

Ahmaud Arbery, Reckless Racism and Hate Crimes: Recklessness as Hate Crime Enhancement

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INTRODUCTION

In February 2020, Ahmaud Arbery, a twenty-five-year-old Black jogger in Georgia, was chased down by a group of armed, White men in trucks, trapped, shot, and killed.¹ His killers pursued Arbery because they suspected him—with no evidence whatsoever—of being behind a string of (unreported) neighborhood robberies.² Arbery’s killers had never seen any suspect in those robberies.³

Arbery was blocked by a large white truck and threatened by a shotgun-wielding Travis McMichael.⁴ When Arbery struggled to take the gun away, McMichael shot him, perhaps multiple times.⁵ Arbery took a few final steps to flee his killers, staggered, and fell dying.⁶ As McMichael stood over Arbery’s dying body, he spat out the words, “fucking nigger.”⁷ Arbery’s murder is now part of the long, mournful litany of killings of unarmed Black

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1. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Feb. 28, 2021), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/38UM-73LE>].

2. It bears noting that there was in fact no such reported string of robberies; police reports reflected only one theft over the preceding weeks. Nelson Oliveira, *No Burglaries Were Reported in Neighborhood Where Ahmaud Arbery Was Killed, Contradicting Suspects’ Claim: Report*, N.Y. DAILY NEWS (May 08, 2020, 4:06 PM), <https://www.nydailynews.com/news/crime/ny-no-burglaries-reported-for-weeks-before-ahmaud-arbery-killing-20200508-6pp35kjezbeszckj4hwvf2h4be-story.html> [<https://perma.cc/ZV3C-G2JL>].

3. *Id.*

4. Fausset, *supra* note 1.

5. *Id.*

6. *Id.*

7. Russ Bynum, *Testimony: Shooter Used Racist Slur as Arbery Lay Dying*, ASSOCIATED PRESS (June 4, 2020), <https://apnews.com/article/7122aaf2c54ed22590a5b8d32565a58f> [<https://perma.cc/74Z5-KE2B>]. As Jeannine Bell has pointed out, there seem to be no actions, no matter how explicitly racist, that those perpetrating them will not deny are in fact racist. Jeannine Bell, *There Are No Racists Here: The Rise of Racial Extremism, When No One Is Racist*, 20 MICH. J. RACE & L. 349, 350 (2015).

men. Despite all appearances to the contrary, his killers insist they did not target Arbery on account of his race.⁸

Three months later, forty-six-year-old George Floyd entered into a Minneapolis gas station and allegedly bought cigarettes with a counterfeit bill.⁹ His death is now so infamous, it hardly requires recounting. Despite being recorded and Floyd pleading for his life, police officer Chauvin kneeled on George Floyd's neck for an unimaginable eight minutes and forty-six seconds, killing him.¹⁰ For numerous reasons, particularly that Chauvin was a police officer, Floyd's death became the most potent symbol in the still ongoing calls for racial justice. Nonetheless, I wish to shift the focus to the important features Arbery's killing teaches about how the criminal law addresses, or more precisely, fails to address, racist violence.

In response to Arbery's killing, Georgia joined the vast majority of states in passing hate crime legislation.¹¹ The law enhances punishment for anyone who commits a hate crime intentionally based on race, sex, sexual orientation, color, religion, national origin, mental disability, or physical disability.¹² Ironically, the law's requirement that a hate crime is committed "intentionally" or with a hateful purpose makes it unlikely that Arbery's murder would qualify.¹³ That is because Georgia's law, like most contemporary hate crime statutes, enhances liability for hate crimes cinematically motivated by explicit and conscious racist animus.¹⁴

8. *Attorneys for Men Charged in Ahmaud Arbery Killing Deny Racial Motive*, USA TODAY (Sept. 12, 2020, 1:30 PM), <https://www.usatoday.com/story/news/nation/2020/09/12/ahmaud-arbery-attorneys-men-charged-killing-deny-racism/5779662002/> [https://perma.cc/3EC5-XNE2].

9. Tim Arango et. al, *What To Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES (Mar. 10, 2021), <https://www.nytimes.com/article/george-floyd.html> [https://perma.cc/Z4JY-4S53].

10. *Id.*

11. Grace Hauck, *Georgia Governor Signs Hate Crime Law in Wake of Ahmaud Arbery Shooting*, USA TODAY (June 26, 2020, 5:18 PM), <https://www.usatoday.com/story/news/nation/2020/06/26/georgia-governor-signs-hate-crime-law-following-ahmaud-arbery-shooting/3266901001/> [https://perma.cc/7SCZ-SZHM].

12. *Id.* To be sure, the bill is quite modest in its enhanced punishment by American standards. It permits the addition of up to two years for certain felonies. For comparison, see ALA. CODE § 13A-5-13 (2021) (requiring a minimum sentence of fifteen years for Class A felonies motivated by bias); CAL. PENAL CODE §§ 190(a), 190.03(a) (West 2021) (increasing minimum penalty for first-degree, hate crime murder from twenty-five years to mandatory life without parole).

13. See Bell, *supra* note 7, at 368.

14. See Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 69 (1997).

Describing precisely what constitutes intentional hatred or racist animus is unsurprisingly controversial.¹⁵ But legal battles over motivation and intent, evidentiary standards, and even free speech in prosecuting hate crimes all rely on the same trope: the racism is cinematic in the sense that the imagined perpetrator is intentionally motivated by racial hatred. It is strangely unnoticed that Arbery's killing, alongside other iconic racist killings, are largely unrecognized by our hate crime statutes.

At least a century and a half of racist violence has made clear that narrow interpretations of bias crimes are insufficient. Many killings of people of color, particularly Black men, are more like Arbery's killing than a person dedicated to killing someone solely because of their race.¹⁶ Hate crime laws that only recognize the hooded KKK are insufficient to punish hate crimes as they most often occur.¹⁷ From Bernard Goetz¹⁸ to George Zimmerman,¹⁹ hate crimes can be just as lethal when springing from recklessly racist assessments of vulnerable minorities. That is not to say intentionally racist murders do not continue to scar our country. But focusing on that alone ignores that for every Dylann Roof there are many more George Zimmermans.

We have powerful reasons to ensure that hate crimes recognize the mens rea of "reckless racism." Perpetrators commit hate crimes with "reckless racism" when they consciously ignore a substantial and unjustified risk of violence motivated by the race of the victim. When an attacker ignores the serious possibility their violence is in part based on someone's race, they have committed a hate crime.

15. Aziz Huq reviews the ways discriminatory intent is measured differently across legal domains. Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211 *passim* (2018). For a specific focus on hate crimes legislation, see Marc Fleisher, *Down the Passage Which We Should Not Take: The Folly of Hate Crime Legislation*, 2 J.L. & POL'Y 1, 50 (1994); James B. Jacobs & Kimberly A. Potter, *Hate Crimes: A Critical Perspective*, 22 CRIME & JUST. 1, 32–39 (1997); Brian S. MacNamara, Commentary, *New York's Hate Crimes Act of 2000: Problematic and Redundant Legislation Aimed at Subjective Motivation*, 66 ALB. L. REV. 519, 538–44 (2003); Lu-in Wang, *Unwarranted Assumptions in the Prosecution and Defense of Hate Crimes*, 17 CRIM. JUST. 4, 10 (2002); Adam Candeub, Comment, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2073–77 (1994).

16. In this article, I will focus on racist killings as the paradigmatic hate crime. My thoughts naturally extend to violence premised on other protected categories.

17. Bill Dedman, Mike Bruner & Monica Alba, *Hate Crime in America, by the Numbers*, NBC NEWS (June 18, 2015, 1:11 AM), <https://www.nbcnews.com/storyline/charleston-church-shooting/hate-crime-america-numbers-n8152> [<https://perma.cc/A9U8-KZHZ>].

18. See GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 203 (1990).

19. Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), <https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html> [<https://perma.cc/QFE9-WYGA>].

Punishing reckless racism does not unfairly level punishment at White people or violate our liberal commitments. Indeed, it is telling that we do not indulge these knee-jerk rejections for a wide range of other punishments premised on reckless behavior.

That said, I should clarify the limits of my argument. While there are powerful normative reasons to use recklessness as the default mens rea state for hate crimes, I will not argue that all told, hate crime legislation is the best tool to address racist violence. I stop short of this obvious conclusion for two interrelated reasons.

First, empowering the state to punish and cage others is hardly the only or best tool to address interracial violence. While the most topical version of this conversation is framed as “Defund the Police,” abolitionist impulses regarding policing and incarceration are much older.²⁰ To be sure, I believe that forceful response to anti-social violence, including punishment and incarceration, is tied to the human condition. It certainly is for the foreseeable future. Still, it is easy enough to agree with abolitionists that our automatic reaction addressing any social problem with criminal law is an unimaginative and failed strategy. There are few social problems we can punish our way out of . . . racism is certainly not among them.²¹

Secondly, the relationship between hate crimes and racial justice is a jagged one. The first American hate crime laws protecting enslaved Black people were passed in the slave-holding South to distract from the evil of slavery.²² Similarly, early hate crime legislation in the North was often offered as a panacea to the deeper racism of employment and housing discrimination.²³ Today, hate crime legislation often ratchets up punishment where both defendant and victims are racial minorities; think of a case of minority teenagers committing vandalism or of two ethnic criminal gangs at battle.²⁴ While being a minority is no shield from justified punishment for

20. See ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); Mariame Kaba, *Summer Heat*, NEW INQUIRY (June 8, 2015), <https://thenewinquiry.com/summer-heat/> [<https://perma.cc/TNU2-MG9M>]; Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019).

21. MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 3–7 (2015).

22. ELY AARONSON, FROM SLAVE ABUSE TO HATE CRIME: THE CRIMINALIZATION OF RACIAL VIOLENCE IN AMERICAN HISTORY 17, 33–46 (2014); Ekow N. Yankah, *The Failure of “Rights” in Racial Justice: Comments on From Slave Abuse to Hate Crime by Ely Aaronson*, 14 JERUSALEM REV. LEGAL STUD. 192 (2017).

23. AARONSON, *supra* note 22, at 133–35.

24. See Fleisher, *supra* note 15, at 50.

hate crimes, disproportionate punishment of minority communities reproduces its own harms.²⁵

In sum, criminal law cannot ultimately solve problems of racist violence. It would be better to focus a couple generations of resources on education, employment, and housing. But criminal punishment is an appropriate reaction to serious forms of violence, and where we deploy our hate crime laws, the appropriate mens rea standard ought to be recklessness. If it is unsatisfying that I do not recommend punishment as the solution to racist violence, there are still important benefits to illustrating that recklessness is a natural default mens rea for punishment enhancement.

First, focusing on reckless racism rids criminal law of a naively narrow view of how racism motivates violence. A generation of social science has made clear that prejudice harms people of color, particularly Black Americans, in more subtle ways than intentionally inflicted harm.²⁶ Unconscious bias, structural racism, and a host of other descriptors are now part of the popular lexicon, more accurately capturing the way racism works in felt experience.

Secondly, defending recklessness as the appropriate culpability for hate crimes harmonizes a broader normative theory of mens rea in criminal law. Theories of criminal law often conceptualize or describe mens rea in sophisticated ways. Admittedly, I am often convinced by the latest formidable rendition. Yet, I remain troubled by the intuition that mens rea is rendered unnecessarily esoteric in many accounts.

Thus, I will offer a somewhat deflationary account of the role of mens rea in criminal punishment. Building loosely on Aristotelian political theories, I will cast mens rea as pegging mental states hostile to or incompatible with one's role as a citizen.²⁷ Criminal mens rea picks out mental states that undermine our ability to live as equals pursuing common goods.²⁸ A broadly

25. See Ekow N. Yankah, *Punishing Them All: How Criminal Justice Should Account for Mass Incarceration*, 97 RES PHILOSOPHICA 185 (2020); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African-American Communities*, 56 STAN. L. REV. 1271 (2004); TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 63–64 (2007).

26. Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1016–37 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 317–88 (1987).

27. See generally Peter K. Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHIL. 289 (2006); JOHN GARDNER, *The Gist of Excuses*, in OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW (2007).

28. See Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457, 460–66 (2015) [hereinafter Yankah, *Republican Responsibility*]; Ekow N. Yankah, *The Sovereign and the Republic: A Republican View of Political Obligation*, in POLITICAL LEGITIMACY: NOMOS LXI 102, 115–16 (Jack Knight & Melissa Schwartzberg eds., 2019).

republican reconstruction of criminal law may not produce flights of wild sophistication. But it explains the role of mens rea in justified state punishment and harmonizes broad features of criminal law while reinforcing the place of hate crime legislation.

The plan ahead. Part I attacks contemporary mens rea requirements in hate crime law as antiquated in their conception of racism, unable to tackle even iconic examples of racist violence. Part II more precisely describes “reckless racism.” Part III addresses evidentiary concerns. Part IV addresses counterarguments that enhanced punishment based on reckless racism would punish too broadly, either too intimately punishing involuntary racist behavior or violating liberal constraints on punishing for immoral character. I conclude by returning to the question of whether recklessness in inflicting racist harm is what hate crimes are fundamentally about.

I. RECKLESS AND RACISM

The killing of Ahmaud Arbery quickly became a flashpoint in nationwide “Black Lives Matter” protests for racial justice.²⁹ Arbery’s death carried many of the same cruel markers that inspired the current movement. His death was at the hands of White men who had been police officers.³⁰ Further, two prosecutors saw a video of Arbery being chased by three armed men in trucks, hit, cornered, and then shot and decided it was self-defense.³¹ Little could highlight the institutional disdain for a Black man’s life more than remembering three different prosecutors watched the video before charges were ultimately brought.³²

Following Arbery’s death, Georgia revisited its hate crime statute, which was previously held unconstitutional, quickly passing a new one.³³ Ironically, despite being a direct response to Arbery’s killing, it is unlikely that the Georgia law, which enhances punishment for “intentionally” committing a

29. See generally Westen, *supra* note 27; GARDNER, *supra* note 27.

30. Anthony L. Fisher, *Ahmaud Arbery’s Murder Shows How Hard It Is To Prosecute Cops, or Even Ex-Cops*, INSIDER (May 8, 2020, 12:10 AM), <https://www.businessinsider.com/ahmaud-arbery-murder-shows-how-hard-prosecute-cops-police-2020-5> [https://perma.cc/GL89-56QE].

31. *Ahmaud Arbery: Prosecutors Under Investigation over Handling of Killing*, GUARDIAN (May 12, 2020, 6:18 PM), <https://www.theguardian.com/us-news/2020/may/12/ahmaud-arbery-georgia-prosecutors-under-investigation> [https://perma.cc/MA3Q-TNLS]; Ekow Yankah, *Racialized Violence Never Takes a Break: On the Killing of Ahmaud Arbery*, N.Y. DAILY NEWS (May 8, 2020, 4:16 PM), <https://www.nydailynews.com/opinion/ny-oped-racialized-violence-never-takes-a-break-20200508-2qgf7s73nzfp3hd7ywiwxnakdi-story.html> [https://perma.cc/AP8C-2M6A].

32. Fisher, *supra* note 30.

33. Hauck, *supra* note 11.

crime based on a victim's protected class, would actually recognize his killers as culpable for a hate crime.³⁴

The failure of this statute is not a rushed accident but is true of hate crime legislation generally. After early cases where some jurisdictions conceived of bias punishment as possible due to “discriminatory”—i.e., disparately motivated injuries—hate crime laws now focus on intentionally motivated injury or racial animus.³⁵ To be sure, there is no uniform understanding of the role of intent in hate crime laws. Various statutes punish crimes committed “because of,” “by reason of,” if the underlying crimes “demonstrate[d] prejudice,” or if the defendant “[intentionally] select[ed] a victim by reason of” their enumerated status or if the crime was caused “in whole or in substantial part because” of the prohibited animus.³⁶ Whatever the resolution to this question, it does not address the shocking killing of Ahmaud Arbery. Whether discriminatorily motivated or intentionally chosen, hate crime statutes focus on showing that the victims were intentionally harmed because of their race in an antiquated and narrow sense.

Put simply, contemporary hate crime legislation largely views crimes as racially motivated if captured by the cinematic racist. The imagined wrongdoer is the Klan member settling on targets only if they are Black. While such racists exist—Dylann Roof serves as a spectacular example³⁷—the lesson of the Arbery killings is precisely that this is not the only, or perhaps even the most dangerous, way in which racism translates into violence.

Rather, Arbery's death shows race can play a decisive role in the mental state of a killer without being the case that “the killer intended to kill another

34. *Id.*

35. Despite being a natural extension of our current law, hate crime laws have systematically clung to a truncated view of what constitutes racial bias. Even as we historically struggled with the mens rea requirements in hate crime legislation, the harms of reckless racial violence were never brought squarely into focus. Consider the landmark case of *Wisconsin v. Mitchell*, in which the Supreme Court ruled Wisconsin's bias crime enhancement, premised on intentionally choosing a victim due to their race, did not violate the First Amendment. 508 U.S. 476, 479 (1993). Wisconsin justified the statute by arguing that the penalty enhancement was for intentionally selecting a victim on prohibited grounds rather than the underlying motivation behind that selection. *Id.* at 484. Thus, the enhancement was warranted whether one selected a Black man by reason of racist hatred or gave into to racist peer pressure. *See id.* at 484–85. Such a construction is contrasted with hate law statutes that require malicious intent or hostility toward the targeted race. *Id.* at 489–90.

36. Gavin F. Quill, Note, *Motivation, Causation, and Hate Crimes Sentence Enhancement: A Cautious Approach to Mind Reading and Incarceration*, 59 *DRAKE L. REV.* 181, 198 (2011).

37. Richard Pérez-Peña, *Sentenced to Death: A Look at Dylann Roof's Rampage and Its Aftermath*, *N.Y. TIMES* (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/us/dylann-roof-trial-sentencing-verdict.html> [<https://perma.cc/5WR6-C55S>].

simply because of the color of their skin.”³⁸ Travis and Gregory McMichael and Willie Bryan saw a Black man jogging through their neighborhood and decided at a mere glance that he was the criminal burglarizing their neighborhood.³⁹ They did so without knowing Arbery or having even seen anyone committing these unreported burglaries.⁴⁰ In short, they saw a Black man, decided he was a criminal, and chased him down with guns. It beggars belief to imagine the group would have come to the same conclusion had they seen an unknown White man jogging. It was Arbery’s skin that marked him as criminal, leading to the deadly encounter.

Arbery’s death echoes iconic killings of unarmed Black people that have come to symbolize racist violence. Famously, Bernard Goetz was riding the New York subway when two Black teens, traveling with two friends, approached him and asked for five dollars.⁴¹ Goetz needed only to look at the boys to decide they would “toy” with him, so he pulled out a hidden gun and shot all four.⁴² After the hail of bullets, Goetz hovered over the helpless Daryll Cabe, saying, “You look alright; here’s another,” before firing the shot that severed his spinal cord.⁴³

A generation later, George Zimmerman, a self-appointed neighborhood watchman, saw Trayvon Martin, a Black teenager, walking home in their neighborhood.⁴⁴ Seeing Martin in his hoodie was enough for Zimmerman to “know” he was a criminal and, despite being told by police not to pursue him, Zimmerman chased after Martin.⁴⁵ A recording of that fatal encounter reveals young Trayvon Martin upset and scared at being pursued by an unknown person.⁴⁶ Of course, Martin was right to be scared. When the two met and

38. Let me note here that the “because” with which I am concerned focuses on the decisive role race plays within the mens rea of the attacker. There is a much broader and all too tragic sense in which one’s race may play a decisive role in one’s death quite outside of the mens rea of an attacker, starting with the concentration of Blacks and other people of color in neighborhoods undermined by poverty and violence. *Cf.* *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–76 (2009) (addressing race as the determining reason in employment discrimination cases).

39. Fausset, *supra* note 1.

40. *See id.*

41. *People v. Goetz*, 497 N.E.2d 41, 43–44 (N.Y. 1986); FLETCHER, *supra* note 18, at 1–2.

42. FLETCHER, *supra* note 18, at 1–2.

43. *Goetz*, 497 N.E.2d at 44.

44. Alvarez & Buckley, *supra* note 19.

45. *See* Linton Weeks, *Tragedy Gives the Hoodie a Whole New Meaning*, NPR, <https://www.npr.org/2012/03/24/149245834/tragedy-gives-the-hoodie-a-whole-new-meaning> (Mar. 24, 2012, 5:44 AM) [<https://perma.cc/63WA-K7SG>].

46. *See Trayvon Martin Shooting Fast Facts*, CNN (Feb. 17, 2021, 9:38 AM) <https://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html> [<https://perma.cc/89J3-XDGY>] (referencing a released voice recording from the night in question of an unidentified voice screaming for help prior to a gunshot).

fought, it was Zimmerman, carrying a concealed weapon, who shot Martin dead.⁴⁷

I have merely chosen a famous two of nearly countless examples. Each case differs in its particulars and even in the jury's findings. But the critical feature they each share is the reading of Black skin as criminal and dangerous and the leaping to fatal violence. The unifying point is that this form of reckless reasoning from racist premises is as potentially fatal to Black people and probably more common than the unwavering intentional racist.

Despite these killings being central in conversations about racist violence, the fatal racism is not the intent ascribed to the cinematic racist. The men who killed Arbery targeted him because of his race. Yet, it is not the case that the killers formed an intention to kill a Black man and then went looking for targets. Rather, the McMichaels and Bryan saw a Black man jogging and without further evidence assumed he was a dangerous criminal to be apprehended. Perhaps such thinking alone is enough for some to consider it intentionally racist.⁴⁸ But we need not stretch our ordinary use of language to capture the legal culpability here.

Arbery's killing, alongside iconic cases like Goetz and Zimmerman, illustrates the danger in recklessly targeting another due to their race or other protected status. Arbery's killers were reckless not only in the generic sense that chasing Arbery with a gun was unjustifiably dangerous, though it was surely that as well. Any victim, whatever their race, would have a strong case for at least manslaughter based on culpably instigating legal violence. But here the recklessness included something more. His killers were reckless in a particular way because they disregarded the risk that they were targeting Arbery based on his racial status. All three ignored not only a substantial and unjustified risk that their actions would result in harm. They ignored a substantial and unjustified risk that their harm-inducing actions were motivated by racist animus. In short, they were at very least "reckless racists."

II. FROM INTENT TO RECKLESSNESS AND BEYOND

Though I take reckless racism to be an accessible idea, clarification may be of help. Recklessness in criminal law is a conscious disregard of a substantial and unjustified risk of a criminal wrong.⁴⁹ A club owner is reckless if he blocks the fire escapes to stop patrons from leaving without paying.⁵⁰ If a fatal fire breaks out, he is liable for manslaughter not because he wanted

47. Alvarez & Buckley, *supra* note 19.

48. See Johnson, *supra* note 26; Lawrence III, *supra* note 26.

49. Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 465–66 (1992).

50. *Commonwealth v. Welansky*, 55 N.E.2d 902, 911–12 (Mass. 1944).

anyone to die but because he considered the risk and dismissed it for unjustified reasons.⁵¹ Similarly, one is recklessly racist if one consciously ignores a substantial and unjustified risk of harm that one's action is motivated by racial animus. The killing of Arbery shows reckless racism can be fatal.

Two addendums are needed here. First, there is a crucial difference between recklessness and negligence. Recklessness is the conscious disregard of an unjustifiable risk.⁵² Where the negligent person should have realized there was a risk to others, the reckless person contemplates and disregards this risk.⁵³ Punishing for reckless racism is not to punish any act we may plausibly link to racism, only those where the offender consciously ignored their racist reasoning. That said, there are cases where the risk is so obvious that even the most ardent testimony of the defendant will not avoid a conclusion of recklessness. My protestations that I never considered my bullet would not perfectly strike the apple on your head is unlikely to convince.⁵⁴

Displaying such recklessness does not mean a defendant has to be self-conscious about the fact that he is being racist. He need not think, "Hey, I wonder if targeting this jogger is the product of hundreds of years of racial inequity and the socially forged link between dark skin and criminality," or some such improbably academic thought.⁵⁵ The defendant need only consciously disregard an unjustified risk that they were wrong *when they are in fact engaged in racist reasoning*.

One might think drawing borders around what constitutes racist reasoning is impossible. Contemporary social science makes ever clearer how much of our reasoning, conscious and unconscious, is held hostage to America's racial history.⁵⁶ But our legal doctrine need not recognize entirely new ways of determining recklessness to recognize reckless racism. Highlighting that the defendant consciously and unjustifiably leapt from a racial (and racist) premise in his mind that motivated unjustified harm need not be overly subtle. For example, seeing a jogger and leaping to the idea, "That's him! I know the

51. *See id.* at 910.

52. MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985); Simons, *supra* note 49, at 470.

53. *See People v. Dellinger*, 783 P.2d 200, 205 (Cal. 1989).

54. Indeed, if the risk is sufficiently obvious, courts have traditionally imputed conscious recklessness. *Welansky*, 55 N.E.2d at 905–06; *cf.* Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1061–62 (1978).

55. *See generally* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 1 (2016); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN AMERICA 1 (2011).

56. *See generally* KENDI, *supra* note 55, at 1; MUHAMMAD, *supra* note 55, at 1.

Black guy did it,” followed by consciously dismissing doubt about that fact would exhibit recklessness based on racist reasoning regardless of whether the attacker recognized their own reasoning as racist.

If this sounds peculiar, it is worth interrogating why? After all, in the ordinary recklessness case we do not require that the offender be self-aware; we merely require that they consciously disregard the underlying facts that make them reckless. A skier careening out of control down a mountain is reckless because he disregards the unjustified risk that he will kill a fellow skier.⁵⁷ It is his disregard of the facts that he is skiing dangerously – his speed, lack of control, etc. – that makes him reckless. That is true even if the skier disregards the risk because he concludes he can handle the terrain. Whether he recognizes himself as being homicidally reckless, cavalier, irresponsible or reaches any other ethical conclusion is beside the point. Similarly, if you unjustifiably jump to the assumption that someone is reaching for a gun when they reach for their wallet, you are reckless if you disregard the risk they are unarmed.⁵⁸

Likewise, we need only find that the reckless racist was reckless in reasoning based on racist premises. If the defendant consciously disregards an unjustifiably dangerous conclusion from racist premises, then he is reckless as to that element, in the same way that had he intentionally acted upon that fact, he would meet the intentional mens rea threshold for a hate crime enhancement.⁵⁹ Just as in any ordinary assessment of recklessness, it is our measuring him as reckless, not his self-understanding, that ground recklessness in the relevant sense.⁶⁰ That noted, I also suspect we are too reluctant to imagine that such considerations of racism may in fact flicker across an offender’s mind; a point to which we will return.

57. *People v. Hall*, 999 P.2d 207 (2000).

58. As Doug Husak points out, we are typically not interested in whether offenders themselves judged the risk to be unreasonable. Douglas Husak, *Negligence, Belief, Blame and Criminal Liability: The Special Case of Forgetting*, 5 CRIM. L. & PHIL. 199, 208–09 (2011). Challenging this view is Marcia Baron, *Negligence, Mens Rea, and What We Want the Element of Mens Rea To Provide*, 14 CRIM. L. & PHIL. 69, 69 (2020).

59. Similarly, the Model Penal Code determines recklessness on whether the defendant consciously disregarded an unjustified risk, not whether the defendant believed themselves to be justified. This is made clearest in its treatment of mistaken judgements in self-defense. Where a defendant holds an honest but reckless belief they are entitled to self-defense, the Model Penal Code then replaces the culpability of the killing with the culpability of a reckless killing, typically manslaughter. See MODEL PENAL CODE §3.09(2) (AM. L. INST. 1985). But it is immaterial to the defendant’s recklessness that they honestly held the belief that the self-defense was justified. *Id.* §3.09(2).

60. I am very grateful to Steven Winter and Antony Dillof, along with the faculty of The Wayne State School of Law for pressing me on this point.

The violence visited on Arbery is an example of reckless racism. To simply see a Black person jogging and decide that they must be an unidentified (indeed, imagined) burglar is to at the least disregard the substantial and unjustified risk that one has no legal right to detain them. Even in the midst of their terrifying chase, the language the McMichaels used and their repeated shouts that “we [just] want to talk to you” betrays their uncertainty that Arbery was a justified target.⁶¹ It is implausible that it did not flit across their minds that it was a particular fact, Arbery’s skin color, that led them to fixate on him as the criminal.

Secondly, it is important to remember that we are assessing the mens rea of a punishment enhancement. Thus, the question of whether one was recklessly racist is not a free-floating question. Were we truly reflective, we could all pick out examples when we ignored the possibility we were acting on racist stereotypes. Assuming the Black customer at the store works there; that a Black colleague is less capable than her White counterpart; or that one person is more threatening than another are all unhappy consequences of growing up steeped with racist stereotypes. But racist thoughts, by themselves, are not punishable at law. Indeed, even racist actions, which can be serious, humiliating, and condemnable, are not for those reasons alone, addressed by criminal law.

Reckless racism is only relevant, as with any punishment enhancement, when considered in conjunction with a criminal wrong.⁶² Thus, a defendant’s racist motivation only matters after the state proves, beyond a reasonable doubt, all the underlying elements of the predicate offense. We are not simply interested in whether one is racist but whether one unlawfully killed with a type of racist animus.⁶³

In some circumstances one will be justified in ignoring potential uncertainty. To defend yourself against an unknown intruder in your home at night may lead to his death. Even if tragically mistaken, the reasonableness of the mistake insulates from any predicate crime, much less any enhancement. Remembering the mens rea for an enhancement only becomes relevant after the material elements of a predicate crime have been proven alleviates the fear that the state will engage in an untethered inspection for unattractive character flaws to punish.

Understanding that important constraint, setting recklessness as the default mens rea in hate crimes harmonizes our punishment practices with

61. Fausset, *supra* note 1.

62. Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 343–44 (1991).

63. *Id.*

our better-considered racial justice commitments.⁶⁴ It allows punishment for racially motivated violence even if it does not fit the simplistic story of the intentional KKK member. While Arbery's death shows the lethality of reckless racism, the very hate crime law it inspired cannot address the hatred the killing revealed. The state ought not be impotent to address lethal racism that falls short of intentional violence.

Unlike criminal negligence, recklessness has long been an uncontroversial basis for criminal liability. The punishment for manslaughter is both more well recognized and more severe than involuntary manslaughter because manslaughter reflects recklessness rather than negligence.⁶⁵ Likewise, if one is reckless as to potentially lethal racism, then aggravating one's punishment is of a piece with our broader enhancement of punishment for hate crimes.⁶⁶

If recklessness is a well-known basis of criminal liability and better describes iconic examples of racist killings, why is recklessness absent from legal and academic literature on hate crime? Indeed, to the extent it is considered at all, most consider reckless racism an *exculpating* rather than enhancing punishment. In part, I suspect it is simply due to our enormous cultural sensitivity to squarely addressing racism. But even if true, this avoidance is scaffolded by both practical and philosophical objections. It is to each we now turn.

III. PROVING RECKLESS RACISM

It is not legal novelty that prevents bias crime enhancements from being based on recklessly inflicted violence. Perhaps then, the practical challenges of punishing recklessly racist violence lead to resistance. This intuition could come in a mixture of related concerns. First, one might imagine that such enhancements grant the state power to punish acts motivated by racism no matter how unconscious.⁶⁷ This might mean punishing on the state's mere

64. Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 354–62 (1995); Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507, 514–16 (1999).

65. Simons, *supra* note 49, at 491–92.

66. Recognizing that racist violence can be based on reckless reasoning is distinct from the earlier historical distinctions about disproportionately targeting someone based on the color of their skin, without underlying racial animus. Whatever one makes of the claim that intentionally targeting someone for violence on the basis of race, gender, religion or so on, could be done without animus, notice this distinction runs orthogonal to the one I am pressing. The discriminatory intent and the racial animus model both rely on some version of the attacker who intentionally focuses on their victim's race, gender, or religion. In short, neither version addresses the kind of violence that killed Amod Arbery. *Id.* at 517–21.

67. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 811–13 (1994).

allegation of racism. In a world where understandings (or theories) of racism are ever evolving and heavily contested, one might worry this is not promising ground on which to base criminal liability.

Secondly, one might worry that there would be no way for the state to prove such a “slippery” notion of racism. Empowering the state to punish anything other than intentional, cinematic racism raises fears of an imperial state searching the souterrain recesses of the psyche for dark impulses.

There is much that could be (indeed has been) said about these related concerns.⁶⁸ But these objections are motivated by a mistaken view of what constitutes reckless racism. Punishment for unjustifiably casting aside the realization that one may be inflicting racist violence no more punishes the subconscious than punishing recklessness in shooting at a shadow.

Reckless racism is not a project that punishes unconscious racism wherever it can be found. The suggestion does not go so far as to punish the “negligent racist,” that is, the person who should have known, but did not, that his actions were motivated by racism.⁶⁹ Rather, it premises punishment on the conscious disregard of a wanton risk that standardly constitutes recklessness.⁷⁰ Further, it does so as an enhancement only when the state has already proven each element of the underlying crime beyond a reasonable doubt.

Of course, proving someone consciously disregarded the risk that their motivation is racist may be difficult.⁷¹ Even when only facing social sanction, people mightily resist the thought that they had racist motivations. When facing state punishment, few will readily admit their racist doubts.

This worry strikes me as correct but in no way novel. Criminal liability for recklessness often requires marshalling circumstantial evidence to prove a state of mind the defendant vigorously denies. The driver who kills, the gun owner who fires an errant shot, and the skier indulging in wild tactics will strenuously deny they consciously disregarded a risk of death. In each of

68. For a brief overview of this debate, see Kenneth W. Simons, *Hate (or Bias) Crime Laws*, in PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW 285 (2019); Ekow N. Yankah, *Race, Criminal Law and Ethical Life*, in PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW, *supra*, at 625; Harel & Parchomovsky, *supra* note 64, at 532–38; Lawrence, *supra* note 64, at 326–42; Heidi M. Hurd, *Why Liberals Should Hate “Hate Crime Legislation,”* 20 LAW & PHIL. 215, 229–32 (2001); Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1117–38 (2004); Janine Young Kim, *Hate Crime Law and the Limits of Inculcation*, 84 NEB. L. REV. 846, 851–60, 879–84 (2006); Carol S. Steiker, *Punishing Hateful Motives: Old Wine in a New Bottle Revives Calls for Prohibition*, 97 MICH. L. REV. 1857, 1870–72 (1999); Gellman, *supra* note 62, at 362–68; Jacobs & Potter, *supra* note 15, at 9–13; Wang, *supra* note 15, at 6–9; Quill, *supra* note 36, at 191–95.

69. Simons, *supra* note 49, at 470.

70. *Id.*

71. Bell, *supra* note 7, at 351.

these cases, it is the job of the state to gather the evidence to prove recklessness.

In some important cases, proof of recklessness will be available. There is nothing exotic about understanding Arbery's killers as recklessly using his race to conclude he was a dangerous criminal. We have noted their words betrayed an unjustified dismissal of the risk of wrongdoing. Nor is it unprecedented for the law to impose liability where one knows (or even should know) that a victim is a member of a vulnerable group.⁷² Yet, there is curious reluctance where race is involved to ascribe mental states that would otherwise seem obvious. Whether in criminal law or in political conversation, one hears we cannot ascribe racism to someone as we "cannot know their heart."⁷³ But in the case of the "William Tell" killing, the law has no difficulty setting aside the preposterous claim that that the defendant never considered the possibility of danger when attempting to shoot an apple off a victim's head.⁷⁴ Whatever their self-serving denials, there is no plausible explanation of why Arbery's killers fixated on him without concluding that they pushed aside any doubts, deciding his race was sufficient marker of his criminality.

In other cases, the evidence will be much murkier. Take the now iconic case I set aside: Derek Chauvin's killing of George Floyd. For many, it is obvious that Chauvin's actions are part and parcel of a history of police violence toward Black men, making Chauvin an emblem of racist police violence. But how could the state prove that Chauvin at least consciously reflected on and dismissed George Floyd's race as a reason for his murderous acts? Without words or actions revealing his reckless disregard of bias, is it possible to convict Chauvin of a hate crime?⁷⁵

The unsatisfying answer is that without further evidence, I suspect it will be difficult, even under a recklessness standard, to prove that Derek Chauvin is guilty of a bias crime. Of course, there is nothing new about the fact that some crimes, no matter how disturbing, cannot be proven beyond a reasonable doubt. But that ought not make us lose sight of cases like Arbery's where reckless racism is amply shown by the evidence.

The deeply skeptical may persist further. What if the reckless racism is not simply difficult to prove but hardly exists? One need not doubt that people are motivated by unjustified racial conclusions. Rather the claim would be

72. U.S. SENT'G GUIDELINES MANUAL § 3A1.1(b)(1) (U.S. SENT'G COMM'N 2018); Lu-in Wang, *Recognizing Opportunistic Bias Crimes*, 80 B.U. L. REV. 1399, 1420–27 (2000); Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO ST. J. CRIM. L. 47, 59–60 (2007).

73. Bell, *supra* note 7.

74. Husak, *supra* note 58.

75. See generally Gellman, *supra* note 62.

that such people are rarely *legally* reckless because they do not consciously disregard the risk that their behavior is racially determined. It never occurs to them. They are confident they are reasoning impeccably. If you were to ask the three men who surround and killed Arbery, they would protest that racial animus had nothing to do with their targeting him. The claim is, at bottom, that self-denial of racism is so deep that most racist violence is not reckless; worse, it is defined by the utter thoughtlessness of negligence.

No doubt, some of this depressing picture is true. But I also suspect that we credit to this picture too much. Issues of race are emotionally loaded; outside of moments of serious reflection or conflict, people rarely admit doubts about the racial elements driving their motives. But I doubt this shows such doubts are absent. I find myself monitoring and inspecting my own behaviors and attitudes for racist concerns. Indeed, despite being Black (or perhaps because of it), I remain very concerned that anti-Black racism unconsciously affects my actions. Further, the claim that such doubts are absent should come under increasing scrutiny as ways of recognizing racism have become more broadly recognized.

Much as decades of cultural education have made it impossible to credibly claim that it never occurred to the drunk driver his behavior was dangerous, so too it strikes me as implausible to assume wholesale that doubt never flickers across the minds of those who commit racist violence.⁷⁶ One of the important functions of law is to mark certain social territories as both morally significant and legally accountable.⁷⁷ Facing potential criminal liability makes clear to those unmoved by moral reasons alone that certain actions are particularly weighty.

It is hard to believe someone claiming the dangers of drunk driving never occurred to them in part because our legal, political, and social norms have highlighted its dangerousness for so long.⁷⁸ A mistake about sexual consent is no longer viewed as a social faux pas; it is rape. Asking someone at work on a date means navigating questions of sexual harassment. Likewise, by declaring that racist mistakes in using violence are to be especially punished, hate crime laws make it less likely such violence is committed unthinkingly. The legal demarcation alone imposes second thoughts.⁷⁹ Despite recognizing that much racism is unconscious, it is too much to grant the motivation to racist violence is impervious to doubt.

76. Armour, *supra* note 67, at 791; Gregory Mitchell, *Second Thoughts*, 40 MCGEORGE L. REV. 687, 688–89, 697–98 (2009).

77. Mitchell, *supra* note 76, at 697–98, 702–15.

78. MODEL PENAL CODE § 2.08(2) (AM. L. INST. 1985).

79. Mitchell, *supra* note 76, at 714–16.

IV. NORMATIVE UNDERPINNINGS OF MENS REA IN CRIMINAL PUNISHMENT

Enhancing punishment for reckless racist violence is not as radical as it first appears. Indeed, without recognizing reckless racist violence, the killing of Arbery, along with other iconic examples of racist murders escape criminal law entirely. Additionally, premising bias crimes on recklessness makes sense of the role of mens rea in an over-arching justification of criminal law.⁸⁰ Thus, grounding hate crime statutes on recklessness both fits them into our criminal law commitments and mutually reinforces our confidence in our justificatory theory.

The philosophically skeptical might be forgiven for wondering if a philosophical theory of mens rea is needed. Oliver Wendall Holmes famous quip, “even a dog knows the difference between being stumbled over and being kicked,” captures the idea that the intentions are obviously morally and legally significant.⁸¹ But that pithy bon mot hardly captures the complex ways criminal law must distill mental states into punishment. Whether a murder was committed with “specific intent;” resulted from a “depraved and indifferent heart;” whether a victim provoked the crime, thus mitigating punishment; whether an act constitutes a hate crime; and countless other questions affect the very concrete question of what punishment will be imposed.⁸² And, to state the obvious, our explanatory theory of mens rea needs to make sense of the countless mental states deemed irrelevant to punishment.⁸³

Not surprisingly, accounts of mens rea typically tracks one’s theory of the justification of punishment. A certain kind of moral retributivist will naturally think mens rea measures one’s moral culpability.⁸⁴ A consequentialist will inspect the connection between mens rea states and disfavored outcomes.⁸⁵

80. MODEL PENAL CODE § 2.01 note.

81. See Michael S. Moore, *Intention As a Marker of Moral Culpability and Legal Punishability* in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 180 (2011).

82. Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation*, 18 U. ILL. L. REV. 1255, 1260, 1266 (2018); Yankah, *supra* note 28, at 470.

83. Lee, *supra* note 82, at 1260–62.

84. There are various versions of retributivism ranging from stringent legal moralism to rights forfeiture theories to axiological views. See generally ALAN BRUDNER, PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL PUNISHMENT 50–52 (2009); MICHAEL S. MOORE, PLACING BLAME: A THEORY OF CRIMINAL LAW 84–188 (1997); DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF CRIMINAL LAW 85–91 (2008); Christopher Heath Wellman, *The Rights Forfeiture Theory of Punishment*, 122 ETHICS 371, 372–93 (2012); LEO ZAIBERT, RETHINKING PUNISHMENT 179–87 (2018).

85. See generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1–27 (2008); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH.

Other communitarian views will match punishment to mens rea states judged worse by their community and so on.⁸⁶

In other work, I have described criminal law as justified by a loosely Aristotelian picture, highlighting our necessary civic bonds.⁸⁷ On this view, punishment is justified where actions undermine our ability to maintain a common civic life.⁸⁸ Obviously, we do not readily think of crime in such abstract terms. The most visceral crimes are recognized in the battered bodies and shattered lives of our fellows. Philosophy pales in the immediate need of a rape victim.⁸⁹

Still, we need to distinguish which of the myriad ways we can harm each other—devastating but accidental injuries, emotionally or financially ruinous encounters, and so on—we rule intolerable and subject to punishment. Determining which actions require us to be accountable to our fellow citizens on pain of punishment unearths this republican justification.⁹⁰ While this view certainly overlaps with other theories of criminal punishment, it makes clear that punishment does not focus on abstract or pre-political rights or freedoms.⁹¹ Rather punishment secures the conditions that make life together as equals possible. Such a view makes sense, for example, of why we punish recidivism at such vastly higher rates.⁹² Under justified conditions, recidivism illustrates a determined undermining of the conditions that make living together possible.⁹³

L. REV. 827 (1988); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232 (1985).

For a sophisticated view of deterrence as the point of punishment without purely focused on consequentialism, see ERIN I. KELLY, *THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY* (2018). For another important view seeking to collapse the distinctiveness criminal law justification, see VINCENT CHIAO, *CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE* (2018).

86. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997). For a modern communitarian view, see Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1486 (2016).

87. Yankah, *Republican Responsibility*, *supra* note 28, at 461–72. For complimentary republican views, see RICHARD DAGGER, *PLAYING FAIR: POLITICAL OBLIGATION AND THE PROBLEMS OF PUNISHMENT* 286–88 (2018); R.A. DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW* 19–140 (2007). For an important critique on superimposing models of private accountability into legal obligation, see Malcolm Thorburn, *Criminal Law as Public Law*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW*, *supra* note 81, at 24–31.

88. Yankah, *Republican Responsibility*, *supra* note 28, at 461–72.

89. *Id.* at 464.

90. DUFF, *supra* note 87, at 51–53, 140–46.

91. NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 171 (1994).

92. Yankah, *Republican Responsibility*, *supra* note 28, at 467.

93. *Id.* at 464–65.

It is hardly shocking a republican vision of criminal law is sensitive to mental states in imposing criminal punishment.⁹⁴ As noted, mens rea is not about measuring one's moral culpability or even ethical failings all told.⁹⁵ But the mental states with which people act are important in determining their respect and care for each other as equal citizens. That is for the obvious reason that our actions are not simply events in the world; the injuries we inflict are not caused by automatons or animals. They are caused by moral agents. Thus, inspecting how and why we did things is to simply recognize the kinds of creatures we are.⁹⁶ So it comes as no surprise that a republican theory, like any theory, will be interested in mens rea in leveling criminal punishment.

All of that seems convincing enough, but is anything distinctive about situating mens rea within a republican theory? Precisely because republican theory focuses criminal law on protecting our ability to live together as equals, it measures culpability in mens rea by evidence of the hostility one's mental states display toward those civic bonds.⁹⁷ So, we conclude in a rough and ready way, that people who attack others intentionally show a degree of open hostility to the victim's well-being. They set themselves against the required conditions of civic equality more rigorously than people who harm others negligently. It is clear, then, that intentional attacks on salient discriminatory features ought to be punished more severely precisely because it attacks both the person and their claim to equality among citizens. But if the reckless racist does not explicitly target such bonds, why should she be subject to greater punishment?

The question again assumes the only way one shows disdain for Blacks, Jews, homosexuals, etc. is by intentionally targeting them. One can show disdain for others by unjustifiably disregarding them.⁹⁸ The law rightfully holds us to a appropriate standards for our roles in civic society; it demands that we show appropriate respect and consideration for the interests of others.⁹⁹ In our moral and legal thinking, we are required to be thoughtful about whether we are fit to drive, to check our sexual passions, and a host of other impulses. Likewise, the law requires one to be aware when one may harm vulnerable groups along prohibited lines.¹⁰⁰

94. *See id.* at 469.

95. *Id.* at 464–65.

96. Antje du Bois-Pedain, *Punishment as an Inclusionary Practice: Sentencing in a Liberal Constitutional State*, in *CRIMINAL LAW AND THE AUTHORITY OF THE STATE* 199, 207 (2017).

97. Yankah, *Republican Responsibility*, *supra* note 28, at 464.

98. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 *HARV. L. REV.* 1, 7–8 (1976); Armour, *supra* note 67, at 795–96.

99. Yankah, *Republican Responsibility*, *supra* note 28, at 464–66; *cf.* GARDNER, *supra* note 27, at 135–37.

100. Yankah, *Republican Responsibility*, *supra* note 28, at 464.

There are, of course, times when even acting with such consideration, things will go badly wrong; we may shoot the confused, harmless intruder. As mentioned, there will be unclear racially loaded situations where the state cannot prove recklessness about racial motivation. Where we show these mistakes were not the result of dismissiveness or contempt toward the equal place of others, then we may be shielded from legal punishment.¹⁰¹ But when the wrongdoing is because one consciously ignored the fault lines of race, gender, or religion, then punishment is justified.¹⁰²

One important upshot is this republican view makes clear that hate crime legislation is not simply the state punishing for particularly odious behavior. As repugnant as racism is, many crimes are committed for other repugnant reasons that do not increase punishment. Instead, hate crime legislation assigns greater punishment because some acts attack particularly fragile fault lines in the life of a particular polity.¹⁰³ Thus, in America, race, religion, gender, and sexuality are central to hate crime legislation.¹⁰⁴

A punishment regime focused on civic equality highlights why punishing reckless racism is not simply convenient; indeed, it is more important than punishing other reckless criminal wrongs. An offender may assume their victim was armed because they are prone to panic. But when that recklessness is on the basis of race or another protected class, the mens rea undermines long-standing fault lines of civic equality. Embedded in a society in which being Black has meant being seen as a less valuable citizen and a more dangerous person, lethal recklessness surrounding race merits our special attention.¹⁰⁵

Given that protecting our political equality is so vital, one might ask why negligent racism is not equally punishable. Indeed, it is arguably worse to be so insensitive to others as to be entirely blind to important vulnerabilities. In a different context, Seana Shiffrin has written compellingly on the under-appreciated moral gravity of negligence.¹⁰⁶

I concede that nothing in this political theory itself denies the possibility of punishing negligent racism. Rather, long-standing concerns against

101. GARDNER, *supra* note 27, at 135–37.

102. Yankah, *Republican Responsibility*, *supra* note 28, at 458.

103. *Id.* at 467–69.

104. *Id.* at 467.

105. *Id.* See generally Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543 (2019).

106. Seana Valentine Shiffrin, *The Moral Neglect of Negligence*, in 3 OXFORD STUDIES IN POLITICAL PHILOSOPHY 197, 197–99 (2017). Other thoughtful explorations are A.P. Simester, *Can Negligence Be Culpable?*, in 4 OXFORD ESSAYS IN JURISPRUDENCE 85, 88–91 (2000); David Dolinko, *Review of “Crime and Culpability: A Theory of Criminal Law,”* 6 CRIM. L. & PHIL. 93 (2012).

criminal prosecution for negligence, alongside the concerns about evidentiary competence and remarkable breadth of such an inquiry, counsel against such an extension. In any case, I do not now set myself to denying the possibility of negligent racism. For now, it is enough to show how a republican theory of criminal law makes sense of recklessness as an important basis of hate crime punishment.

V. LIBERALISM AND HATE CRIMES, TAKE 1000

If protecting the fragile joints of our civic bonds is so critical and punishment for recklessness in other places commonplace, why has punishment for hate crimes remained controversial? I have suggested that one important reason stems from cultural aversion. Whatever its source, this controversy has translated not merely into academic skepticism but outright hostility about the legitimacy of hate crime laws. A standard line argues that an appropriately liberal state cannot appropriately punish hate crimes because doing so simply punishes the underlying hateful character of the offender.¹⁰⁷ Perhaps, the state may enhance punishment if hate crimes show greater culpability,¹⁰⁸ are more harmful because they destabilize wider communities,¹⁰⁹ or reveal the offender violated some prior recognized political duty.¹¹⁰ But to punish for racism itself is to punish a person for being abhorrent, something, we are told, any truly liberal state should reject.

If the liberal state cannot punish intentional racism, then certainly it cannot punish reckless racism. Indeed, on some accounts, because recklessness about race cannot be repudiated without attacking the offender's underlying character, the defendant's behavior may be subjectively justified. So, paradoxically such recklessness must not only be ignored as an enhancement but may even mitigate or excuse criminal liability all together.¹¹¹

Thus, reckless racial violence has not merely been ignored; racial panic is so secure in America that just a generation ago there was still a serious question of whether unintentional racially motivated violence could *excuse* otherwise culpable killings. In his seminal article, *Race Ipsa Loquitur*, Professor Jody Armour tackled the question of unconscious bias from the

107. Hurd, *supra* note 68, at 223–24; Hurd & Moore, *supra* note 68, at 1129–38; Kenneth W. Simons, *On Equality, Bias Crimes, and Just Deserts*, 91 J. CRIM. L. & CRIMINOLOGY 237, 238–43 (2000).

108. Hurd & Moore, *supra* note 68, at 1085–100; Harel & Parchomovsky, *supra* note 64, at 518.

109. Paul Iganski, *Hate Crimes Hurt More*, 45 AM. BEHAV. SCIENTIST 626 *passim* (2001).

110. Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM. L. REV. 119, 168 (2008).

111. *Id.* at 134–35.

opposite direction suggested here.¹¹² Armour persuasively argued that someone motivated by unintentional racist motivations—a woman who unjustifiably shoots a Black man—should not be able to excuse the killing by arguing her racism is reasonable.¹¹³ Thus, it is a profound reorientation to not merely strengthen Armour’s claim that reckless bias cannot excuse but to argue that such racist recklessness is itself basis for enhanced culpability.

It would be easy enough to argue many of the criticisms launched at hate crime laws are perfectly ordinary features of criminal law.¹¹⁴ That one can imagine a peculiar hate crime that does not trigger wider social anxiety hardly stops us from recognizing that most crimes do.¹¹⁵ Likewise, we could imagine a robbery that does not undermine property rights while recognizing that robberies as a general matter do. But rather than pointing out the practical shortfalls of such critiques, it is important to challenge their normative foundations.

Objections equating punishing hate crime to illegitimately punishing character strike me as adopting a fanatical focus on the offender and his abstract liberal freedom from having his character inspected, as though his demand for liberal neutrality were all that was at stake in criminal punishment. But hate crimes are not the state turning its eye onto a random citizen in search of poor moral motivation. It is important to focus on the painful real-world examples. The reason the state is inspecting the motivations of Arbery’s killers is because they killed Ahmaud Arbery.¹¹⁶ It is the uncontroversial need to accurately determine their mens rea during the killing that motivates the inquiry.

The nagging worry is that the state cannot simply condemn and punish people for poor character traits; for example, simply being racist. But this prohibition is put too baldly. It is true the state ought not simply enforce character traits according to some thick conception of the good life.¹¹⁷ But there are a broad range of character traits that are enforceable civic requirements. The state may not require virtuous levels of sobriety and prudence, but it can require one to internalize enough to avoid drunk driving. The state may not enforce financial rectitude, but it can require your greed stop short of insider trading.

112. Armour, *supra* note 67 *passim*.

113. *Id.* at 785.

114. Steiker, *supra* note 68.

115. Economist Lisa Cook demonstrates how salient violence against African-Americans depressed entrepreneurship nationwide. Lisa D. Cook, *Violence and Economic Activity: Evidence from African American Patents, 1870-1940*, 19 J. ECON. GROWTH 221 *passim* (2014).

116. See Fausset, *supra* note 1.

117. Hurd & Moore, *supra* note 68, at 1117–38; Garvey, *supra* note 110, at 169–70.

So we ought to directly challenge the claim, “the state cannot require people not be racist.” It simply depends on what you mean. A liberal state cannot force you to have a diverse set of friends or date outside your race. But it can unquestionably sanction racist preferences in who you promote, allow into your neighborhood, your schools, and so on. In matters of civic importance, the state is perfectly legitimate in protecting the grounds on which we interact as equals.¹¹⁸ In these matters, the state can indeed require you not to be racist.¹¹⁹

Just as in requiring one be sober enough to drive lest your intoxication cause damage in the world,¹²⁰ our criminal law requires one to be appropriately prudent when using defensive violence.¹²¹ Just as the state requires that one does not open fire in unjustified panic when someone walks behind you at night, so too the state ought to require that one does not shoot at a Black man because one unjustifiably assumes he is dangerous.¹²²

Further, the fact that one shot him because he is Black is not merely an unrecognizable legal parenthetical. Because these fault lines have for so long undermined our ability to live as equals, the state is authorized to especially patrol them. If such requirements strike some as violating the strictures of the liberal state, so much the worse for that conception of liberalism. The idea that a liberal state only shows equal concern for each citizen by being neutral between a history of casual racist violence to avoid siding with a particular conception of the good ought to be a laughable non-starter.¹²³ If others are permitted to see my brother or my sons coming home from the gym and leap from their skin color to violence without the state repudiating that message, then such a state cannot command my allegiance or theirs.¹²⁴

CONCLUSION

There remain two related contentions to address that uncomfortably cut in opposite directions. The first denies that punishing reckless racism ought to be the point of hate crime legislation at all. Even granting that Ahmaud

118. Michelle Adams, *Racial Inclusion, Exclusion and Segregation in Constitutional Law*, 28 CONST. COMMENT. 1, 11 (2012).

119. *Id.*; Garvey, *supra* note 110, at 169–70.

120. 36 C.F.R. § 4.23 (2021).

121. Armour, *supra* note , at 805–11; GARDNER, *supra* note 27, at 134–39.

122. George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1291 (1974); MODEL PENAL CODE § 2.09(1) (AM. L. INST. 1985).

123. Armour, *supra* note 67, at 805–15; Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crime Legislation Are Wrong*, 40 B.C. L. REV. 739, 758–85 (1999); Brest, *supra* note 98.

124. Armour, *supra* note 67, at 803.

Arbery's killers unjustifiably disregarded the risk they were targeting him due to his race,¹²⁵ the violence visited on him is simply not what the law should pursue for additional punishment. The idea of hatred is that one focuses a certain kind of anger and contempt onto another. In that sense, one cannot hate recklessly.

I am not entirely sure what to make of the philosophical contention that one cannot hate unintentionally. There are people who stew on things or allow anger to corrode into hatred in fascinating ways. This invites more careful exploration of the phenomena of hatred than I am prepared to undertake here. But as a legal matter, the claim that hate crime legislation can only target intentional actions or focus on animus versus discriminatory selection does not match history.¹²⁶ In any case, it strikes me as overly formalistic to be married to any single conception of hate as though the label "hate crime" were a definitive conceptual category. Even if "hate" is a different kind of thing, it does not change the fundamental idea that reckless racism is culpable and dangerous.

What then of the final reservation? Given the importance of protecting vulnerable minorities from racist violence, is the clear conclusion to pursue a new campaign of hate crime prosecutions of those who recklessly cast aside doubts about the reasons they inflict violence? Despite my commitments, I hesitate due to two well-known limitations of criminal punishment more generally.¹²⁷ The first is that expanded use of criminal punishment typically generates greater suffering within minority communities.¹²⁸ Indeed, there is evidence that cases of violence between ethnic minority groups in gang-related conflict or low-level graffiti offenses are among the most vigorous uses of hate crime prosecutions.¹²⁹ Of course, I do not think that being a minority is legal immunity from hate crime prosecution; we have highlighted the killing of Trayvon Martin by George Zimmerman. But whatever the individual culpability of each offender, I am sensitive to how concentrated incarceration in those same minority communities unravels the very civic

125. Oliveira, *supra* note 2.

126. Lawrence, *supra* note 64, at 324–26.

127. In field after field, from housing, to domestic violence, to policing, the instinct to use criminal law to pursue deeper structural change requires careful thought and often backfires. See generally Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337 (2018); Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129 (2014); Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839 (2019); Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. (forthcoming 2021).

128. NAT'L RSCH. COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES* 70 (Jeremy Travis et. al. eds., 2014).

129. Fleisher, *supra* note 15, at 23; Jacobs & Potter, *supra* note 15, at 19.

fabric hate crime laws are intended to protect.¹³⁰ Lastly, I share the concern that criminal law is too often imagined as the solution to much deeper social ills. History is replete with hate crime legislation offered as a panacea to wider structural racial problems in housing, education, employment, and more.¹³¹

Nonetheless, the recklessness captured in so many iconic moments of unjustified violence visited on Black and Brown people is deserving of repudiation by our criminal law. After all, it is precisely this kind of behavior, more so than the imagined focused and intentional hate, that threatens Black men in our everyday lives. As we see from the death of Ahmaud Arbery, it is precisely the danger that rattles through our lives, destabilizes our ability to move in society as equals, and threatens racial fault lines everywhere. And it is the kind of protection that people of color everywhere deserve.

130. See sources cited *supra* note 25.

131. AARONSON, *supra* note 22, at 15.