32, at 240–45.

theoretic framework[50] and identify some of the general implications for deterring hate crimes that I discuss at length in Part II.

Kaplow's, Klumpp and Mialon's, McAdams's, and Farnsworth's work should be just the tip of the iceberg in terms of scholarship on other-regarding preferences, but in fact they are among the rare examples of the fruitfulness of studying this topic. For other-regarding preferences to be generative of a significant body of scholarship, it is important to be able to model such preferences so that the formal analysis that characterizes the economic approach to law can be used. Reducing other-regarding concerns to tractable mathematical formalisms will necessarily flatten the underlying psychology and require subtle and modest interpretation to avoid overclaiming, but these formalisms will also result in greater transparency and precision in the analysis of other-regarding concerns. Moreover, as I demonstrate in this Article in the case of animus, it can suggest new ways of approaching old problems.

All of this is to say that it would be desirable for law and economics scholars to exploit research on social preferences, even if the law itself took no notice of our motives and intentions, because doing so generates better models of individual behavior in the shadow of the law than models based solely on wealth maximization. But, of course, the law does take notice of our motives and intentions. Fact finders are often tasked with determining whether an individual gave due weight to the interests of another person when they acted or whether that individual had improper motives.[51] To understand the properties of such legal rules, scholars must allow for the possibility that people are capable of the psychology that the law assumes they are. Given the empirical significance of other-regarding concerns as a motivation for action, and the fact that such concerns are a predicate for liability across a wide range of areas of the law, one would expect that law and economics would have more enthusiastically embraced models of social preferences and applied them in the many areas of law where intentions matter. And yet, this has not been the case. Intentions have, for the most part, been neglected by law and economics scholarship.[52]

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[50] Tilman Klumpp & Hugo M. Mialon, *On Hatred*, 15 AM. L. & ECON. REV. 39, 50–56 (2013).

[51] For example, see the discussion of punitive damages in Strausberg, *supra* note 11, at 278.

[52] *See generally* POSNER, *supra* note 15. Professor Jeffrey Parker has noted that "[i]n contrast with the legal scholarship, the existing literature on the economic analysis of crime largely neglects mens rea." Parker, *supra* note 17, at 743.

B. Preferences and Intentions

I say that an individual intends those consequences of her actions that are motivationally significant, which is to say, she prefers that those consequences are realized, and so those consequences increase the "choiceworthiness" of any action that brings them about. Formally, those consequences are included in her utility function with a positive valence. Defining intent in terms of motivational significance is methodologically convenient because it allows intent to be modeled in a way that fits comfortably within traditional economic theory, but it also focuses attention on the most important aspect of intent for economic purposes: the influence of intended consequences on behavior.[53] Shavell and Kaplow use a similar definition,[54] and Judge Posner asserts in his seminal work on the economics of criminal law that an outcome is intended if the actor derives a benefit from it,[55] which is to say that "[t]he intent relevant to criminal liability is the intent to bring about a certain (forbidden) object by investing resources in its attainment."[56] This is precisely the effect of including an outcome in an individual's utility function.

This definition of intention—the actuated desire to bring about a particular consequence—is narrower than it sometimes appears in the law. For example, the legal concept of intent is often extended to cover the "natural and probable consequences" of an individual's actions, not only those that are motivationally significant.[57] Some legal theorists might support a broader definition of intent along these lines. However, the fact that the legal definition of intent is broader than the definition used here is irrelevant for purposes of this Article. My ultimate interest is in the

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[53] Professor William Landes and Judge Posner offer three definitions of intent. *See generally* William M. Landes & Richard A. Posner, *An Economic Theory of Intentional Torts*, 1 INT'L REV. L. & ECON. 127 (1981). My definition corresponds to their second definition—that one wants to bring about a particular result. The authors assert that when a person "desires to inflict an injury, he is more likely to inflict it than when the injury occurs as a byproduct of other activity." *Id.* at 129. See Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255, 1268 (2014) (quoting THOMAS M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 13 (2007)), for a discussion of the "predictive significance" of intent in the First Amendment context.

[54] *See generally* Shavell, *supra* note 17; Kaplow, *supra* note 18.

[55] *See* POSNER, *supra* note 15, at 275–76.

[56] *See id.* at 276.

[57] *See, e.g.*, People v. Gonzales, 256 P.3d 543, 576 (Cal. 2011) (quoting People v. Prettyman, 926 P.2d 1013, 1020 (Cal. 1996)); *cf.* Ferzan, *supra* note 30, at 1157–58. Professor Claire Finkelstein argues that the dominant mens rea requirement is knowledge, but she notes that the crimes of conspiracy, attempt, and accomplice liability are offenses where culpability turns on the intent to violate a norm. Claire Oakes Finkelstein, *The Inefficiency of Mens Rea*, 88 CALIF. L. REV. 895, 913–14 (2000).

regulation of individuals for whom animus is, in fact, motivationally significant. An analysis of laws that assign liability on the basis of intent in this broader sense would require different formalisms than I adopt here and is outside the scope of the Article.

There are a handful of creative explanations for why it might be efficient for the law to punish people differently for the same harmful conduct depending on their intentions.[58] However, these explanations all take wealth maximization as the overriding purpose of the law; therefore, they give only an instrumental role to intentions in assigning criminal punishments.[59] This mode of explanation strikes many outside the law and economics tradition as counterintuitive and stands in stark contrast to other traditions in criminal law scholarship, such as retributivism, which justifies punishing actions taken with bad intentions more severely because those intentions are normatively significant in and of themselves.[60]

The leading account from law and economics about the role of intentions in the criminal law comes from Judge Posner, who argues that the primary purpose of the criminal law is to discourage people from engaging in nonconsensual transfers of wealth or utility.[61] Criminal law, with its use of hard treatment and imprisonment, is necessary to discourage nonconsensual transactions because of judgment-proof defendants, whose limited financial resources prevent tort law from providing a sufficient deterrent.[62] Because the purpose of the criminal law is to discourage people from transacting outside of a marketplace, the only reason to

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[58] *See* Parker, *supra* note 17, at 743 ("[T]he existing literature on the economic analysis of crime largely neglects mens rea."). Parker argues that the mens rea requirement facilitates wealth maximization. *Id.* at 769–77. Professor Assaf Hamdani argues that strict criminal liability is more desirable when the costs of ignorance are low. Hamdani, *supra* note 17, at 425. Professor Murat Mungan does not directly address mens rea, but he proposes an economic theory of crime that "conceptualize[s] [the mens rea] requirement as an information-exploiting device." Murat C. Mungan, *The Law and Economics of Fluctuating Criminal Tendencies and Incapacitation*, 72 MD. L. REV. 156, 218 (2012).

[59] *See* Alex Raskolnikov, *Irredeemably Inefficient Acts: A Threat to Markets, Firms, and the Fisc*, 102 GEO. L.J. 1133, 1149 (2014) ("[The] few scholars who do offer economic interpretations of intent treat it as an indicator of some objective state of events such as the magnitude of harm, various probabilities, or the cost of acquiring certain information." (first citing Posner, *supra* note 16, at 1221; then citing Shavell, *supra* note 17, at 1248; and then citing Parker, *supra* note 17, at 745–46)).

[60] *See* David Dolinko, *Some Thoughts About Retributivism*, 101 ETHICS 537, 555–57 (1991).

[61] *See* Posner, *supra* note 16, at 1205.

[62] *See id.* at 1195 ("The optimal damages that would be required for deterrence would so frequently exceed the offender's ability to pay that public enforcement and nonmonetary sanctions such as imprisonment are required.").

make punishments depend on intentions is because doing so helps the law steer people toward consensual market transactions.

On Judge Posner's account, intent is relevant in criminal law because the desire to harm another person helps identify coercive transfers, reduces the likelihood the actor will be convicted of wrongdoing, and makes it more likely that criminal punishments will be cost-effective at deterring the conduct.[63] For example, Judge Posner argues that the punishment for premeditated murder is more severe than that for manslaughter because the probability of apprehension for premeditated murder is lower.[64] The reason to punish acts motivated by animus is that such acts will encourage wasteful spending on protection by potential victims and wasteful spending on measures to overcome that protection by offenders.[65]

Professor William Landes and Judge Posner identify similar reasons to account for intentions in tort law. They assert that "[w]hen a person desires to inflict an injury, he is more likely to inflict it than when the injury occurs as a byproduct of other activity"[66] and that this kind of intent "identifies a class of activities in which the *probability* of injury (per victim) is higher than in the ordinary accident case."[67] But consequences that follow from actions have no effect on the likelihood that any particular outcome will occur. If I drive ninety miles per hour on a residential street, the probabilistic harm that this speeding imposes on other people is identical, regardless of whether I desire to bring about that harm or not. Outside the realm of magical thinking, only actions, and not states of mind, have causal power. Presumably Landes and Judge Posner mean that an actor's intent to bring about an injury is a good proxy for those unobserved causally relevant features of an actor's conduct that could bring about an injury. Thus, the fact finder who can ascertain that the speeding driver desired to harm pedestrians may be justified in thinking that the driver was engaged in other behaviors (e.g., swerving) that increased the probability of harm.

My project differs fundamentally from prior efforts to analyze intentions from an economic perspective. Because prior work

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63 *See id.* at 1221.

64 *See id.* at 1222–23.

65 *See id.* at 1198. Judge Posner's discussion of animus is limited to "crimes of passion" motivated by "interdependent negative utilities." *Id.* at 1196–97.

66 Landes & Posner, *supra* note 53, at 129.

67 *Id.* (emphasis in original).

understands efficiency in terms of wealth maximization,[68] the role of intentions in that scholarship is justified only instrumentally. I do not provide an explanation for how accounting for animus in the law might be wealth enhancing. Instead, I take as given that some people are motivated by animus and explore how this affects efforts to deter such people from antisocial behavior. My approach begins with the premises that people may be motivated by animus and that the law wants to discourage such motivations, but I do not make the normative argument that the law should try to deter actions motivated by animus.

In the next Section, I define animus and discuss—but not purport to answer—a thorny normative question that arises within law and economics when animus is a motivation: Should the satisfaction of an individual's animus toward another person be valued by society? Put differently, is animus a source of utility that the law should maximize like any other source of utility? My purpose in this Article is to put economics in service of the normative aims that society has decided upon, and those aims include discouraging conduct that is motivated by animus. My goal is the deterrence of hate crimes, not social-welfare maximization. However, for scholars who prefer to marry utilitarian or welfarist normative commitments to the positive economic analysis I provide here, the question of whether animus utility should "count" or not is front and center.

C. Definitions and the Normative Question

Suppose that individual i cares only about her own wealth w_i and about the well-being or utility of individual j, which in turns depends only on their wealth w_j. The weight that i assigns to j's well-being is given by the variable α. We can represent i's preferences with the following utility function:

$$u(w_i) - \alpha u(w_j)$$

The parameter α is i's animus toward j, so if α is positive, then i would prefer that j be made worse off.[69] This representation of i's preferences means two things. First, the preference for j to be made worse off is motivationally significant for i. Because i

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[68] *See* Posner, *supra* note 16, at 1195 ("[E]conomists equate efficiency with wealth maximization." (citing RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 66–107 (1981))).

[69] In writing down a utility representation, I assume that the agent is guided by deliberative, rational choice. Alternatively, the utility representation could reflect the way that people instinctively respond to environmental stimuli, in which case it could capture unconscious bias.

intends those consequences of an action that are motivationally significant for her, then whenever α is positive and i takes an action that makes j worse off, we shall say that i *intended* to harm j. Second, if preferences are understood, in their colloquial sense, to refer to attitudes about how one would like things to be, then the second implication of including j's well-being in i's utility function is that i considers herself better-off when j is made worse off.

If α is i's animus for j, then we can refer to the term $\alpha u(w_j)$ in i's utility function as her *animus utility*. Note here the subtle difference between i's preferences in this example and Maria's preferences from Part I.A. Whereas Maria cared about Juan's wealth, i cares about j's utility (into which wealth is only an input). This interest in j's well-being, as compared with just j's wealth, distinguishes animus from preferences for positional goods of the kind discussed by McAdams. To see the difference, suppose that Maria prefers to be richer than her brother Juan because her parents consider wealth a marker of success and she enjoys the status of being their favorite child. But she might not actually want him to be unhappy, and she might most prefer that she be richer than Juan but that he have other compensating advantages (e.g., meaningful relationships, work-life balance) that make him as happy as she is.

Including j's well-being in i's utility function will have normative implications for law and economics, which generally seeks to maximize social welfare.[70] Social welfare is simply the weighted sum of the welfare of individuals in society, where welfare is synonymous with the satisfaction of preferences.[71] The weights that go into the sum allow for some individuals to be given greater priority than others by society.[72] For example, a social-welfare function might assign a larger weight to the well-being of the poorest members of society. The extreme case, in which society assigns an infinitely greater weight to the interests of the least well-off, is known as a Rawlsian social-welfare function.[73] By contrast, a utilitarian social-welfare function gives equal weight to all individuals in society.[74] If we begin by adding the utility

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[70] Within law and economics there is also an influential view that the proper goal is wealth maximization. *See generally* POSNER, *supra* note 68.

[71] *See* MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS 5 (2012).

[72] *See, e.g.*, Amartya Sen, *On Weights and Measures: Informational Constraints in Social Welfare Analysis*, 45 ECONOMETRICA 1539, 1555 (1977).

[73] *See, e.g.*, *id.* at 1546.

[74] *See, e.g.*, Roger B. Myerson, *Utilitarianism, Egalitarianism, and the Timing Effect in Social Choice Problems*, 49 ECONOMETRICA 883, 883 (1981).

functions of i and j to arrive at the social-welfare function, the question arises: How much weight—which we denote γ—should be placed on i's *animus utility*?

$$u(w_i) - \gamma\alpha u(w_j) + u(w_j)$$

The utilitarian answer is that γ is equal to 1 because all utility is valued equally. Note that if α and γ both equal 1, then the utility of j drops out and social welfare depends only on i's wealth. One way of thinking about this result is that j's well-being imposes a negative externality on i that just equals j's well-being. At the other extreme is the view that γ equals 0, so that animus utility does not count at all.

Naturally, the question of the proper value for γ is controversial, and it has a very long pedigree. One view is that welfarism cannot accommodate restrictions on individual preferences in the aggregation process, or at least that doing so forsakes one of its most attractive features, which is its agnosticism about sources of value.[75] Restrictions of this sort are pejoratively labeled "preference laundering"[76] and are viewed by some scholars as ad hoc concessions to the unacceptable implications of a utilitarian framework.[77] There is a sort of democratic appeal to taking all citizens' interests and assigning them equal weight in the welfare calculus. If we move away from an equal weighting of interests, how does society decide what the weights should be? On the other hand, equal weighting can lead to seemingly intolerable conclusions, such as the idea that one should weigh the benefits to a murderer of committing a murder against the harm to the victim.

Many economists who have considered the question believe that the law does not value all utility equally, labeling these lesser forms of utility "illicit."[78] For example, Professor George Stigler asked: "What evidence is there that society sets a positive value upon the utility derived from a murder, rape, or arson? In fact the society has branded the utility derived from such activities as illicit."[79] Thus, both philosophers (such as Claire

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75 *See* ERIC RAKOWSKI, EQUAL JUSTICE 23–43 (1991).

76 ROBERT E. GOODIN, UTILITARIANISM AS A PUBLIC PHILOSOPHY 132–48 (1995).

77 *See* Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173, 195 (2000).

78 *See, e.g.*, STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 147 (1987); Shavell, *supra* note 17, at 1234.

79 George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970). For a general discussion of the inclusion of moral costs in welfare, see GUIDO CALABRESI, *Of Merit Goods: Commodification and Commandification*, *in* THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION 24, 27–29 (2016).

Finkelstein) and law and economics scholars (such as Al Klevorick) argue that we must have a normative theory of legitimate and illegitimate forms of utility to avoid repugnant policy conclusions.[80]

An alternative basis for devaluing illicit sources of utility can arise from within the social-welfare calculus itself. If some people prefer that other individuals not enjoy animus utility, then the social-welfare function may devalue animus simply because any benefit from animus utility satisfaction creates an offsetting harm to those who dislike seeing animus vindicated.[81] For example, suppose that bystander b cares just as much as i does about j's well-being but in the other direction, so that her utility is given by $u(w_b) - \alpha_b u(w_j)$ where α_B is negative, which is to say that she is altruistic toward j. If b's altruism just offsets i's animus, or if it pains b to know that i is enjoying j's suffering, then the social-welfare function would be given by $u(w_i) + u(w_j) + u(w_b)$ and the animus utility would fall out of the social-welfare function.

My analysis in this Article does not rest on any normative claim about the proper weight assigned to animus utility in the social-welfare function. I do, however, take it as descriptively true of the law that it does not value all forms of utility equally, and so an analysis of legal rules against that backdrop is worthwhile.[82] Readers who are sympathetic to arguments for devaluing animus utility may interpret the analysis as normative in nature. Other readers, who think that all preferences should be honored, can take the following analysis as answering the following question: If society excludes animus from social welfare, what is the best way to do that?

D. The General Problem

The problem of regulating actors based on their animus has a general structure. An actor can take some action that imposes

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[80] *See* Alvin K. Klevorick, *Legal Theory and the Economic Analysis of Torts and Crimes*, 85 COLUM. L. REV. 905, 910–11 (1985); Alvin K. Klevorick, *On the Economic Theory of Crime*, *in* CRIMINAL JUSTICE: NOMOS XXVII 289, 298–300 (1985); Finkelstein, *supra* note 57, at 903. Some argue that all other-regarding preferences should be excluded from social welfare. *See, e.g.*, John C. Harsanyi, *Problems with Act-Utilitarianism and with Malevolent Preferences*, *in* HARE AND CRITICS: ESSAYS ON MORAL THINKING 89, 97–98 (Douglas Seanor & N. Fotion eds., 1988) ("[I]t seems to me that even socially *desirable* external preferences should be *excluded* from our social-utility function." (emphasis in original)).

[81] There is evidence that people do not think that utility from envy should be vindicated. *See* Weinzierl, *supra* note 40, at 31.

[82] For examples of enmity leading to aggravated damages or a new cause of action, see Farnsworth, *supra* note 32, at 233–37.

a harm on a third party. The action generates two kinds of benefits for the actor, which I will call simply the "benefit" and the "animus utility," respectively. Social welfare does not include animus utility. Although the magnitude of the harm can be measured, the benefit and the animus utility cannot. This presents a problem for a regulator who would like to permit the action if the benefit is greater than the harm but not if the action is motivated by animus. If the actor commits the harmful act, we do not know whether it was because it generated a substantial benefit or because it was motivated by animus.

The key intuition for thinking about regulating in the presence of animus comes from recognizing that there is an advantage in *thwarting* an actor's animus motive by undoing, as closely as possible, the realization of the animus utility. If animus gains are denied to the actor, then she will only act out of permissible motives. The denial or disgorgement of animus utility is a special application of the general economic principle that complete deterrence can be achieved by eliminating the gains sought by the potential wrongdoer.[83] Implementing this logic requires identifying a punishment that is commensurable with the animus utility enjoyed by the actor, which requires a close examination of the nature of the animus utility itself.

There are two important distinctions shaping animus utility. The first distinction is between animus that is intrinsically directed at the victim herself and animus directed with the instrumental desire to hurt someone because it will achieve some other goal. Consider, for example, a politician who defames his rival. The politician might be motivated to win the election and would be just as happy to increase his odds of winning by any other means. In that case, the politician could be deterred from defaming his rival by imposing any punishment that reduces his likelihood of winning the election. On the other hand, the politician might want his rival to be harmed because of personal antipathy, in which case the harm is intrinsic to the animus utility. Hereafter, when I refer to animus it will be this second, intrinsic form of animus.

The second distinction tracks whether the actor cares about being the cause of the animus utility or not. Someone may want the object of her animus to be hurt, regardless of the cause, or she may want to be the one herself who hurts that other person. I will

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[83] Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 421 (1998) ("[C]omplete deterrence is accomplished by eliminating the prospect of gain on the part of the offender.").

refer to this second kind of animus as "malice." Malice utility is satisfied by the contribution that the actor herself makes to the harm suffered by the third party. This distinction between animus and malice is symmetrical with the distinction between altruism and "warm-glow giving" analyzed by Professors Jim Andreoni and Louis Kaplow in the context of charitable contributions.[84] An altruist is one who derives utility from another person being better-off.[85] A warm-glow giver derives utility if she herself makes that other person better-off.[86] In the case of malice, just as in the case of the warm-glow giver, the effects of the actor's actions are a source of utility to him independent of—although perhaps in addition to—any effect it has on the third party's overall well-being.

II. CRIMINAL DETERRENCE

In this Part, I analyze the problem of criminal deterrence for individuals motivated by animus. I begin by describing the deterrence problem in a general way and highlighting the economic costs and moral concerns that are implicated by the economic approach to deterrence. I then discuss hate crimes laws and the specific moral and legal issues that they raise.

In Part II.C, I describe two solutions to the problem of deterring animus-driven actors. I begin by explaining the usefulness of thinking about deterrence as a project of thwarting bad actors. If a potential wrongdoer knew that any harms she desired to bring about with her action would be undone, or perhaps even that her actions would have the perverse effect of making the object of her animus better-off, then this would deter her from taking the action in the first place. This framework raises issues of commensurability between motivations and punishments that may not be surmountable in all cases. But where punishments can be made to truly fit the crimes, there are significant benefits, particularly in very hard cases in which individuals are willing to die in order to inflict harm on others.

Then, I consider two deterrence regimes for animus-based harms. I first discuss the special role that damages can play as a deterrent because of two distinctive properties: (1) damages have a greater deterrent effect than fines for actors motivated by animus, making it easier to deter those who are nearly judgment-

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[84] James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464, 465 (1990); Kaplow, *supra* note 44, at 473.

[85] *See* Kaplow, *supra* note 44, at 473.

[86] *See id.*

proof, and (2) the deterrent effect of damages automatically calibrates to the amount of animus that an individual actor has, providing more deterrence for actors with worse motives. Damages thereby implement the logic of thwarting in an especially vivid way. Second, for individuals whose animus motive is too strong to be deterred by fines, hard treatment, and damages, I argue for a community-based deterrence regime, which I call "solidarity deterrence," under which the state pools economic resources and employs legal tools beyond the criminal justice system to thwart the realization of animus utility.

Under solidarity deterrence, animus-based harms trigger a communal transfer of resources to the individual victims of the harm or, more generally, the class of individuals who are the object of the actor's animus. Because the hateful actor is motivated to take an action by the harm it brings to an individual or a class of persons, the transfer makes the action counterproductive from the actor's perspective. Solidarity deterrence decouples responsibility for the harm from responsibility for compensating the victims and thereby raises a number of questions of morality, efficiency and administrability. At the same time, I argue that the benefits outweigh the costs and the risks in at least some cases.

A. Statement of the Problem

To illustrate the problem, it may be helpful to use a hypothetical. Suppose that Michael lives on a quiet residential street adjacent to an African Methodist Episcopal church. In late November, the church places a large crèche on its property, in compliance with local ordinances but over the opposition of Michael and the other residents who view the crèche as disrupting the local neighborhood aesthetic and obscuring desirable views from some of the homes nearby. Michael contemplates destroying the crèche late one evening. Let b be the benefits to Michael from reclaiming his sight lines and the neighborhood aesthetic. Let h be the harm to the church from destroying the crèche. If Michael is concerned solely with aesthetics and sight lines, the harm that is done to the congregation will be incidental to his choice. On the other hand, the harm itself could be part of the point; Michael may harbor animus for the church because of its religiosity or its racial composition. In that case, the distress to the church would increase Michael's desire to destroy the crèche. We can represent Michael's animus utility by αh so that he derives utility equal to $b + \alpha h$ from committing the destructive act. How can we deter Michael from destroying the crèche? Should we?

There are two answers to the latter question. The first answer is that yes, of course we should discourage Michael from destroying property that doesn't belong to him. This is the sort of nonconsensual, market-bypassing, transfer of value that Judge Posner holds out as a prime candidate for criminal deterrence.[87] An alternative answer is that we should only deter Michael from destroying the crèche if the harm to the church is greater than the benefits to him of doing so, because only in that case is the act inefficient. I will discuss the second case, which we might call selective deterrence.

The standard economic analysis of deterrence emerges from the simple premise that Michael will destroy the crèche only if the expected benefits are greater than the expected costs of doing so. Suppose that Michael will be liable for the act with probability π (representing the perceived probability of conviction), in which case he will receive punishment P. In that case, Michael will destroy the crèche only if $b + \alpha h > \pi P$. How should we set the deterrence variables π and P if we want to deter Michael from destroying the property unless b is greater than h? Much of the economic analysis of deterrence involves trading off the costs of increasing π and P with the deterrence benefits, because increasing either the size of the punishment or the probability of being punished will make intentional destruction of property less attractive.

Punishment, of course, only happens after a series of earlier events have taken place, so the variable π nests a collection of more "primitive" probabilities—namely the probabilities of detection, arrest, prosecution, and conviction. Increasing the probability of detection involves devoting greater resources to policing and monitoring, which are costly. Increasing the probabilities of arrest, prosecution and conviction entails greater costs in terms of law-enforcement time and prosecutorial resources. Manipulating these probabilities also raises a set of thorny cost-benefit questions, because regulators will generally want to increase the probability of convicting persons who have committed the prohibited act without increasing the likelihood of accidentally convicting the innocent.[88] There is a large literature in law and economics on the trade-offs involved in allocating resources to law enforcement.[89] A second branch of the deterrence literature is devoted to

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87 Posner, *supra* note 16, at 1205.

88 *See* Erik Lillquist, *Balancing Errors in the Criminal Justice System*, 41 TEX. TECH L. REV. 175, 175–77 (2008).

89 *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 49–56 (2000).

the costs and benefits of choosing *P*.[90] Monetary fines are generally viewed favorably because transfers of resources between individuals are close to costless, in the aggregate. The payer is worse off while the recipient of the transfer is better-off.

In contrast, imprisonment has significant social costs. The resources devoted to imprisoning someone cannot be deployed elsewhere and the incarcerated person cannot deploy her human capital to its best use.[91] In the United States, these costs exceeded $80 billion in 2010.[92] Moreover, estimates of the cost of incarceration typically do not include the additional costs borne by the families and communities of incarcerated persons.[93] Although incarceration is more socially costly than financial penalties, it may be the only deterrent available in cases where the offender is judgment-proof or where incapacitation is the only effective form of deterrence. Nevertheless, one of the general takeaways from the economics of deterrence is the desirability of financial penalties as a substitute for both incarceration and increased policing and enforcement.[94]

Moreover, the costs of increased policing, surveillance, and enforcement must be incurred regardless of whether anyone commits a crime, whereas the costs of punishment are only incurred if the punishment is imposed. This creates something of a paradox. If one is interested in minimizing the costs of punishment and the frequency of antisocial behavior, it might be ideal to set the punishment at an unreasonably severe level. If the punishment is effective at deterring all criminal behavior, then it will never actually have to be imposed, and so choosing the punishment that would be most costly if it were imposed may end up minimizing the actual costs of punishment. Of course, there are many reasons why these results cannot naively be translated into policy. For example, there are a number of noneconomic and deeply entrenched norms around punishment that rule out some

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90 *See generally* Shavell, *supra* note 17.

91 Incarceration in state prisons cost an average of $33,274 per inmate in 2015. CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUST., THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015, at 8 (2017).

92 MELISSA S. KEARNEY, BENJAMIN H. HARRIS, ELISA JÁCOME & LUCIE PARKER, THE HAMILTON PROJECT, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES 13 (2014).

93 One estimate has the total cost of incarceration in the United States exceeding $1 trillion per year. Michael McLaughlin, Carrie Pettus-Davis, Derek Brown, Chris Veeh & Tanya Renn, *The Economic Burden of Incarceration in the U.S.* 5 (Inst. for Advancing Just. Rsch. & Innovation, Working Paper No. AJI072016, 2016).

94 *See, e.g.*, Polinsky & Shavell, *supra* note 89, at 70 ("The use of fines should be exhausted before resort is made to the costlier sanction of imprisonment.").

of the simple prescriptions from this literature. It will be helpful to lay these out before discussing the effects of animus.

First, the prescription to set the punishment severity as high as possible faces practical, legal, and moral limitations. As a practical matter, it may not be possible to make the punishment severe enough to deter a highly motivated individual from committing a harmful act. In the case of financial penalties, this is the problem of "judgment-proofness." More generally, the benefits to an offender from a prohibited act may be too great to deter her with punishment. This finds its clearest expression in the case of a wrongdoer who anticipates dying in the commission of a crime. Such a person clearly will not be deterred by the death penalty and may not be deterred by even the more exotic and macabre punishments that we might dream up. This changes the calculus of punishment severity. It is one thing to threaten draconian penalties knowing that one will not have to impose them, but if one has to actually impose those penalties, then it will generally be optimal to choose something less than the most severe punishment.[95]

Second, there are legal and moral constraints on punishment severity that limit the set of feasible punishments. Well-settled constitutional and moral principles rooted in deeply held notions of culpability and responsibility limit the severity of punishment that can be imposed.[96]

Finally, there are fairness concerns with a sanction regime that substitutes lower monitoring and policing efforts for more severe punishments. In such a regime, only a small subset of the people who commit a particular infraction will be punished, and they will be punished more harshly than they would need to be if enforcement were perfect. These unlucky few bear the entire burden of a regulatory scheme meant to deter a vast number of crimes. This outcome may offend our sense of fairness even if the likelihood of being punished were not correlated with normatively arbitrary characteristics of the wrongdoers—such as race and class—as it is likely to be. Although these ex post inequities in punishment are irrelevant within an economic framework of social-welfare maximization, any policy proposal will have to respect these concerns about inequity in order to be taken seriously as a practical matter.

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[95] *See id.*

[96] *See* U.S. CONST. amend. VIII; John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 689 (2012) ("Because punishment is the community's formal expression of blame or condemnation through the imposition of sanctions, it is unjust to impose punishment in the absence of culpability.").

I have identified some of the economic, moral, and legal considerations that bear on the choice among forms of punishment and the choice between punishment severity and enforcement efforts. The discussion has been general, and not specific to punishments that depend on the actor's intentions. In the next Section, I discuss hate crimes and add to this list of general considerations, some of the objections that have been made to singling hate crimes out for enhanced punishment.

B. Hate Crimes

Forty-six states and the District of Columbia have statutes that provide for aggravated sentencing, civil remedies, or both, for hate crimes.[97] Many of these laws, passed in the late 1980s and early 1990s, cover race, ethnicity, religion, disability, and sexual orientation. Although there was a lot of optimism about the potential effectiveness of hate-crime statutes in the early years after their adoption,[98] there is little good evidence about their effectiveness.[99] Many scholars remain skeptical about the potential of hate-crime laws,[100] due in part to the enforcement challenges that hate crimes present. Underreporting is a common issue for hate crimes.[101] Hate-crime prosecution is also hindered by the difficulty of proving hate as a motive.[102]

Hate-crime statutes typically include enhanced criminal penalties for bias crimes, but only some include a civil cause of action—generally to encourage increased reporting.[103] However, civil remedies under these laws have proven difficult to obtain even when they are technically available.[104] The general omission

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[97] *See* MICHAEL SHIVELY, STUDY OF LITERATURE AND LEGISLATION ON HATE CRIME IN AMERICA 127–36 (2005). Federal civil rights statutes also punish certain acts motivated by animus. *See, e.g.*, 18 U.S.C. § 249.

[98] *See, e.g.*, Marguerite Angelari, *Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women*, 2 AM. U. J. GENDER SOC. POL'Y & L. 63, 67 (1994).

[99] *See* SHIVELY, *supra* note 97, at v ("The impact of hate crime law reform has not been subject to rigorous evaluation.").

[100] *See, e.g.*, James Morsch, Comment, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659, 660 (1991) ("[S]tate hate crimes statutes have largely failed to address the problem of racially-motivated violence.").

[101] *See, e.g.*, Sahar Fathi, *Bias Crime Reporting: Creating a Stronger Model for Immigrant and Refugee Populations*, 49 GONZ. L. REV. 249, 262 (2013) (discussing hate-crime underreporting in the context of immigrant and refugee communities).

[102] Morsch, *supra* note 100, at 667 ("The fact that an individual's motive lies peculiarly within his or her knowledge undermines the ability of prosecutors and plaintiffs to prove racist motive in hate crimes cases.").

[103] *See* SHIVELY, *supra* note 97, at 14–15.

[104] *Id.* at 36–37.

of private causes of action for hate-crime laws was due to concerns about nuisance suits.[105] Because of the evidentiary and procedural hurdles to obtaining damages, the primary tool for deterring hate crimes remains hard treatment.

Part of the challenge in deterring hate crimes comes from the fact that animus can have multiple origins. Work by Professors Jack McDevitt, Jack Levin, and Susan Bennett, has developed a typology of hate-crime offenders, by identifying four sets of motives for their animus.[106] "Thrill seekers" are motivated by the excitement of the crime but choose their victims in part because they believe that society is in different to the well-being of those victims and holds them in low regard.[107] "Defenders" believe that they are protecting spaces or institutions from the threat of outsiders.[108] "Retaliatory offenders" act out in response to perceived harms committed by members of the victim group.[109] Finally, "mission offenders" are motivated by ideology, typically racial or religious in nature.[110] Deterring individuals with animus requires a deterrent that answers to these different psychologies.

Setting aside the (unanswered) question of whether hate-crime laws successfully deter anyone, legal scholars have also questioned the morality of hate-crime legislation. Scholars operating in the retributivist strand of criminal law scholarship must justify aggravated punishments either in terms of the nature of the criminal act (i.e., the act itself is made worse by the actor's bad intentions) or in terms of the actor's culpability (i.e., the presence of animus makes the actor more morally blameworthy). These are controversial positions about which retributivists disagree. For example, Professors Heidi Hurd and Michael Moore argue that enhancements for hate crimes punish people for their bad character, and that it is wrong to do so.[111] They conclude that there is no compelling moral justification for hate-crime statutes and no place for such laws in a liberal society.[112]

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[105] *See* Morsch, *supra* note 100, at 664 n.36, 665 n.43.

[106] Jack McDevitt, Jack Levin & Susan Bennett, *Hate Crime Offenders: An Expanded Typology*, 58 J. SOC. ISSUES 303, 305–06 (2002).

[107] *Id.* at 305–08.

[108] *Id.*

[109] *Id.* at 306.

[110] *Id.* at 305–09.

[111] Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1135–38 (2004). On whether hate-crime laws punish people for beliefs, see, for example, Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015, 1044–45 (1997).

[112] Heidi M. Hurd, *Why Liberals Should Hate "'Hate Crime Legislation"*, 20 LAW & PHIL. 215, 231–32 (2001). *But see* Mohamad Al-Hakim, *Making Room for Hate Crime*

Other scholars from outside the retributivist camp have offered arguments in support of hate-crime legislation. Professors Alon Harel and Gideon Parchomovsky ground a justification for hate-crime legislation in equality and the idea that all persons are entitled to fair protection by society from criminal conduct.[113] They argue that some individuals are more vulnerable to criminal harms because they are members of targeted classes of persons, and this greater vulnerability means that the law must provide greater deterrence for acts that target them.[114] From the economics literature, Professors Dhammika Dharmapala and Nuno Garoupa argue that the penalty enhancements can be justified within an optimal deterrence framework because the aggregate social costs of hate crimes can be greater than for ordinary crimes, even if any individual act may not be made worse by a hate motive.[115]

C. Punishments that Fit the Crime

Animus increases the intensity of an actor's motivation to commit a harmful act, but it also enlarges the set of tools available for regulating the offender's conduct. The richer the set of an individual's motivations, the more points of leverage that the regulator has over her behavior. In this Section, I describe how a regulator should think about using these points of leverage to enhance deterrence of antisocial behavior.

1. A thwarting approach to deterrence.

Recall that the problem we are concerned with is an actor who may have more than one objective in committing a harmful act. In the example above, Michael wants to reestablish a congenial neighborhood aesthetic, but he may also enjoy harming the church itself. The optimal punishment must make Michael liable not only for the harm to the church (which is necessary for him to

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Legislation in Liberal Societies, 4 CRIM. L. & PHIL. 341, 348–49 (2010) (explaining that the impermissibility of such laws in liberal societies is overblown).

[113] Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507, 532–34 (1999).

[114] *Id.* (arguing for a "fair protection" paradigm that allocates protection in an egalitarian manner and thereby justifies harsher penalties for hate crimes). Harel and Parchomovsky's fair-protection paradigm provides a normative justification for the solidarity-deterrence scheme that I propose in Part II.C.

[115] Dhammika Dharmapala & Nuno Garoupa, *Penalty Enhancement for Hate Crimes: An Economic Analysis*, 6 AM. L. & ECON. REV. 185, 198–201 (2004). On the politics of hatred—and the role of politicians in fostering it—see generally Edward L. Glaeser, *The Political Economy of Hatred*, 120 Q.J. ECON. 45 (2005).

internalize the costs of his actions) but also for the benefits that he realizes and that society does not honor as a legitimate source of value—his animus utility.[116] The optimal punishment then has two functions: cost internalization and the deprivation of illegitimate gains.

This second function of the punishment is to *thwart* Michael from realizing objectives that society does not honor. If the punishment causes him to disgorge any illicit gains from an action, then his actions will only be guided by licit gains. There are many examples where this logic applies. For example, in the federal income tax context, there are a variety of common law doctrines that are meant to discourage taxpayers from entering into transactions for the tax benefits that the transaction will generate rather than for the profitability of the transaction.[117] The taxpayer will always argue that their true purpose for entering into the transaction was the expectation of profit. By denying the taxpayer outsized tax deductions of credits, the doctrines ensure that a taxpayer will only enter into the transaction if, in fact, she expects a pretax profit.

Or consider trying to deter an actor motivated by religious animus to burn down a nearby synagogue. If her objective in burning down the synagogue is to deprive the local Jewish community of common spaces for worship and community building as well as to cause fear and anxiety, then any response to the action that has the opposite effect—facilitating community building and alleviating anxiety and fear—will tend to thwart the actor's purposes and discourage her from taking that act in the first place. For example, a collective response to rebuild the synagogue, provide heightened security, and perhaps even make additional investments in upholding and protecting Jewish cultural and religious institutions will tend to deprive the actor's action of its efficacy and perhaps even cause it to have a counterproductive effect, from her perspective.

Alternatively, it could be that the actor's motive in burning down the synagogue is malice and that she has a personal grudge against the members of the synagogue. In the case of malice, where the actor is concerned not only with the harm to the victim but also with who the agent of that harm is, then truly thwarting

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[116] *Cf.* 18 U.S.C. § 247 (providing for heightened penalties against individuals who deface religious property because of its religious character or obstruct people engaged in the free exercise of religion using force or the threat of force).

[117] *See, e.g.*, Kirchman v. Comm'r, 862 F.2d 1486, 1492 (11th Cir. 1989) ("[T]ransactions whose sole function is to produce tax deductions are substantive shams.").

the actor involves making the actor herself provide benefits to the members of the synagogue. In that case, a community-based response to an act of vandalism will not thwart the actor. Only a sanction that requires the actor to be the agent of the Jewish community's rehabilitation will thwart her.

Thwarting actors with bad motives from acting on those motives means matching the punishment with the crime—not in the sense of imposing a punishment on the offender that resembles, in some sense, the nature of the harm borne by the victim, but by imposing a punishment that disgorges the benefit that the actor herself obtained from creating the harm. It is no surprise that the form and size of the punishment should be focused on the actor and not the victim when the goal is deterrence, since it is the actor's conduct that we want to control.

By creating a tight connection between the animus motive and the punishment, a thwarting approach to deterrence not only creates new points of leverage over perpetrators of hate crimes, it can help distinguish between crimes motivated by animus and those with other motives without undertaking costly fact-finding and meeting high standards of proof. Thwarting punishments have a "screening" effect, disproportionately and automatically imposing greater deterrence for people motivated by animus without proving that such animus exists. Proving the subjective intent necessary to convict someone of a hate crime has been a significant obstacle to successful prosecution of hate crimes with enhanced sentences. Thwarting punishments avoid this problem because they impose greater harms on people with animus than people without animus, effectively increasing the punishment for hate crimes.

Thwarting deterrence can also be effective against people who do not harbor animus but instead seek the approval of other people who do. Dharmapala and McAdams argue that some people who commit hate crimes are motivated by the desire to be esteemed by other people who have animus toward vulnerable populations—call them "haters."[118] Such a person might commit a hate crime because he knows that doing so will cause him to be held in high regard by the haters. A thwarting punishment will deter him, too, because he knows that by committing a hate crime his actions will actually redound to the benefit of the target group,

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[118] Dhammika Dharmapala & Richard H. McAdams, *Words That Kill? An Economic Model of the Influence of Speech on Behavior (with Particular Reference to Hate Speech)*, 34 J. LEGAL STUD. 93, 108 (2005).

having the opposite of the effect desired by the haters and earning the perpetrator their frustration—rather than their esteem.

Although the simple economic model used in Part II.A to illustrate deterrence of property crime can just as easily be used as a formal description of the decision to commit a violent crime, achieving deterrence through thwarting faces a couple of limitations in the context of violent crime that are important to highlight.

First, we may be concerned that violent crimes arise from emotional reactions rather than sober cost-benefit calculations, and therefore any scheme of deterrence that relies on people thinking about the consequences of their actions is likely to fail. But we need not assume that people actually perform the cost-benefit calculations described in the model for deterrence to work, only that, by being responsive to thwarting in the way we predict, they behave as if they perform those calculations. In Part II.C.3, I discuss some of the psychological mechanisms through which "solidarity deterrence," in particular, may thwart the desire to commit acts of animus-based violence.

Second, thwarting logic works by benefiting the object of a bad actor's animus. In attempting to deter homicides, this works only when the true object of the actor's animus is a class or group of people. When the actor harbors animus for only one person in particular, it is not possible to deter homicidal intentions by committing to benefit that person. But when a hate crime is motivated by animus toward a cause or a class of persons represented by that single person—such as is often the case in hate crimes where there is no personal connection to the victim—then thwarting is possible.

In the next Section, I explain how damages thwart actors who act out of animus or malice, and I evaluate damages according to the economic and moral issues raised in Part II.B.

2. Penalties and damages.

Returning to the example of Michael and the African Methodist Episcopal church, recall that Michael will destroy the crèche if $b + \alpha h > \pi P$. Suppose that we want to deter him from committing this act unless the illicit benefits are greater than the harm. We can ensure this will be the case by setting the punishment P^* to satisfy the following equation:

$$P^* = \frac{h(1+\alpha)}{\pi}$$

Setting the punishment at this level requires knowing his animus α, the magnitude of the harm h, and the probability of arrest and conviction π. Although the harm to the church of the destroyed property may be measurable (e.g., the cost of replacing the crèche), and the probability of conviction can be estimated using data on arrests and convictions, Michael's animus can only be determined through a costly process of evidence collection and discovery. Moreover, the additional prosecutorial burden of having to prove α may reduce the likelihood that Michael is convicted, thereby reducing the probability of conviction and further increasing P^*.

It is obvious from the equation for P^* that the punishment must be greater to deter someone motivated by animus than someone without animus. The question is *how much greater*? A small increase in animus increases the punishment necessary to deter them by $\frac{h}{\pi}$. Thus, when this fraction is large, such as in the case of very large harms or when there is a small probability of being punished, even a little bit of animus can have large effects on the punishment necessary to deter. For example, suppose that the benefit to Michael of destroying the crèche and the harm he would cause the church by doing so are both equal to $1,000. Assume that the probability of being punished is 10%. If Michael is without animus, then a financial penalty of $10,000 will deter him. If Michael's animus utility is equal to the harm caused to the church (that is, α equals 1) then the financial penalty necessary to deter him is $20,000. If he gets twice as much pleasure from the church's loss (α equals 2) then the financial penalty necessary to deter him is $30,000. As his animus increases, the penalty necessary to deter him spirals upward.

Thus, animus increases the cost of punishment along several dimensions. First, the optimal punishment requires determining α, which demands a costly adjudication process. Second, the difficulty of proving α may result in decreased probability that someone acting out of animus will be convicted for doing so, reducing π. Third, both the direct effect of α on P^* and any indirect effect that it might have through reducing π increase the size of the punishment necessary to deter Michael. As the punishment necessary to deter him increases, it becomes more likely that P^* will exceed either the defendant's ability to pay—raising problems of judgment-proofness—or legal and moral restrictions on maximal punishments, either of which would make it impossible to impose P^*.

When the optimal punishment cannot be achieved because of moral, legal, or judgment-proofness constraints, more people will commit the act and more people will need to be punished. If the nature of the punishment is imprisonment, these costs can be substantial. As the optimal punishment increases and bumps up against its maximal value, it may be necessary to devote more scarce resources to monitoring and enforcement. Moreover, the fairness concerns noted above become more acute, as an arbitrary subset of those who commit a bad act become subject to an especially severe punishment. Thus, the presence of animus will tend to increase the costs of deterrence and introduce more arbitrariness into the administration of punishment. As the costs of deterrence increase, the amount of wrongdoing will increase and the people who commit the bad act will be the ones with the greatest animus.

So far, I have been vague about the nature of the penalty that is imposed on Michael for his criminal act and, in particular, what is done with the proceeds from any fine that might be imposed. This, however, is a crucially important question because the analysis of the optimal punishment changes radically if Michael is assessed a fine that is transferred to the church. This is because paying the fine helps the very people he intended to harm. If the fine D is collected from Michael and transferred to the church, then the optimal penalty satisfies the following equation:

$$D^*(1+\alpha) = \frac{h(1+\alpha)}{\pi}$$

Now the fine D^* is multiplied by both 1 and the animus parameter α because when the fine is transferred to the church, it becomes the cause of two sources of disutility to Michael: the loss of wealth from paying the fine and the thwarting of his animus utility by transferring it to the object of his animus. Note also that because the term $(1+\alpha)$ appears on both sides of the equation it can be divided out, leaving $D^* = \frac{h}{\pi}$. If we compare D^* with P^* using the earlier example, we can generate the same deterrence with a $10,000 transfer from Michael to the church as we would get by imposing on him $20,000 of punishment by other means, such as a fine payable to the government or the monetary equivalent of hard treatment. In this way, a fine of $1 generates $\$(1+\alpha)$ dollars

of deterrence if it is transferred to the object of the actor's animus. There is of course a name for such transfers: damages.[119]

When thinking about deterrence, it is typical to focus just on the hardships that can be directly imposed on someone to discourage them from bad behavior.[120] However, there are hardships that produce benefits for someone that the offender dislikes, and these kinds of hardships not only reduce the social costs of punishment but also multiply the deterrent effect of the hardship.[121] This multiplier implies that a smaller amount of damages is required to achieve the same deterrent effect as a larger fine would. Lowering the financial penalty needed to deter someone makes it more likely that deterrence can be achieved in the face of practical, legal, and moral constraints on the maximal penalty, and it reduces the need to resort to costly monitoring and enforcement or hard treatment as a way of ensuring deterrence.

A real-world example of this logic in action was the so-called "People's Pledge," adopted by Elizabeth Warren and Scott Brown in the 2012 Massachusetts Senate race. The two candidates agreed to pay a penalty equal to one half of any funds spent by outside groups on television or internet advertising on behalf of their campaigns. The penalties were paid to a charity of their

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[119] This is far from a full characterization of the relative costs and benefits of damages and fines. For other considerations, see, for example, Landes & Posner, *supra* note 53, at 131. In this Article, I focus on deterrence, rather than social-welfare maximization. Professors Robert Cooter and Ariel Porat adopt a welfarist approach and consider the opposite case to animus in which the potential wrongdoer suffers some nonlegal harm (rather than animus benefit) that benefits other people. Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Sanctions from Damages?*, 30 J. LEGAL STUD. 401, 405–10 (2001). On their account, the "ideal" damages rule requires subtracting the nonlegal sanction cost from the amount of damages. *Id.* at 409.

[120] Professor Dan Kahan notes that "for those who commit serious criminal offenses, the law strongly prefers one form of suffering—the deprivation of liberty—to the near exclusion of all others." Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 591 (1996). Kahan argues that the unacceptability of alternative sanctions is "their inadequacy along the expressive dimension of punishment." *Id.* at 592. I argue that the expressive function of solidarity-based deterrence may be an advantage.

[121] The benefits of damages in multiplying incentives for actors with animus can be analogized to other insights in the literature about complementing negative punishments for bad behavior with positive incentives for good behavior. *See, e.g.*, Omri Ben-Shahar & Anu Bradford, *Reversible Rewards*, 15 AM. L. & ECON. REV. 156, 162–63 (2012); Murat C. Mungan, *Rewards Versus Imprisonment*, 23 AM. L. & ECON. REV. 432, 454–67 (2021); Giuseppe Dari-Mattiacci & Gerrit De Geest, *Carrots, Sticks, and the Multiplication Effect*, 26 J.L. ECON. & ORG. 365, 380–81 (2009); Donald Wittman, *Liability for Harm or Restitution for Benefit?*, 13 J. LEGAL STUD. 57, 71–73 (1984). Professors Klumpp and Mialon's work notes (without discussing) the multiplicative effect of damages. Klumpp & Mialon, *supra* note 50, at 56 n.12.

opponent's choice.[122] The agreement was publicized to outside groups in a letter from the candidates saying: "Your spending will damage the candidate you intend to help."[123] The pledge worked and has been adopted in other electoral races.[124] Warren herself proposed that her opponent in the 2018 Senate race agree to the same pledge.[125]

People trying to lose weight or achieve some other goal that requires overcoming temptation can exploit this multiplicative deterrent effect using the website stickK.com, founded by Professor Ian Ayres, Jordan Goldberg, and Professor Dean Karlan.[126] Financial stakes that a user posts on that website are forfeited if the participant fails to fulfill some obligation, like stopping smoking or exercising.[127] This forfeiture operates like a fine. However, at the user's option, the funds can be forfeited to a friend or foe, to a charity or an "anti-charity."[128] Why would one choose to forfeit the funds to a foe or a charity with a mission that one strongly disagrees with? As the website puts it: "Wouldn't it just kill you to hand over your hard-earned money to someone you can't stand? That's a pretty strong incentive to achieve your goal now isn't it?"[129]

In addition to multiplying the deterrence of a given financial penalty, damages have another considerable benefit: they automatically calibrate to the degree of the actor's animus. Recall first that setting the optimal financial penalty P^* requires knowing how much animus an offender harbors for the victim. The analysis of P^* assumed that an offender's animus could be discovered by a fact finder but that doing so was costly and subject to error. Since whether an individual is motivated by animus is unobservable and the individual has every incentive to mislead the fact finder, direct investigations into intent are costly and fraught.

But note that D^* does not depend on α at all. The reason is that although the optimal penalty increases with α, so does the deterrent effect of paying damages to the victim. An actor who

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[122] Dan Eggen, *Scott Brown, Elizabeth Warren Pledge to Curb Outside Campaign Spending*, WASH. POST (Jan. 23, 2012), https://perma.cc/7WP8-A88A.

[123] Tovia Smith, *Warren-Brown Pledge Keeps Attack Ads at Bay*, NPR (May 6, 2012), https://perma.cc/B2U8-MND9.

[124] *See, e.g.*, Nik DeCosta-Klipa, *Joe Kennedy and Shannon Liss-Riordan Signed a People's Pledge. Ed Markey Is Proposing Something Different.*, BOSTON.COM (Dec. 2, 2019), https://perma.cc/Y6YR-3TQQ.

[125] Victoria McGrane, *Warren Wants Another 'People's Pledge' Barring Outside Advertising*, BOS. GLOBE (Mar. 31, 2017), https://perma.cc/Y8F4-LSKH.

[126] *About stickK.com*, STICKK, https://perma.cc/L6QM-3GH7.

[127] *FAQ - Commitment Contracts - Stakes*, STICKK, https://perma.cc/336A-ENAJ.

[128] *Id.*

[129] *Id.*

harbors a great deal of animus will especially dislike making payments to her victim, while someone who harbors no animus will be indifferent about to whom she pays her fine. The same dollar amount of damages provides a large deterrent to actors with high values of α and less deterrence to actors with low values of α. Thus, damages automatically calibrate the deterrent effect to the magnitude of the actor's animus. Whereas assigning a longer prison sentence to someone with more animus requires knowing how much animus they have, damages do not have this informational requirement. Not having to prove α may also increase the probability of conviction, which can further lower the amount of damages needed to efficiently deter potential offenders.

This result about the deterrence benefits of damages adds nuance to Judge Posner's suggestion that damages are generally inadequate as a form of deterrence.[130] Judge Posner argues that the amount of punitive damages needed to provide optimal deterrence can be very large, taking into account the probability that the defendant will be found liable.[131] This is certainly true, but when an actor is motivated by animus, damages have a greater deterrent effect than a fine or hard treatment imposing the same nominal cost. This is not to say that damages will always be adequate as a deterrent. For sufficiently large harms, legal, moral, and judgment-proofness constraints may still be limiting and there will be a role for imprisonment. However, damages, including punitive damages, can play a role in a suite of instruments that discourage hate crimes and other conduct motivated by animus.[132]

How do damages hold up to philosophical criticisms about enhanced penalties for hate crimes? Although the amount of damages D^* is independent of the actor's animus, the *disutility* of paying that amount of damages does vary with an actor's animus. Paying a specified amount of damages is more unpleasant to an actor who has animus for the victim than an actor who does not. Does this mean that paying damages violates a principle of proportionality or basic fairness because it punishes people as a function of their character, which may be outside of their control? A full treatment of this question is beyond the scope of this Article, but it must begin by answering the question of what would be

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130 Posner, *supra* note 16, at 1201–05.

131 *Id.* at 1203; *see also* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 367 (2003).

132 Historically, tort damages have played a greater role in controlling crime. Posner, *supra* note 16, at 1203 ("Primitive and ancient societies . . . have relied much more heavily than has our society on a form of tort damages.").

required for a punishment *not* to vary with the offender's character. As explained above, the obligation to pay a specified amount of damages will impose greater harm on individuals with more animus. Does fairness then require that individuals with more animus pay *less* in damages? This is a counterintuitive conclusion, to say the least. If we reject this view and accept instead that the amount of damages should be fixed, then damages can both satisfy moral conditions of proportionality and fairness and provide greater deterrence for actors harboring more animus.

The example of damages illustrates the benefits of paying close attention to the plural motivations that people have when trying to deter them. For people motivated by animus, it is worth considering not just the harm that can be directly imposed on them but also the ways that we treat the objects of their animus. As I explain in the next Section, focusing on the well-being of victims as a point of leverage over offenders with animus does not just highlight the relative superiority of damages over fines, it suggests the possibility of alternative regulation mechanisms that eliminate the judgment-proofness concern entirely.

3. Solidarity deterrence.

On November 15, 2014, neo-Nazis marched through the streets of Wunsiedel, Germany.[133] They were greeted with placards thanking them for their presence.[134] This was not because the residents of the small town were sympathetic to them, but because the residents had pledged to make financial contributions to deradicalize former neo-Nazis for every meter the neo-Nazis walked.[135] The idea for the "involuntary walkathon" comes from the Center for Democratic Culture in Germany (ZDK Deutschland), which started Rechts Gegen Rechts (Right Against Right), "the most involuntary charity in Germany."[136] There is no conclusive evidence on the efficacy of these organized community responses, but they do appear to vex the organizers of the marches. A representative of ZDK Deutschland who follows the online platforms where neo-Nazis gather notes that "we see that

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[133] Elena Cresci, *German Town Tricks Neo-Nazis into Raising Thousands of Euros for Anti-extremist Charity*, THE GUARDIAN (Nov. 18, 2014), https://perma.cc/KT9T-K6YS.

[134] *Id.*

[135] *Id.*

[136] Elissa Stolman, *German Activists Are Trolling Anti-immigrant Groups*, VICE (Dec. 12, 2015), https://perma.cc/B27R-CYM5.

the neo-Nazis see our actions, discuss them, and think about how to handle it. I think they have no idea how to combat our actions."[137]

Return to the case of Michael. If a community group, or the local government, responded to his act of violence by compensating the people that he intended to harm, how much would that compensation need to be to deter him? If he values the well-being of the church according to the parameter α, the transfer T will need to satisfy the following equation:

$$\alpha T^* = \frac{h(1+\alpha)}{\pi}$$

Alternatively, we can write that $T^* = \frac{h(1+\alpha)}{\pi\alpha}$. We can now compare the amount of the community transfer with the amount of damages and the amount of a fine that would be needed to deter Michael. The transfer T^* is larger than the damages D^*; however, T^* may be larger or smaller than the fine P^*. Community transfers to his victims and monetary fines are two different ways of punishing Michael, and each of them generates different amounts of disutility. If Michael hates the members of the church more than he values his own self-interest, then it will be cheaper to deter him by helping the church. If he cares more about himself than he dislikes the church members, it will be cheaper to deter him with a fine than with a community transfer.

Like fines—but unlike damages—the optimal community transfer depends on knowing α. This reintroduces the costliness of ascertaining intent as a factor in deciding between community transfers and damages. However, note that as the actor's animus increases to very high levels, T^* is equal to D^* and it is no longer necessary to know α to set the optimal transfer. So, a community transfer of $\frac{h}{\pi}$ can deter people who are single-minded and care only about imposing harm on the affected group. On the other hand, community deterrence does not deter individuals acting out of malice. Malice is thwarted only when the actor herself helps the victim, so solidarity-based deterrence works for animus but not malice.

In the remainder of this Section, I describe in general terms how a scheme of community-based solidarity deterrence involving a transfer of T^* could deter acts from animus. I will describe the scheme in isolation, as though it were the only tool used for deterrence, but such a scheme could supplement other deterrence

[137] *Id.*

measures such as fines, damages, and incarceration—all of which might vindicate values other than those bolstered by the solidarity-deterrence scheme.

The idea behind solidarity-deterrence schemes is as follows. Whenever a harmful act motivated by animus is committed, prosecuted, and convicted, a monetary transfer from a "solidarity" fund is transferred to the victims or the class of persons that are the objects of the actor's animus. To the extent possible, the transfer should be directed to support and enhance the values, institutions, and concerns that that actor was motivated to harm. For example, consider the mass shooting on August 3, 2019, at a Walmart in El Paso, Texas.[138] The shooter appears to have been motivated by an anti-immigrant ideology.[139] In this case, the transfer from the solidarity fund could be used to aid Central American migrants by increasing access to legal services for immigration or providing income and social services support. If the shooter's purpose was to reduce the number of Central American immigrants in Texas, a more narrowly tailored response to thwarting his animus would involve transferring resources to increase the number of Central American migrants.

Properly calibrated, the solidarity scheme would be adequate to deter acts of animus and no transfers would ever have to be made. However, for the transfer scheme to be credible and to provide a salient deterrent, the solidarity fund should be funded in advance and perhaps be financed with a separate devoted revenue stream.[140] To deter all hate crimes the fund would need to be sufficiently large to deter the acts that impose the most harm on vulnerable groups and for which wrongdoers have the lowest likelihood of being apprehended and convicted.[141] For very large harms or crimes that are difficult to prosecute, this amount could be quite large. Therefore, a trade-off exists between the social costs of hate crimes and the cost of raising the funds to credibly deter them.

a) Collusion. The fact that compensation under solidarity deterrence comes from the community at large, rather than the offender, creates the incentive for collusion between the offender

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138 Romo, *supra* note 6.

139 *Id.*

140 It is important that the effects of the transfer fund be salient to potential wrongdoers. Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 38 (2017) ("Overall, the evidence [on criminal deterrence] suggests that individuals respond to the incentives that are the most immediate and salient.").

141 The minimum transfer is $\frac{h}{\pi}$, which is greater than the amount of harm itself and therefore will confer a windfall on the victim or victim class.

and the victims of the putative animus-based harm. For example, suppose that Michael's community has adopted solidarity deterrence. If Michael is sympathetic to the church members but he is able to convince a fact finder that he harbors animus for them instead, then he could commit a harmful act against the church that would trigger the solidarity fund disbursement, in which case both he and the members of the church would benefit at the expense of the community.

This possibility raises the stakes for the fact finder's determination of Michael's animus. Moreover, the availability of funds to support vulnerable individuals or groups may also place pressure on jurors to make a finding of animus in potential hate-crime circumstances or encourage prosecutors to charge individuals under hate-crime statutes. The adjudication of these claims will be a costly and imperfect process, but these costs must be weighed against the benefits of deterring what might otherwise be undeterrable crimes.

b) Group punishment and matters of fairness. There is a natural comparison to be made between solidarity deterrence and group punishment. Under solidarity deterrence, everyone suffers a little (by financing the solidarity fund) to provide compensation to the victims of animus harms. Under group punishment, a collection of people is punished even if they are not culpable under conventional criminal law standards.[142] The threat of group punishment is generally justified by the claim that members of the group are in a position to monitor and discourage wrongdoing by people with whom they are in close proximity,[143] but the practice is controversial and fundamentally at odds with retributivism. Nevertheless, group punishment has historical precedents and is used even now in certain circumstances.[144]

Professor Daryl Levinson has argued that "the optimal target of liability is not [always] the wrongdoing injurer but rather some

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[142] *See* Thomas J. Miceli & Kathleen Segerson, *Punishing the Innocent Along with the Guilty: The Economics of Individual Versus Group Punishment*, 36 J. LEGAL STUD. 81, 88–96 (2007) (analyzing when group punishment is efficient).

[143] *Id.* at 99–100.

[144] This approach is adopted by the Israeli Defense Force through the punitive destruction of the homes of Palestinian suicide bombers. Efraim Benmelech, Claude Berrebi & Esteban F. Klor, *Counter-Suicide-Terrorism: Evidence from House Demolitions*, 77 J. POL. 27, 29 (2015). The deterrent effect of such policies is controversial, with some arguing that the net effect of punishing innocent individuals to deter bad actors only results in more terror incidents. *Id.* at 30. For evidence that such policies can deter terrorist activities, see *id.* at 33–35. The possibility of harming innocent individuals to achieve some other end brings into sharp relief the difference between consequentialist and deontological moral theories. I do not attempt to resolve those differences here.

other individual, institution, or group that is well situated to monitor and control the wrongdoer's behavior and can be motivated to do so by the threat of 'indirect' liability."[145] He gives as an example the tragic use of this tactic in World War II, during which the Nazis confronted resisters in occupied territories who were willing to die or be tortured for their cause and responded by imposing collective punishment on the civilian population in order to compel submission from resisters.[146] Levinson observes that "insurgents had to bear the moral costs of their acts of resistance. Willingness to sacrifice one's own life to the cause was one thing; willingness to sacrifice the lives of one's countrymen, neighbors, and family was another."[147] Professor Sarah Swan has analyzed the related concept of "conjugal liability."[148] She describes one-strike policies in public housing, which result in the eviction of families for the acts of individual members.[149] The idea behind the ordinances is to provide "maximum incentives to tenants to prevent, discover, and remedy' the drug or criminal issues of household members."[150] "In general, conjugal liability is meant to harness the potential of one spouse to serve as a source of discipline for the other."[151]

But the group punishment analogy is not a close one. Solidarity deterrence is more efficient than group punishment. First, whereas group punishment collects resources from the community to impose costly punishment on a subgroup, solidarity-based deterrence collects resources from the group to benefit a subgroup. Thus, the solidarity scheme has lower social costs—which only involves monetary transfers—than group punishment, which imposes hard treatment. Moreover, solidarity deterrence can be justified to people who pay into the fund but are not generally victims of hate crimes from a contractarian perspective. No one knows from behind the veil of ignorance whether they are likely to be the object of animus on the basis of identity characteristics. And there already appears to be some appetite for

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145 Daryl J. Levinson, *Aimster and Optimal Targeting*, 120 HARV. L. REV. 1148, 1148 (2007).

146 Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 409 (2003).

147 *Id.* On the effectiveness of collective reprisals, see *id.* at 409–10.

148 Sarah L. Swan, *Conjugal Liability*, 64 UCLA L. REV. 968, 1019–36 (2017).

149 *Id.* at 1002–04.

150 Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 847 (2015) (quoting Reply Brief for Dep't of Hous. and Urb. Dev. at 12, Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125 (2002) (No. 00-1770)).

151 Swan, *supra* note 148, at 1021 (citing Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 27–28 (2012)).

providing social insurance to the victims of hateful acts. Consider, for example, the taxpayer-funded September 11th Victim Compensation Fund.[152] Second, in terms of basic fairness, although it is arguably true that the beneficiaries of the solidarity fund are being used instrumentally to deter the animus-motivated actor, the fact that the group is being made better-off takes some of the teeth out of this concern. The group is only being used for the purpose of deterring animus harms against itself.

c) Public vs. private action. Providing public solidarity-based deterrence for religious groups would likely run into constitutional challenges. Could private individuals organize to fund a similar scheme that would not implicate state action? Happily, it is common enough for regular citizens to respond to episodes of animus-based violence by making contributions of money, time, and resources to support the communities affected by these acts.[153] If private citizens already do this, is it necessary to have a compulsory government transfer scheme? Will solidarity-deterrence regimes crowd out these private actions? If they do, is that a bad thing?

The spontaneous outpouring of public support that happens in the wake of hate crimes differs from solidarity deterrence. First, a solidarity regime's purpose is deterrence. Private sentiments of support for victims of animus crimes are complex but generally include a desire to compensate or console—however imperfectly—the victims rather than serve as a means of deterring future acts of animus. This distinction is important because if the purpose of the support is compensation, then the form of compensation will take its cues from the preferences of the victims. In many cases, such as where the effect of an animus crime is death, private transfers will be incommensurable with the harm borne by the victims. If the goal of the transfers is deterrence, however, then the form of the transfers must depend on the preferences of the wrongdoer, which may allow for greater commensurability between the transfers and the underlying harms. Without agreement on purpose, it is unlikely that spontaneous community transfers will be calibrated in form or magnitude to deter potential offenders.

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[152] For a description, see *September 11th Victim Compensation Fund*, SEPTEMBER 11TH VICTIM COMP. FUND, https://perma.cc/4LWD-PNNB.

[153] *See, e.g.*, *National Center for Victims of Crime*, NAT'L CTR. FOR VICTIMS OF CRIME, https://perma.cc/U2NU-U8XC; *Victim Connect Resource Center*, VICTIMCONNECT, https://perma.cc/J2BV-YDCM.

For example, suppose that Smith, motivated by animus against migrant workers, murders three such workers. The lives of those three particular people will be irreplaceable to the people who loved them. On the other hand, Smith may have been quite indifferent about precisely whom he murdered, so long as they shared the trait of being migrant workers. Indeed, recent high-profile hate crimes seem to have this characteristic, whereby there is no personal animosity between the wrongdoer and the victim. The only reason that the victims were targeted was because they were members of a class that was the object of the animus. In such cases, it may be possible to match the solidarity-based response with the harm intended by the wrongdoer. If Smith's aim is to reduce the number of migrant workers, then providing resources to support any migrant worker or facilitate the entry of more migrant workers as a result of Smith's crime will thwart his intentions, generating a deterrent that is commensurable with his intended harm.

There are other reasons to think that solidarity deterrence will be more effective than spontaneous private outpourings of support.[154] The first is predictability. Private support for victims of animus-based harms varies depending on idiosyncratic features of the harm, such as how the harms are reported in the media and how sympathetically the victims are viewed. The same animosity that motivated the harm may exist, in a more muted form, in the population at-large so that private transfers may be more limited when the victims are marginalized minority groups.

The social meaning of solidarity transfers is also different than private, spontaneous transfers. Because the focus of solidarity deterrence is on the wrongdoer, transfers to targeted individuals or groups are made instrumentally to deter actors motivated by animus. The entire scheme is based on the view that it is wrong to target individuals or members of a group for harm out of animus. For this reason, solidarity-deterrence schemes express social disapproval of animus-based harm. They single out for special condemnation the particular wrong of desiring to harm a victim not because it is instrumental to achieving another end but because of a bare desire to harm that victim.[155] In the same way that

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[154] Private donations can have mixed effects on communities that have been affected by tragedy. Elizabeth Williamson, *A Lesson of Sandy Hook: 'Err on the Side of the Victims'*, N.Y. TIMES (May 25, 2019), https://perma.cc/WPN8-LJ3W.

[155] Some scholars disagree that this bare desire to harm is either necessary or sufficient to make an action wrong. *See, e.g.*, DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 139 (2008).

discriminatory public statements might create expressive harms through what they suggest about the unequal status of persons in society, solidarity-based deterrence may have expressive value both as a communication about fundamental equality before the law and as a manifestation of civic solidarity against animus.

This expressive function of solidarity deterrence may have its own, independent, deterrent effect. As discussed in Part II.B, many perpetrators of hate crimes are motivated, in part, by the belief that society approves of their actions. Thrill seekers tend to choose their victims because they believe that society does not value them equally with others, and defenders believe that, in committing hate crimes, they are simply doing what others are too afraid to do. A public deterrence scheme, funded at some cost by the community, has the potential to be a salient repudiation of these views.

Individuals motivated by hate would seem to be the hardest to deter. From an economic perspective, this strong motivation for antisocial behavior will generally raise the cost of regulating their behavior. However, the presence of animus also provides another point of leverage over their conduct. By helping the people that the bad actor intends to harm, it may be possible to deter such bad actors. An analysis of the animus motive reveals that damages may have an underappreciated role in deterring bad actors, both because they multiply the deterrent effect of penalties and because they automatically calibrate to the amount of the bad actor's animus. Acknowledging animus opens the door to a novel solidarity-deterrence scheme, under which the wrongdoer's aims are thwarted by a community response to advance the interests of the group that the wrongdoer intends to harm.

III. UNCONSTITUTIONAL ANIMUS

Although the reach of law and economics is long, some of the most important constitutional questions of the day—such as those surrounding religious freedom, voting rights, or the equal protection of minorities—have been mostly beyond its grasp.[156] As a result, law and economics has been largely silent on the

[156] This is, of course, not to say that there have not been important contributions by law and economics scholars to the study of constitutions, such as those coming out of the public-choice tradition. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 63–84 (1962). For a more contemporary example analyzing state constitutions, see Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 712–20 (2010).

questions associated with some of the deepest fault lines in law and politics. Perhaps this is as it should be. Law and economics scholarship has historically been guided by the totalizing goal of wealth maximization, which solves difficult questions about the ranking and commensurability of different values by ignoring their differences. It is unsurprising, then, that in the realm of constitutional debate, where battles are fought over the fundamental principles for ordering society, enthusiasm for subsuming all of those concerns under the umbrella of wealth maximization has been muted.

But even in constitutional law, economic analysis can play a useful role as a servant rather than as a master. Economics qua social science asks: Given a set of objectives, what is the most efficient way of achieving those objectives and how can legal institutions be designed to account for the incentives and constraints that individuals face?[157] As an analyst, the economist takes society's goals as she finds them and puts economic reasoning and empirical methods to use in helping the lawmaker achieve those goals.[158]

In this Part, I use economics in this "servant" tradition. In particular, I focus on how the difficulties associated with determining whether government acts were motivated by animus can be resolved using a law and economics–based approach.[159] I do not attempt to explain whether constitutional prohibitions on certain discriminatory lawmaking help maximize social wealth or social welfare (I don't know if they do). Neither do I evaluate whether animus *should* be a feature of constitutional equal protection analysis.[160] Instead, I take as given that government acts are constitutionally suspect if they are motivated by the desire to harm

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[157] *See* MILTON FRIEDMAN, *The Methodology of Positive Economics*, *in* ESSAYS IN POSITIVE ECONOMICS 3, 3–7 (1953) (describing the framework of normative economics as opposed to positive economics).

[158] In related work, I describe how facts-and-circumstances tests should be structured so that courts can draw credible inferences from the evidence. *See generally* Andrew T. Hayashi, *A Theory of Facts and Circumstances*, 69 ALA. L. REV. 289 (2017).

[159] For an example of legal scholarship analyzing whether a particular piece of legislation was motivated by animus without using a law and economics model, see Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1206–18 (2020) (arguing that animus motivated the Prison Litigation Reform Act).

[160] For an overview of the role of intentions in constitutional doctrine, see generally Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016); Calvin R. Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1 (2007); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297 (1997). For a history of judicial review of forbidden purposes, see Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1795–1859 (2008).

some group of people, and I use economic analysis to provide insights to distinguish between laws motivated by animus and those with a legitimate public purpose.

Animus is only one of several illegitimate government purposes. Others include racial balancing[161] and excluding a category of persons because they are presumed to be inferior.[162] But animus is different, resembling a motive more than an intention. Scholarship on forbidden legislative intentions has tried to distinguish between intentions, purposes, and motives. Professor Richard Fallon, for example, argues that bad legislative intentions (which are directed at the proximate goal of the law) have constitutional implications but that motives (which relate to the values that the goal vindicates) do not, except as far as these motivations inform intentions or act as evidence of intentions.[163] Yet animus does have constitutional significance.

A. The Equal Protection Significance of Animus

In this Section, I describe the relevance of animus in equal protection jurisprudence.[164] Understanding exactly what animus means in that context and how it operates to invalidate government actions is necessary to implement an economic approach that maps to the doctrine. Unfortunately, the doctrinal significance of animus as a motive for government action remains ambiguous even as it has increased in importance in recent years.[165]

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[161] *See, e.g.*, Univ. of Cal. Regents v. Bakke, 438 U.S. 265, 319–20 (1978) (holding that using racial quotas violates the Fourteenth Amendment); Miller v. Johnson, 515 U.S. 900, 920 (1995) ("Race was . . . the predominant, overriding factor explaining the General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-black populations. As a result, Georgia's congressional redistricting plan cannot be upheld unless it satisfies strict scrutiny." (citing Johnson v. Miller, 864 F. Supp. 1354, 1372, 1378 (S.D. Ga. 1994))).

[162] *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) ("Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." (quoting Frontiero v. Richardson, 411 U.S. 677, 684–85 (1973) (plurality opinion))).

[163] Fallon, *supra* note 160, at 536.

[164] The framework is relevant in other areas of constitutional law where intent matters, such as First Amendment jurisprudence. *See, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1729; Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 427–32 (1996) (defining "impermissible motive" in the context of First Amendment jurisprudence).

[165] *See* Susannah W. Pollvogt, Windsor*, Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204, 208 (2013) ("[T]he concept is inherently enigmatic, as the Court itself has yet to present a unified theory of animus. Rather, the Court's precedent presents a shifting, incomplete portrait."). Courts have sometimes downplayed evidence of animus, and, in the employment discrimination context, such evidence is

We can contrast the effect of animus with the effect of discriminatory intent. Facially discriminatory laws are evaluated using the "tiers of scrutiny" approach.[166] Under this approach, laws are subject to more rigorous review depending on the nature of the discriminatory classification. Laws that discriminate on the basis of race,[167] religion,[168] national origin,[169] or alienage,[170] are subject to "strict scrutiny," which requires that the law be narrowly tailored to advance a compelling government interest.[171] Discriminatory laws that classify on the basis of gender[172] or birth legitimacy[173] are subject to "intermediate scrutiny," which requires that the law be substantially related to the furtherance of an important government interest.[174] Laws that provide for differential treatment on the basis of other classifications are given "rational basis" review, which requires only that the law be rationally related to a legitimate government interest.[175]

In the case of laws subject to strict or intermediate scrutiny, the burden of proving constitutionality is assigned to the government.[176] Under rational basis review, constitutionality is presumed, and the plaintiff must disprove all legitimate justifications for the law, regardless of the actual motivations for enactment.[177]

Since *Washington v. Davis*,[178] courts will entertain equal protection challenges to laws that are facially neutral only if they have a discriminatory effect and the discriminatory effect was intended.[179] The Supreme Court has since clarified that proving this

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sometimes precluded under the "stray remarks doctrine." *See* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 523–24 (2018).

166 Ernest A. Young, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 75 LAW & CONTEMP. PROBS. 157, 157 (2012).

167 *See* Loving v. Virginia, 388 U.S. 1, 11 (1967).

168 *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963), *abrogated by* Emp. Div., Dep't. of Hum. Res. v. Smith, 494 U.S. 872 (1990).

169 *See* Oyama v. California, 332 U.S. 633, 640 (1948).

170 *See* Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

171 *See id.* at 375–76 (quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969)).

172 *See Miss. Univ. for Women*, 458 U.S. at 724.

173 *See* Mills v. Habluetzel, 456 U.S. 91, 98–99 (1982).

174 *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

175 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 565–66 (5th ed. 2015). The tiers of scrutiny have been criticized for being overly determinative of the outcome. Pollvogt, *supra* note 165, at 206–07.

176 CHEMERINSKY, *supra* note 175, at 699.

177 *See* Pollvogt, *supra* note 165, at 207 n.18 (citing FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993)).

178 426 U.S. 229 (1976).

179 *See id.* at 239. For a critical analysis of *Davis*, see Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L.

prong of an equal protection challenge requires showing that the adverse impact on a protected class was motivationally significant for the government actor and not just an incidental consequence.[180] If an official act was motivated by discriminatory intent, then the facially neutral law with discriminatory effects is subjected to the same scrutiny as if it were facially discriminatory. This holding places the heavy burden of proving subjective intent on would-be plaintiffs, sharply limiting the availability of relief for laws with "merely" discriminatory effect.[181]

Whereas discriminatory intent subjects a facially neutral law to heightened scrutiny, the legal significance of animus is murkier. Even as animus has grown in prominence in recent Court opinions,[182] fundamental questions are unresolved[183] due to uncertainty about: (1) how to define animus, (2) what counts as evidence of animus, and (3) the doctrinal effect of animus.[184] I will refer to these as the definitional question, the evidentiary question, and the doctrinal question.[185]

One of the narrowest definitions of animus is that it is "a form of malicious, subjective intent."[186] In *United States Department of Agriculture v. Moreno*,[187] the Court articulated the significance of

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REV. 36, 40, 111–14 (1977) ("I will propose the following principle: regardless of the motives underlying official action, the equal protection clause requires special scrutiny of governmental acts resulting in disproportionate impact whenever such impact is reasonably attributable to race."). *See generally* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494 (2003) (exploring the question of whether Equal Protection jurisprudence precludes the constitutionality of Title VII when an action is grounded solely on disparate impact). Professor Daniel Ortiz has argued that intent primarily functions in equal protection analysis to allocate the burden of proof between the state and private actors. Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1118–19 (1989).

[180] *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 278–79 (1979). For a summary of disparate impact jurisprudence, see generally Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653 (2015).

[181] *See* Ortiz, *supra* note 179, at 1111–15.

[182] *See* Pollvogt, *supra* note 165, at 210 ("[A]nimus is alive and well and is poised to increase in importance in the pantheon of equal protection arguments.").

[183] For more on animus in constitutional doctrine, see generally Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018); and WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (2017).

[184] Pollvogt, *supra* note 165, at 208–10.

[185] Professor Pollvogt provides her own answers to these three questions. Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 924–30 (2012). On the evidentiary question, "[t]he cases instruct that there are essentially two methods: by pointing to direct evidence of private bias in the legislative record, or by supporting an inference of animus based on the structure of a law." *Id.* at 926.

[186] Pollvogt, *supra* note 165, at 209 (citing Pollvogt, *supra* note 185, at 924–25).

[187] 413 U.S. 528 (1973).

legislative animus in this way:[188] "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[189]

This definition of animus suggests the absence of any principled reason—only a "bare desire"—to disfavor or harm the affected group. This narrow interpretation of animus considerably limits its legal relevance because there will typically be reasons—however unpersuasive or idiosyncratic they may be—other than irrational prejudice for disfavoring a group. A broader definition of animus allows for motives other than mere prejudice, including animus arising from moral disapproval or fear. The distinction between these narrower and broader definitions of animus is subtle—too subtle to capture within an economic model. But the difference is important as a political and rhetorical matter. If animus is understood to derive solely from bigotry or hatred, then it becomes difficult for the Court to invoke it because doing so accuses public officials of immorality.[190]

The subjective nature of animus raises difficult evidentiary problems. Proving the presence of animus has historically invited courts to look for direct statements of hostility or bias by legislators but also to draw an inference of animus from the structure and function of the law.[191] For example, in *Romer v. Evans*,[192] the Court inferred the presence of animus from the overly broad nature of the law and did not find credible the legitimate justifications offered by Colorado in defense of the law.[193]

One might hope that proof (however obtained) of animus (however defined) would have predictable consequences within equal protection analysis, but even this doctrinal question has not been resolved. It seems clear that a law motivated only by animus

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[188] Chief Justice John Roberts adopted the subjective intent definition in *United States v. Windsor*, 570 U.S. 744 (2013). In searching for malice in the adoption of the Defense of Marriage Act, he could not conclude that the "'principal purpose' of the 342 Representatives and 85 Senators who voted for it, and the President who signed it, was a bare desire to harm." *Windsor*, 570 U.S. at 776 (Roberts, C.J., dissenting) (citation omitted) (quoting *id.* at 772 (majority opinion)).

[189] *Moreno*, 413 U.S. at 534 (emphasis in original).

[190] *See* Pollvogt, *supra* note 165, at 211.

[191] *See id.* at 211–12.

[192] 517 U.S. 620 (1996).

[193] *Id.* at 632 ("[The law's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

is unconstitutional, but beyond that the picture is murky.[194] In *Lawrence v. Texas*,[195] Justice Sandra Day O'Connor wrote in concurrence that when a law "exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws,"[196] what has been called rational basis with "bite."[197]

United States v. Windsor,[198] a case about the constitutionality of the federal Defense of Marriage Act, was not a case explicitly about legislative animus, but many commentators view it as an animus case.[199] Writing for the majority, Justice Anthony Kennedy wrote that "the federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[200] Professor William Araiza notes that this allowed Justice Kennedy to avoid answering the question: "To what extent and by what mechanism does a legitimate motive cleanse a law of the taint of animus?"[201]

The Court has not yet answered this question, and scholars have offered their own conclusions. Professor Susannah Pollvogt argues that animus operates as a silver bullet that is necessarily fatal to a law and that "poisons the well" from which states may draw legitimate purposes in defense of the challenged law.[202] Araiza—tracing the roots of animus doctrine back to the Founding and especially to nineteenth-century anticlass legislation jurisprudence—argues that the presence of animus should be a fatal constitutional defect, although he does not think that the law has gone this far yet.[203] Professor Dale Carpenter argues that a law should not be struck down on account of animus unless the animus "materially influenced" the government's decision.[204]

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194 *See* Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech*, 63 ARIZ. L. REV. 45, 62 (2021) ("Contemporary equal protection doctrine appears to disqualify government acts that are motivated solely by animus.").

195 539 U.S. 558 (2003).

196 *Id.* at 580 (O'Connor, J., concurring).

197 Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–19 (1972).

198 570 U.S. 744 (2013).

199 *See, e.g.*, Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 231–32 (2014); ARAIZA, *supra* note 183, at 65–75.

200 *Windsor*, 570 U.S. at 775.

201 ARAIZA, *supra* note 183, at 72.

202 Pollvogt, *supra* note 165, at 889, 904.

203 ARAIZA, *supra* note 183, at 11–28, 107, 109.

204 Carpenter, *supra* note 199, at 231–32.

In light of the definitional, evidentiary, and doctrinal ambiguities around animus in constitutional law, a precise mapping of law to an economic account is not possible. I offer instead an economic approach to animus that does not simply implement the doctrine—which is, after all, unclear—but that incorporates some of the doctrine's most important features while taking the ambiguity as license to provide a positive account that answers some of the open questions. My account assumes that courts do not want legislatures, conceptualized as a single corporate body, to act in a way that is consistent with affording a class of persons less regard or respect than others. The account suggests a simple mechanism for proving the absence of animus in the case of discriminatory laws, and it facilitates a flexible doctrinal role for animus that allows it to operate as either a fatal constitutional flaw or as a defeasible objection to the law that can be overcome by sufficient, legitimate government purposes.

B. Statement of the Problem

I begin by stating the animus problem in economic terms, and then explain how my formulation of the problem maps onto current animus doctrine. As discussed above, there is a lack of clarity about what exactly that doctrine is, and so my contribution in this Part is both to formulate the problem in a way that captures much of what is wrong with animus, while also providing a partial solution.

Consider a law that allocates some fixed public benefit, such as an appropriation for food stamps, between two groups i and j in the amounts f_i and f_j. Suppose that the two groups are already endowed with wealth in the amounts w_i and w_j.Congress's preferences about how to allocate the food stamps are given by the utility function:

$$u(f_i, w_i) + (1 - \alpha)u(f_j, w_j) + b(f_i - f_j).$$

Congress cares about the utility of each group, but it assigns weight $(1 - \alpha)$ to the utility of group j. If α is greater than 0, then group j is valued less than group i, and I say that Congress has animus for group j.[205] Suppose that Congress also derives some

[205] Note that this formalism captures the idea that Congress values one group less than another. One way of thinking about animus here, which doesn't track the doctrine perfectly, is that it fails Ronald Dworkin's "equal concern and respect" treatment by government officials. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1977). For the most well-known articulation of the central role of legislative intent or prejudice for equal protection norms, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL

benefit b from a law that allocates more food stamps to group i than group j. For example, this benefit could be reduced administrative or compliance costs resulting from imposing more stringent access limitations on group j. In general, this benefit represents any legitimate government purpose accompanying inequality in the allocation of food stamps.[206] Congress will allocate more food stamps to group i if there are either legitimate administrative benefits from doing so or if they harbor animus for group j. This is the crux of the problem. A court reviewing a law that creates an unequal allocation of food stamps cannot tell whether it is due to a legitimate government purpose or animus.

The court would like to discourage legislation that creates inequality deriving from animus but not inequality with a legitimate purpose.[207] Congress can either allocate food stamps equally between groups i and j—in which case the law will not be subject to an equal protection challenge—or choose its most preferred allocation of food stamps.

This model assumes that Congress and the courts are concerned with the overall well-being of groups i and j and not the allocation of food stamps itself. However, there may be circumstances in which Congress harbors animus toward one group with respect to only one kind of good. For example, access to the legal institution of marriage may be allocated unequally because, for reasons of moral disapproval, the weight that is given to the enjoyment of marriage rights by certain groups is less than the weight given to others. I discuss this possibility at greater length in Part III.C; but for now it suffices to say that this difference does not affect Congress's preferred allocation of the good, but it will affect the best way to discourage legislative animus.

It is important at this point to connect the formal setup of the problem to the discussion of the constitutional role of animus given in Part III.A. I begin with the definitional question. By formalizing animus with the parameter α, I have given it motivational significance, so this is an account of animus based on subjective intent, but only of a sort. Note that the actor whose

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REVIEW 135–45 (1980). A special case of this, which corresponds to the definition of animus used in Part II, is where Congress desires to harm group j and is captured by $\alpha > 1$. The screening logic that motivates the rest of the Article does not change in this special case.

[206] The allocation of food stamps that maximizes Congress's utility satisfies the following condition: $1 - \alpha = \frac{u_f(f_i, w_i)+2b}{u_f(f_j, w_j)}$.

[207] This approach tracks the judgment of the Court in *Windsor*. 570 U.S. at 772 (invalidating a federal statute whose "principal purpose is to impose inequality, not for other reasons like governmental efficiency").

objectives are described by the utility function above was described as Congress. Corporate bodies can take actions, but can they have preferences, intentions, and motives?

I think that the answer is no, but the question is contested, and fortunately economics allows us to be agnostic on that point (which I discuss in greater detail in Part III.D). There are two approaches to preferences in microeconomics.[208] The first approach treats preferences as real things that motivate choices. If these preferences have certain normatively desirable properties then the preference relation can be represented by a utility function.[209] The "preferences" of a corporate entity—and now we are no longer speaking about mental states—might then be understood as the result of individual preferences processed through some method of aggregation, such as a voting procedure. Although the preferences of the corporate body would find their origin in the preferences and motivations of the constituent members, the relationship between individual preferences and the preferences of the corporate entity is likely to be unpredictable.[210] The second approach begins with the choices of the actor. If the choices of that actor satisfy certain consistency conditions, then they can be represented by a utility function *as if* the actor had real preferences.[211]

What does this have to do with the definitional question? The economic setup allows a court to be concerned with whether the actions of a legislature are consistent with the presence of animus at the corporate level, which is to say with whether the imposition of harm on a group of people makes a legislative act more choiceworthy or not. This shifts the focus from the actions (including speech acts) of individual legislators to the actions of the legislative body. As a normative matter, this clearly relegates the motives of individual legislators to second-class status. The animus of individual legislators matters only insofar as it manifests in animus at the corporate level. This simplifies the analysis because we no longer have to come up with a theory of how individual animus traces through an aggregation process to taint the actions of corporate bodies; we simply ask whether the corporate body itself acts out of animus. Since animus is, on this account, a preference of the legislature, the evidentiary question is

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[208] *See* ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY 5 (1995).

[209] *See id.* at 9.

[210] For example, if preferences are aggregated using majority voting, then it is unlikely that the entity's preferences will be rational—specifically, transitive—even if all the individual preferences are rational. This phenomenon is known as the Condorcet Paradox.

[211] *See* MAS-COLELL ET AL., *supra* note 208, at 9–10.

answered by the choices of the legislature. The proof—or disproof—of legislative animus is revealed by the legislature's actions.

Is this attractive as a normative matter? Should courts care only about whether the legislative process results in behavior that is consistent with animus or not, and how would this approach differ from what might arise from subjective intent inquiries at the individual level? There are two consequences for judicial review of focusing on the choices of the legislature rather than expressions of intent by individual legislators. First, courts will view with skepticism any legislation that evidences different concern for the well-being of different classes of persons, even if there is no evidence that individual legislators harbored animus. Second, courts will, conversely, view favorably legislation that is consistent with a "taste" for equality, even if there is evidence of animus at the individual legislator level.

The definitional question is answered by reference to the motives of the legislature—animus is acting in a way that is consistent with assigning less weight to the well-being of certain groups. The evidentiary question is answered solely by reference to the actions of the legislature—animus is proven by the actions of the legislature. What about the doctrinal question of whether animus necessarily renders a law unconstitutional or whether a legitimate government purpose can redeem the law? The setup does not assume an answer to this question. Instead, it provides a framework for implementing an animus test regardless of the answer. In fact, we can ask a more specific question: For a given amount of animus, how important does a legitimate government purpose have to be in order to redeem the law? Will a showing of a de minimis, but legitimate, government purpose do the job or must the government benefit be sufficiently large that it outweighs any animus that is present? The approach I provide below gives the Court a tool for calibrating the required solution for a variety of answers to that question.

C. An Economic Approach

The Court's problem is similar to the problem faced by the lawmaker in Part II who is interested in deterring actors from engaging in activities when they are motivated by animus but not otherwise. The key insight in that context was that damages could play an important role in deterrence because they had a greater effect on people motivated by animus. The same insight can be used here: by allowing the Court to screen laws through

the use of compensatory damages, it becomes possible to deter legislatures from enacting laws based in animus.

1. The screening effect of compensation.

Consider again the situation in which Congress is choosing between an equal allocation of some good—which will certainly be upheld by a court—and choosing its most preferred allocation, which will be unequal if it either harbors animus for group j or if there are some legitimate benefits that accompany the inequality.

Suppose that Congress is compelled to transfer $\$T$ to group j if it allocates food stamps unequally. The net effect of this transfer, from Congress's perspective, is a loss of $\$T$ and a gain of $\$(1-\alpha)T$, for a net loss of $\$\alpha T$. Congress dislikes making this transfer by as much as it harbors animus for group j.[212] What is the effect of increasing T? Can it be used to ensure that no unequal law was motivated by animus?

Not quite. As the amount of animus α falls, the deterrent effect of paying compensation to group j also falls. As a result, it is impossible to set the transfer high enough to ensure that laws do not reflect any animus at all. Although it is not possible to ensure that all laws pass free of animus, as α shrinks, so too does the amount of inequality that animus generates. Figure 1 illustrates conceptually how the maximal amount of animus that exists in any law decreases as the transfer increases. For example, at a transfer of 19, no law will be passed in which the legislature values group j at less than 50% of group i. If the court is concerned with ensuring that Congress acts with some minimal level of regard for the well-being of group j, then it can do so by requiring a transfer of the appropriate amount.

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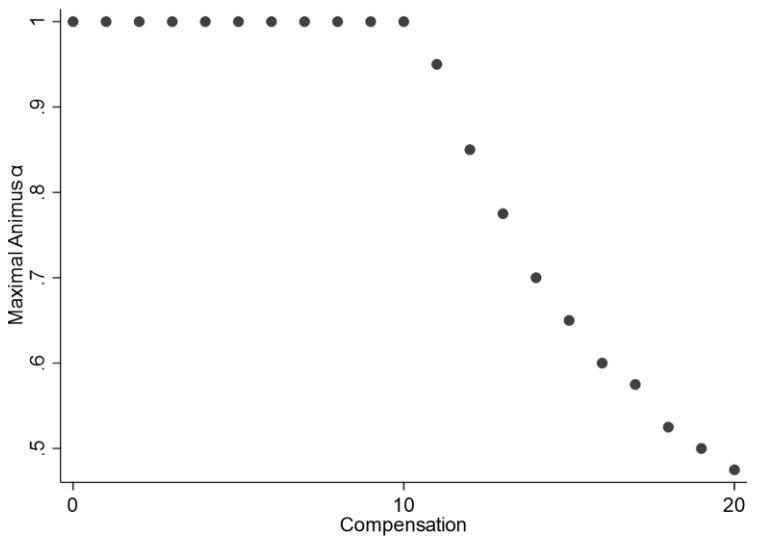
[212] The lawmaker will prefer to implement the unequal allocation f_i^*, f_j^* and make the transfer $\$T$ rather than allocate food stamps equally if $\alpha T \leq u(f_i^*) + (1-\alpha)u(f_j^*) + b(f_i^* - f_j^*) - (2-\alpha)u\left(\frac{f}{2}\right)$. The lawmaker's objective function can be aligned with the socially optimal one if the utility that goes to group j from the allocation is taxed away by the government.

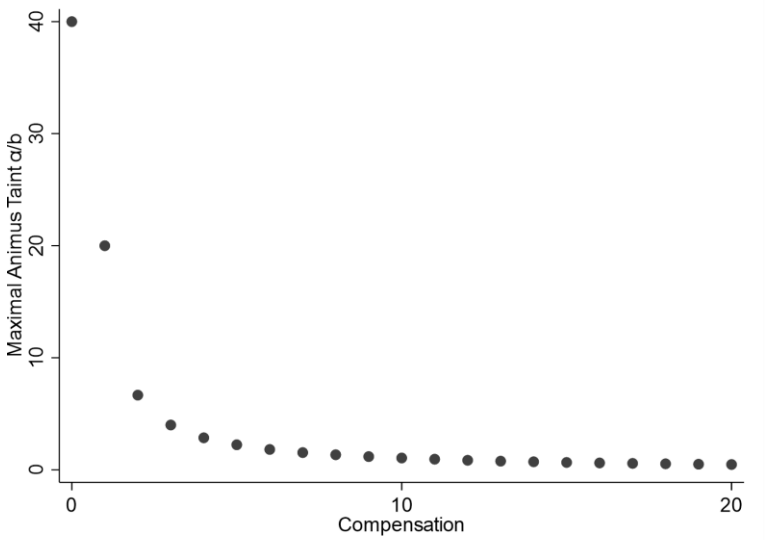
FIGURE 1: COMPENSATION AND ANIMUS



A compensatory transfer mechanism can also ensure that a law motivated by animus is redeemed by a legitimate government purpose. For example, suppose that the doctrinal rule is that a certain amount of animus motivating a law is permitted only if the amount of legitimate government benefit exceeds some threshold. We can represent the relative importance of these two motivations with the ratio $\frac{\alpha}{b}$, which is the animus of Congress toward group j divided by the marginal legitimate benefit of inequality. For example, a ratio of 2 reflects a lawmaker whose animus toward group j is twice the legitimate social benefit from inequality. I will call this ratio the "animus taint," which reflects the relative subjective motivations behind the law. If the ratio is sufficiently high, then animus played a much greater role than legitimate government purposes in motivating the law.

Quantifying Congress's preferences in this way allows for a more flexible weighing of motivations than the all-or-nothing approach under which a law is redeemed in the presence of a legitimate government purpose. Figure 2 shows the effect of increasing the compensatory transfer to group j on the maximum amount of animus taint among laws that are passed.

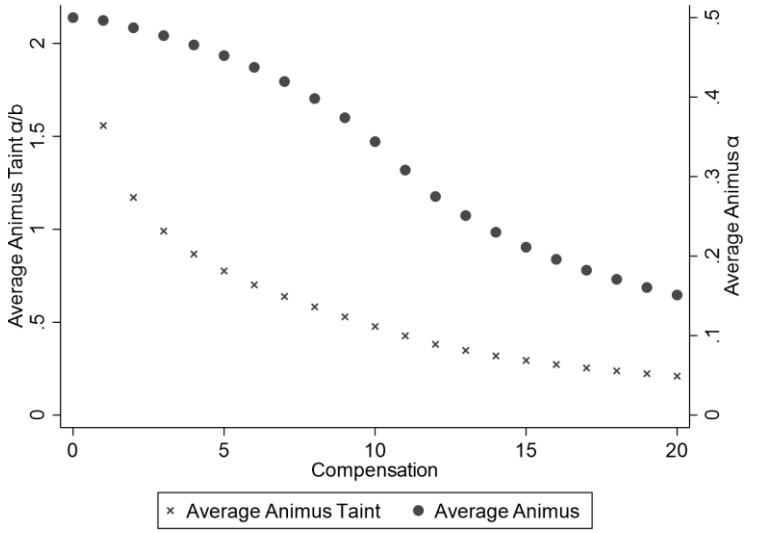
FIGURE 2: COMPENSATION AND ANIMUS TAINT



Whereas Figure 1 showed that increasing the compensatory transfer only begins to reduce the maximal amount of animus at large transfers, Figure 2 shows that compensatory transfers begin to reduce the maximal animus taint from the very beginning.

A constitutional rule prohibiting laws with more than a threshold level of animus or animus taint is a severe standard. An alternative rule might aim to ensure that the average amount of animus or animus taint among promulgated laws does not exceed some threshold. For example, Figure 3 below illustrates the average amount of animus and animus taint among laws that are passed depending on the size of the compensatory transfer. When it comes to the averages, the specific shape of the curves will depend on the statistical distributions of animus and legitimate government benefits, but the curves will always have a downward trend. Note that the size of the compensatory transfer necessary to ensure that no law exceeds a specified amount of animus or animus taint is larger than the transfer necessary to ensure that the average law does not exceed that amount.

FIGURE 3: COMPENSATION AND AVERAGE ANIMUS/ANIMUS TAINT



In this way, bundling compensatory transfers to a group that receives the short end of the stick under an unequal law can distinguish legislatures that are motivated by animus from those that are motivated by a legitimate government purpose. The scheme works in this way because transfers to the burdened group are more unpleasant for a lawmaker motivated by animus than a lawmaker that is motivated primarily by legitimate government purposes.

2. Clarifications and objections.

It is important to emphasize that compensatory transfers in this scheme are designed to deter public officials from treating certain persons or groups unequally out of animus. The transfers can be calibrated to either purge the taint of animus from legislative inequality or ensure that any taint is washed away by a sufficient amount of legitimate government purpose. For this reason, there is no necessary connection between the size of the transfer and either the material disadvantage experienced by group *j* from the unequal law or the size of the legitimate benefit created by the inequality. By contrast, other normative theories that require government compensation to classes of persons that are shortchanged by the legislative process tend to calibrate compensation by reference to one of these two amounts.

For example, one normative criterion for legislation is Kaldor-Hicks efficiency.[213] This requires that the move away from equality be justified because the legitimate benefits are so sufficiently great in magnitude that they can be used to compensate group *j* and make them better-off than they are under equality.[214] Thus, there is a close connection between the size of the legitimate benefits and the size of the transfer under Kaldor-Hicks efficiency but not under the antianimus scheme.

In fact, if the goal is to screen out animus motives, compensatory transfers do not even need to be made to the specific persons who are treated unequally. If the people who are treated unequally are members of a class for which the legislature harbors animus, then a mandatory transfer to any members of that class will have the desired deterrent effects on legislatures motivated by animus. For example, a prejudiced legislature will be deterred from making an unequal allocation that disadvantages an ethnic minority in one area of the law if, as a condition of doing so, it is compelled to make a transfer of resources to other members of the ethnic minority.

U.S. courts likely cannot compel governments to make appropriations as a condition of passing legislation that creates inequality between classes of persons, but they can interpret those appropriations as evidence of the government's intent. As the figures above illustrate, including a compensatory transfer will partially reveal the existence of any legislative animus and should affect a court's beliefs about legislative motives. Moreover, the failure to include compensatory transfers with discriminatory legislation—or subsequent repeal of a compensatory rider—should be viewed with suspicion, even in the absence of hostile public statements made by members of the legislative body. Since the cost of the transfers is small, and the benefit of having a law with legitimate benefits upheld by a court is likely to be significant, then a legislative body should be willing to make compensatory transfers to encourage courts to find an absence of animus.

Is providing cash compensation to those treated unequally akin to paying for the right to harm that group? This misunderstands the role that the compensation plays. If designed properly, it will not be worth it for a legislature motivated by animus to pass a discriminatory law. The effect of a compensatory rider is

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[213] *See* Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 66 (1990).

[214] *See* Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 10 (1982).

to allow a legislature to credibly signal that it is *not* acting with a discriminatory purpose, not to allow a legislature to act from a discriminatory motive so long as they compensate the group that is harmed. Thus, compensatory transfers have an expressive benefit. A legislature that includes a compensatory transfer with the passage of a discriminatory law acknowledges as valid the concerns of minorities about being devalued in the legislative process and puts its money where its mouth is in attempting to persuade minorities that their interests are given equal weight.[215]

Compensatory transfers make it possible for legislatures acting from legitimate purposes to credibly communicate the intentions of their laws, and in doing so they can enhance the perceived legitimacy of those laws.[216] Enhancing the legitimacy of the law is likely to have positive effects in general on the relationship between minority groups and the state and may result in better compliance and less suspicion and resentment of discriminatory laws.

For compensatory transfers to have this effect, however, the form of the compensatory transfer must be tailored to the specific kind of animus we are worried about. For example, I have been focused on the case in which we are worried that the legislature generally regards the well-being of one group less than another group. There are a variety of factors that go into well-being, and any one of those factors (including cash) can be used to make the targeted group better-off and deter legislatures from acting on animus. What if, however, the legislature does not devalue the overall well-being of one group but thinks that some groups are entitled to more of a particular good than another?

For example, the legislature might assert that it values all persons the same but that certain goods, such as the right to marriage, are more socially valuable in the hands of heterosexual couples than same-sex couples. Such a legislature will allocate more of such rights to heterosexual couples. Compensatory cash

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[215] Some scholars argue that certain forms of discrimination create expressive harms or are wrong by virtue of what they express. *See, e.g.*, Fallon, *supra* note 160, at 530 (arguing that when legislators act from bad intentions that give a law an "objective" stigmatizing expressive effect, then heightened scrutiny should be triggered); *see also* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1532 (2000); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–16 (1993). For some scholars, a law violates equal protection when it fails the government's obligation to treat each person with equal concern. *See, e.g.*, Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 13 (2000).

[216] *See* Schwartzman, *supra* note 12, at 206–11.

transfers in this scheme will not have any effect on the choice that the legislature makes about how to allocate the good, because cash is not a substitute from the perspective of the legislature for marriage rights. If we think it is wrong to have unequal distributional preferences for particular goods, then we can only deter the discriminatory lawmaker by requiring transfers of that good itself. Thus, it is harder for the government to credibly signal an absence of animus when the relevant inequality being policed is narrow or specific. For very particular goods—those for which there is no other substitute for marriage equality—there are no compensatory transfers possible.

This discussion has been motivated by a very simple model about the relationship between resources and well-being. Specifically, it has assumed that allocating fewer resources to a group of people is consistent with valuing their interests less than other groups. Sometimes the opposite argument is made, and in this case the scheme of compensatory transfers I have outlined will founder. Sometimes legislators argue that depriving a group of resources is actually in that group's interests. For example, suppose that a certain group—Group A—was denied unemployment benefits because, the legislators say, denying them these benefits will induce them to work harder to find gainful employment, the benefits of which they do not fully appreciate but are in their long-term interests.

On this account, the question is what justifies doing Group A this favor, rather than extending to everyone the "privilege" of being denied unemployment benefits. The legislature will resist compensating Group A because doing so would undermine the putative mechanism through which financial deprivation is meant to help them and because compensating everyone else who remains eligible for benefits is likely to be reasonably interpreted not as compensating them for a harm but amplifying their favorable treatment. Compensatory riders will not help a legislature credibly convey that they are acting for a legitimate purpose in this case. I think the cases are rare where one can plausibly argue that receiving a lesser share of some good is in one's interest, but when they do arise, the legislature will have to find ways other than compensatory transfers to signal their impartiality.

3. Examples.

The idea of compensating individuals who are adversely affected by changes in law is a familiar one. For example, under the Takings Clause, private property cannot be taken for public use

without just compensation.[217] But the history of government takings is tainted by the appearance of animus. Just compensation has not historically been enough, or of the right kind, to purge takings of this taint.[218]

In *Kelo v. City of New London*,[219] Justices Clarence Thomas and Sandra Day O'Connor injected language from equal protection doctrine into their dissents, expressing concerns that the heightened power of the government to take property for private benefit would likely impose a greater burden on low-income groups.[220] Between 1949 and 1973, governments have been five times more likely to use eminent domain to displace African Americans than other members of the population,[221] and advocates have argued that it has been used to target racial minorities.[222] These tendencies have been enabled by the expansion of the power to cover "blight" removal.[223] In several takings cases, plaintiffs have alleged animus on the part of the government as part of an equal protection claim that generally accompanies, but is analyzed separately from, the takings claim.[224] Although the Supreme Court has held that such "class of one" equal protection claims do not require an allegation of animus,[225] lower courts have not consistently applied this rule and some have in fact required an allegation of animus.[226]

How might the economic approach work in two equal protection cases confronting animus? In *Moreno*, the Court considered the constitutionality of § 3(e) of the Food Stamp Act of 1964,[227] which generally excluded from the food stamp program any

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217 U.S. CONST. amend. V.

218 *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 521–22 (Thomas, J., dissenting).

219 545 U.S. 469 (2005).

220 *Id.* at 521–22 (Thomas, J., dissenting) ("The consequences of today's decision are not difficult to predict, and promise to be harmful . . . . [T]hese losses will fall disproportionately on poor communities."); *id.* at 505 (O'Connor, J., dissenting).

221 Alison Somin, *Eminent Domain and Race*, THE FEDERALIST SOC'Y (Oct. 7, 2015), https://perma.cc/FV9B-HF7W.

222 Brief of Amici Curiae National Association for the Advancement of Colored People et al. in Support of Petitioners at 7, *Kelo*, 545 U.S. 469 (2005) (No. 04-108).

223 *See* Berman v. Parker, 348 U.S. 26, 32–33 (1954).

224 *See, e.g.*, Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 939 (Tex. 1998); Prater v. City of Burnside, 289 F.3d 417, 431–32 (6th Cir. 2002); Cnty. Concrete Corp. v. Township of Roxbury, 442 F.3d 159, 167 (3d Cir. 2006).

225 *See* Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

226 *See* Michael S. Giaimo, *Challenging Improper Land Use Decision-Making Under the Equal Protection Clause*, 15 FORDHAM ENV'T L. REV. 335, 335 (2004) ("The [*Olech*] decision was a mere five paragraphs long, and seemingly very straightforward, but it has prompted varied reactions and considerable disagreement in the lower courts.").

227 Pub. L. No. 88-525, 78 Stat. 703.

household with two unrelated individuals.[228] The Court held that the provision was not rationally related to the stated purpose of the Act, and the most plausible purpose appearing in the history of the legislation—animus toward hippies—could not constitute a legitimate government purpose.[229] If Congress wanted to persuade the Court that it had a legitimate purpose for its unequal treatment of related and unrelated families, it could bundle with the food stamp legislation another provision that provided, for example, direct income support to unrelated households below a certain income level.

In *City of Cleburne v. Cleburne Living Center*,[230] a Texas city had a municipal ordinance requiring a special use permit to operate a group home for individuals who were "mentally retarded."[231] The city denied a permit and the plaintiffs brought suit alleging unequal treatment.[232] The Fifth Circuit held that "mental retardation" was a "quasi-suspect" classification and that the ordinance failed to survive scrutiny.[233] On appeal, the Court overruled the Fifth Circuit on the standard of review but held that the ordinance failed rational basis review, as applied.[234] If the city of Cleburne wanted to provide evidence of an absence of animus with respect to housing access in particular, it might have bundled the ordinance with set asides for the affected persons in public housing or in housing that receives government property tax subsidies. If, on the other hand, the animus concern is with respect to the interests of the disabled more generally, then direct financial transfers would be sufficient to signal the absence of animus.

Or consider voting rights. Restrictions on voting rights are subject to their own distinct line of analysis, but we can consider what a legislature concerned with inoculating a voting restriction from equal protection challenges might do. Specifically, consider a voter identification law that either has a discriminatory effect or that incorporates a classification inviting rational basis review. The Court might be concerned that the additional burden placed on these groups was designed to discourage them from voting, but the legislature is likely to argue that there is a legitimate purpose such as deterring voter fraud. If the animus concern is about the

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[228] *Moreno*, 413 U.S. at 529.
[229] *Id.* at 534.
[230] 473 U.S. 432 (1985).
[231] *Id.* at 435.
[232] *Id.*
[233] *Id.*
[234] *Id.* at 442, 450.

regard the legislature has for the overall well-being of the burdened group, then any form of compensatory transfer will deter legislative animus. But if the Court is concerned specifically that the voting rights of all groups be valued equally, then the appropriate compensatory transfer must lower the cost of exercising voting rights. For example, a legislature wanting to ward off an equal protection challenge on this basis could bundle a voter identification law with funding for free transportation to the polls for groups that are burdened or opening new polling stations in areas with a higher concentration of such persons.

D. Improving the Animus Inquiry

The significance of animus in constitutional doctrine persists, but it does so despite objections on multiple fronts. These objections are relevant to any legal rule in which subjective intent plays a role. They call into question the existence, knowability, efficacy, and relevance of subjective intent as a constitutive feature of the law. In a recent article, Professors Leslie Kendrick and Micah Schwartzman label these the ontological, epistemic, futility/taint, and relevance objections to intent-based inquiries.[235] In this Section, I explain how the economic approach responds to these objections.

The economic approach assumes that individuals are concerned with whether the actions of public actors are consistent with preferences that devalue the well-being of certain classes of persons. This approach is in the core of the economics tradition of revealed preference; it asks whether the choices of the legislature are consistent with pursuing a particular set of objectives. Equal protection, on this account, is not concerned with whether particular members of the legislature vote for a law out of animus but whether the laws that the legislature passes are consistent with animus of the corporate body itself. This approach is an example of what Fallon would call an objective account of legislative intent, which ascribes purposes to the legislature based on objective properties of the law itself rather than by inquiring into the mental states of individual lawmakers.[236] Justice Elena Kagan's analysis of governmental motives in speech regulation is a leading example of this approach.[237]

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[235] *See* Kendrick & Schwartzman, *supra* note 183, at 146, 148, 149, 151.

[236] Fallon, *supra* note 160, at 541–53.

[237] Kagan, *supra* note 164, at 505–14.

1. Existence.

The first question about intent-based inquiries is whether intent is something that exists for corporate bodies.[238] Consider, for example, a discriminatory provision such as the one at issue in *Moreno*, which denies food stamp benefits to households with unrelated persons. What does it mean to say that the exclusion was intended to harm hippies? If we must locate group intent first in the subjective intentions of actual individuals, whose intent matters? The form of legislation will generally reflect the authorship and influence of many individuals, including legislators, staffers, and lobbyists. If some of these individuals were motivated by animus, but some were not, then how does this affect the determination of the existence of group animus? What if a challenged provision was overdetermined, so that it would have made its way into the bill even if the legislators who harbored animus for hippies had not supported it? If the animus did not change the content of the bill, does that matter? If legislators merely channel the sentiments of their constituents, is the animus of the legislator magnified by the number of constituents who harbor those feelings?

The economic approach answers the ontological problem by changing the definition of intent, so that it no longer is based in the subjective intentions of individuals, or at least it is only based on those subjective intentions insofar as they influence the decisions of corporate bodies. The economic approach asks: Does the legislature act *as if* it has bad intentions? The approach thereby sidesteps questions about the process by which individual intentions should be aggregated to form a group intention. Whatever the process by which legislators come to pass legislation, it is that process that must be held to account. Thus, so long as public acts are consistent with a process that gives equal weight to the interests of all persons, then those acts will be upheld. In its starkest form, this approach generally ignores the statements and ancillary actions of public officials.

Ignoring individual animus in determining the existence of group animus is not just convenient as an evidentiary matter or a way to avoid trying to answer difficult questions—it also has normative appeal. What exactly are individuals owed in the way of equal treatment by the government? Are they owed that each

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[238] Skepticism abounds. *See, e.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 428–32 (2005). But some philosophers disagree. *See, e.g.*, MICHAEL E. BRATMAN, FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY 109–29 (1999); CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 42 (2011).

individual engaged in shaping the law not be motivated by animus when those individuals are acting in a public capacity?[239] If individuals do act out of animus in their public capacity, is the grievance against the corporate body of which the bad actor is a member or against the member herself? The economic approach presumes that equal protection claims should be levelled against corporate bodies when those corporate bodies act in a way that is consistent with animus. This approach avoids questions like whether the animus of one person creates a taint and what is required to cleanse that taint. It also avoids the need for a theory of how individual animus translates into group animus.

2. Evidence.

The notion that courts are unfit to make factual determinations about congressional intent has a long pedigree.[240] Kendrick and Schwartzman call this the "epistemic objection," which is that "[c]ourts may not be able to know with any reliability what reasons motivated a particular action or decision."[241] This skepticism is both natural and justified when there is no rigorous definition of group intent to begin with. Which definition of group animus we adopt will affect the epistemic demands. For example, if group animus is defined as the share of individuals voting for a bill that themselves harbored animus, then determining group animus requires evidence on the subjective state of mind of all legislators, or at least as many as would be sufficient to show that a majority harbored animus.

In *Masterpiece Cakeshop*, the Court relied both on public statements made by Colorado officials and on the disparate

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[239] Some scholars hold this view. *See, e.g.*, Fallon, *supra* note 160, at 530 (observing that legislators "have obligations—which I call 'deliberative obligations'—not to pursue constitutionally forbidden aims or to take official actions based on constitutionally forbidden motives."); Carpenter, *supra* note 199, at 185 (emphasis in original):

> [J]ust as *individuals* have a moral and sometimes legal duty not to act maliciously toward others, the *group* of people elected as representatives (or acting in some other official governmental capacity) in a liberal democracy has a moral and sometimes constitutional duty not to act maliciously toward a person or group of people.

[240] *See, e.g.*, Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937) ("Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts."). Courts have expressed ambivalence about extrinsic evidence of discriminatory intent when a law is facially neutral. *E.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018) ("[W]e may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.").

[241] Kendrick & Schwartzman, *supra* note 183, at 148.

treatment of religion as evidence of religious animosity.[242] Justice Kennedy inferred from the silence of certain officials that they acquiesced to the animus of those who made the problematic statements.[243] The Court then properly (under current law) adopted a "totality-of-the-circumstances" approach to inferring intent.[244] This is the same approach used to identify discriminatory intent in the equal protection context for race.[245] In general, totality-of-the-circumstances approaches are indeterminate, leaving it to judicial idiosyncrasies to determine which features of the circumstances are relevant and how much weight they should be assigned in coming to an all-things-considered judgment.[246]

The economic approach largely disregards evidence about the subjective intent of individual legislators. The normative reason for this disregard is that the approach is concerned with the revealed preferences of the legislature, not the preferences of individual lawmakers. But there is an evidentiary reason as well for devaluing assertions made by public officials in trying to infer their intentions: such statements can be easily manipulated by actors trying to insulate their behavior from constitutional scrutiny. Cheap talk by legislators can be used to mask animus, and stray statements that suggest animus may not have had motivational force. Moreover, even innocuous answers are subject to misinterpretation. Whereas assertions about one's intentions are mostly costless, actions have consequences and are therefore generally more credible signals of intentions than verbal statements.[247]

3. Futility and taint.

The third objection to using intent as a criterion of constitutionality arises from a conundrum about the lasting effects of striking down a law because of an impermissible motive. If a law is struck down because of impermissible motives, then how should courts review an identical law passed afterwards? Should an evaluation of the new law include the bad motive for the old law? Not doing so would seem naïve. On the other hand, if the taint of the old law is inherited by the new law, then the new law

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[242] *Id.* at 138.

[243] *Id.* at 147.

[244] *Id.* at 148.

[245] *Id.* at 149.

[246] *See, e.g.*, Hayashi, *supra* note 158, at 312.

[247] Many courts already disregard evidence of explicit bias in discrimination inquiries. Clarke, *supra* note 165, at 523.

may never be enacted even if there are legitimate purposes for the new law.

This conundrum arises from the use of public statements as credible expressions of intentions. The economic approach shifts attention away from what legislators say in the course of deliberating about a law toward what they do by passing the law. This shift in focus is based on two claims. The first is that actions speak not only louder but also more reliably than words. The second claim is that the government speaks through what it does, and that the expressions of motives by individual legislators are largely irrelevant except insofar as they result in social priorities, manifested in government actions, that reflect those motives.

Under this approach, statements made in connection with passing the old law would be given very little weight in evaluating the presence of animus in motivating the new law (or the old law, for that matter). If the presence of a compensatory transfer is dispositive of the question of intent, then the absence of a transfer with the old law will cause it to be struck down as unconstitutional. This determination is mostly irrelevant for evaluating the passage of a subsequent law with the same discriminatory effect. The legislature can pass a new law that burdens the same group as the old law as long as they include an adequate compensatory transfer to the class of persons that is burdened. If they include such a transfer then, by hypothesis, the law is inconsistent with legislative animus. Further, we do not need to worry about the possibility that striking down a law motivated by animus will taint subsequent laws passed for legitimate government purposes. All that is required to enjoy the presumption against animus is to include an adequate compensatory transfer to the burdened class.

4. Relevance.

The final objection to intent-based tests is simply that subjective intentions are not morally or legally relevant.[248] On this view, justification, not motivation, is what matters.[249] Although this view has some influence, the "permissibility objection" seems inconsistent with commonsense morality and many scholars argue

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[248] *See* Fallon, *supra* note 160, at 564–65. *See generally* SCANLON, *supra* note 53; HELLMAN *supra* note 155.

[249] For one view in this spirit, see Fallon *supra* note 160, at 529 ("[C]ourts should never invalidate legislation *solely* because of the subjective intentions of those who enacted it. Instead, in all cases, final determinations of statutes' validity should depend on their language and effects." (emphasis in original)).

that the intentions behind public actions can be relevant to their moral and legal legitimacy.[250] The economic approach does not answer the question of relevance; it assumes that animus is relevant.

CONCLUSION

The specter of animus looms over contemporary U.S. life. It is expressed in criminal acts of mass violence and the actions of public officials in their official capacities. Law and economics has largely ignored the fact that individuals sometimes want to hurt other people, and this blind spot hinders economics from helping to address some of the most pressing legal problems of the day.

I show that animus can be straightforwardly incorporated into law and economics analysis in a way that does not undermine any of the core commitments of the economics approach and that doing so can lead to novel legal prescriptions for deterring hate crime. Damages, including punitive damages, multiply the deterrent effect of fines and automatically calibrate to provide greater deterrence to individuals who harbor more animus. For individuals motivated by animus who cannot be deterred by any punishment imposed on them, acknowledging animus reveals the possibility of solidarity-deterrence schemes, under which communities can thwart the objective of animus by supporting the very groups and communities that the actor hates. In the midst of gridlock over gun regulation and mental-health interventions as ways of deterring mass-shooting hate crimes, new solutions are needed.

Incorporating animus also points the way to an economic approach for equal protection review of public acts. This approach sidesteps or helps solve some of the thorniest questions of intent-based analyses. Together, these two examples of the benefits of incorporating animus into economic models illustrate a rich new vein of law and economics scholarship that incorporates other-regarding concerns more generally.

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[250] *See, e.g.*, J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 954 (1978) ("[L]aws passed for reasons of prejudice or animus frequently stigmatize those whom they burden.").