Discrimination and Exclusion: Toward an Interdisciplinary Approach to Hate Crimes Law

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Introduction

In this paper, I focus on the tensions between the notions of "discrimination" and "exclusion" in relation to hate crimes law. I propose an analytical distinction of what seems to be tightly connected, if not merged, in the legal and scholarly literature on hate crimes.[1] In the first section I explore general definitions of "discrimination" and "exclusion" and from there I propose a working theory in which "discrimination" indicates inferiority and "exclusion" points to erasure and suppression. Hate crimes, I argue, are exclusionary rather than discriminatory practices.

In the second and third sections, I elaborate a critique of the legal parallel between discrimination laws and hate crime statues as announced in *Dobbins v. Florida* (1992) and *Wisconsin v. Mitchell* (1993). I identify three elements for the critique: the compelling state interest in curbing hate crimes, the reduction of the role of motivation of the perpetrator by emphasizing discrimination in selecting the victim, and the emphasis

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[1] I have found that in scholarly literature and political discourses around hate crimes, but also in works specifically oriented to anti-discrimination laws there is no distinction between the notions of "discrimination" and the notion of "exclusion". For instance, Freeman says, "…racism as traditionally practice led to *discriminatory exclusion* (my emphasis) from employment, from "white" neighborhoods…" see. Freeman, Alan, "Anti-discrimination Law from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial", in *The Politics of Law. A progressive critique,* David Kairys ed., New York: Perseus Books Group, 1998. p. 288. I also have found examples where the notion of "discrimination" is used to describe hate crimes, for instance, "Whether the number of hate crimes is increasing or stabilizing, hate crimes are still occurring and victims are being harmed by individuals who perceived of them as inferior [where inferiority is an element clearly connected with the notion of "discrimination']." See Levin, Jack and Jack McDevitt, *Hate Crimes{revisited}.America's war on those who are different,* Boulder, Colorado: Westview Press, 2002, p. 193. Jennes and Grattet also define their position as "an alternative view that recognizes the symbolic and instrumental importance of [hate crimes] law and, at the same time, concedes that the law alone will not solve the problem of discriminatory violence in the United States" See. Jenness, Valerie & Ryken Grattet, *Making Hate a Crime: From Social Movement to Law Enforcement,* New York: Russell Sage Foundation, 2001, p.16. See also, Eskridge, Jr., William N. *GayLaw. Challenging the Apartheid of the Closet,* Cambridge: Harvard University Press, 1999.

on "universal categories" as protected classes instead of on specific groups or identities under attack.

Hate crimes attempt to suppress the "other" while discrimination locates the "other" as inferior. This means that through anti-discrimination measures minority groups may negotiate their "differences" into the hegemonic system of values and reclaim equality. But with exclusionary practices the picture is different. For perpetrators the "other" constitutes a threat to his or her "way of life" so difference has to be suppressed. In this sense, overturning such practices require a different strategy from anti-discrimination measures. They require a deconstruction of the hegemonic values of the system to figure out ways, different from assimilation, to include the "other".

In the fourth section I identify the ways in which symbolic and instrumental force of the laws intertwine with state and non-state practices of exclusion and describe the contradictions coming from penalty-enhancement as a "remedy" for hate crimes.

The last section acts as an appendix where I outline some comments on the possibility of formulating the status of anti-lesbian violence as an illustration for radical exclusion. I describe here as one possible way of articulating such a question notions of "lesbian existence" and "heterosexuality as a political regime" as developed in the work of Monique Wittig.[2]

Definitions

Discrimination is defined[3] as either a "distinction among things" or "to treat someone as worse than others". In the latter sense, *discrimination* prevents individuals or collectivities, for reasons of their differences, from sharing as full partners the rights and benefits guaranteed to other members of society. For definitional purposes, then, I argue

[2] Although I hope this paper gets some coherence on its own, it represents one part of a broader argument. The distinction that shapes my working model for approaching hate crimes comes from contemporary political theory. I draw on the notion of social and political recognition to reformulate the struggle for recognition in the logic of discrimination. From discourse and ideology theory I reformulate the struggle for recognition in the logic of exclusion. In this paper, however, *you will not find*, although they are part of my project at large, an analysis of theories of recognition and ideological interpellation as they operate when applied to hate crimes and hate crimes law, a historical account of extra-legal and legal violence on gays and lesbians, or an analysis of the status of anti-lesbian violence as a paradigmatic case for radical exclusion. In the last section, however, I will risk some thoughts on the latter issue.

[3] The *Oxford English Dictionary*, 2nd edition, Oxford: Clarendon Press, 1989.

that *discrimination* is linked to the notion of *inferiority*. In *discriminatory practices* a status of *inferiority* is assigned to the "other", making his or her difference the mark of such inferiority. For instance, *Dred Scott v. Sanford*[4] (1857) a landmark case on black people's status in pre-civil war America, Chief Justice Taney affirms:

"[T]he public history of every European nation displays it in a manner too plain to be mistaken. [T]hey (the black race) had for more than a century before been regarded as beings of an *inferior order,*[5] and altogether unfit to associate with the white race, either in social or political relations; and so far *inferior*, that they had no rights which the white man was bound to respect…"[6]

Also in *Brown v. Board of Education* (1954), the case that put end to segregation in schools, the court emphasized the *inferiority* element of discriminatory practices,

"To separate them [black children] from others of similar age and qualifications solely because of their race generates a feeling of *inferiority*[7] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. … "…The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the *inferiority* of the Negro group. A sense of *inferiority* affects the motivation of a child to learn…"…We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal."[8]

These examples suggest that the notion of inferiority is tightly connected to the legal use of the notion of discrimination.[9] Following this, *antidiscrimination* measures

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[4] See. W. Haywood Burns, "Law and Race in Early America", in *The Politics of Law. A progressive critique,* David Kairys ed., New York: Perseus Books Group, 1998. pp. 281. Burns informs us that "Dred Scott was a slave who had been taken to a free territory by his master, attempted to sue for his freedom based upon the theory that residence in a free state had made him free." The Court presided by Justice Taney ruled that "Dred Scott, and by extension, any other black person, could not be citizen under the Constitution."

[5] My emphasis

[6] 19 How. (60 U.S.) 393 (1857) p. 407, cited by Burns, *op.cit.,* p. 282.

[7] My emphasis

[8] *Brown v. Topeka Board of Education,* 347 U.S. pp. 494-495

[9] In his book *The Racial State,* Malden, Mass.: Blackwell Publishers Inc., 2002, pp. 74-80., David Theo Goldberg distinguishes between "racial naturalism" and "racial historicism". "Racial naturalism" embodied the notion of "racial inferiority" (Hobbes, Kant) and was justificatory for slavery and apartheid. "Racial naturalism" was hegemonic from the XVII to the end of XIX centuries. Then the paradigm shifted towards "racial historicism" (Locke, Hegel, Stuart Mill, Marx, Las Casas) embodied in the notion of "historical immaturity" that served as argument for the abolitionist movement. The historicism paradigm was hegemonic in the XX century. I argue that in spite of the shifting from inferiority to immaturity, the hierarchical context of the description prevails. In this sense, my emphasis on discrimination as hierarchy is not endangered by Goldberg's distinction. What it basically gives is a non-essential character to the

are designed to promote those marked as *inferior* to the same status enjoyed by the hegemonic group in a determined society. Antidiscrimination struggles negotiate privileges and values that are already embedded in the hegemonic rule of law. Discriminated groups may struggle for equality through efforts to *assimilate* into the rules of the hegemonic system of values (and indeed there many examples of this).

*Exclusion***,** on the other hand, is defined as "to expel or to keep out" and as a condition of "incompatibility"[10]. If what characterizes exclusion is incompatibility, then the practices that operate to *expel* "material or immaterial objects" from a determinate system might be called *exclusionary practices*. So, for purposes of definition I argue that e*xclusionary practices* are not aimed to locate the "other" in an *inferior* position within the operating system but to *expel* or *erase* the "other/difference" from the system.

A possible outcome of this basic definition is that while anti-discriminatory remedies should guarantee "equal enjoyment" of the values of the system –*rights*- anti-exclusionary remedies have to identify why "difference" *appears* as a threat that urges expulsion.

Hate crimes[11] are based on the notion that the 'other' embodies a challenge to a prevalent social order. For this reason, I argue that hate crimes are situated in the logic of exclusionary practices. Because the "other" is seen as a threat, the ultimate purpose of

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hierarchy. The subordinated position coming from historical immaturity could be, under the proper conditions, overcome. A parallel between race and [homo]sexuality might be of interest. Justifications from legal and extra-legal violence on homosexuals oscillate from biological malformations, sexual immaturity, mental illness and moral inferiority.

[10] *OED*. See also, *Merrian-Webster Collegiate Dictionary*, *Longman Dictionary of Contemporary English*.

[11] Hate crimes statutes differ depending on the state and therefore there are several ways of defining a hate crime. Not all states include the same target groups or protected classes, the same code provisions or employ the same language. Those differences are fundamental for an exhaustive research of hate crime definitions. However, I provide here the Anti-Defamation League model because several states had statutes similar or based on this model:

- "A person commits a Bias-Motivated Crime if, by reason of the *actual or perceived (my emphasis)* race, color, religion, national origin, sexual orientation or gender of another individual or group of individuals, he violates Section _____of the Penal code (insert code provisions ……other appropriate statutorily proscribed criminal conduct).
- A Bias-Motivated Crime under this code provision is a _____misdemeanor/felony (the degree of criminal liability should be at least one degree more serious than that imposed for commission of the underlying offense).

The central core of the ADL model is the concept of "penalty-enhancement". It means that "criminal activity motivated by hate is subjected to a stiffer sentence." (www.adl.org/hatecrime) Some statutes create "a crime" for certain violent conducts based on prejudice.

the crime is the elimination of "difference" in order to preserve the established social order. But, as we shall see the act of erasing "difference" is full of ambiguity.

Human rights organizations report that in cases of violence against gay and lesbians the attacks are *particularly* vicious. One such report described attacks in the following manner: "… They aren't just punched and kicked. They're beat and spit on. They're tied up and dragged behind the cars. It's almost as if the attacker is trying to *rub out* the gay person's entire *identity*." [12]

Because the target of hate crimes is not *who* people are but *what* they are identified as --in this case, lesbian or gay-- identity becomes the element that has to be "*rubbed out*" from the perpetrator's social landscape or social order.

The form of violence that characterizes exclusionary practices has been legally and extra-legally exerted on gay and lesbians for long time in the United States. As law Professor William N. Eskridge, Jr.[13] has shown, the legal treatment of homosexuals in the U.S. has followed the path of Kulturkampf or erasure. He compares the anti- homosexual terror in Nazi Germany from 1935 to 1945 to the American anti-homosexual campaigns from 1947 to 1961 as a strategy of Kulturkampf, and reminds us that this notion was historically defined as "a state war to assimilate a threatening minority or to force it into a state directed conformity."[14]

Exclusion can be functional or radical. *Functional exclusion* operates at two regulatory levels, either as a form of disciplining the body[15] that recalls *assimilation* the erasure of difference *or* as the normative production of the "other". In the first sense, through disciplining the body, difference is repressed and subjugated in order to impose homogeneity and compliance with the norm or assimilation. This includes normative practices of gender behavior such as proper attire, gait, speech; in sum, the register of

[12] Southern Poverty Law Center, *1997 Report*. See also *Crimes of hate, conspiracy of silence. Torture and ill-treatment based on sexual identity*. Amnesty International Publications. NYC, 2001. Similar descriptions can be found in multiple sources.
[13] William N. Eskridge Jr., *Gaylaw. Challenging the Apartheid of the Closet*, Cambridge: Harvard University Press, 1999.
[14] Ibid., pp.80-82, pp. 294-295.
[15] In a Foucaultian sense.

appearances[16] but also more "intensive" treatments of domesticating the body. For example, in the United States,

> "After 1946 American jurisdictions sentenced a fraction of their homosexual offenders to hospitals or special prison wards, where they were subjected to experimental medical treatments, sometimes castration, but more typically electrical and pharmacological shock treatments and lobotomies."[17]

In the second sense, functional exclusion operates as the normative production of the "other". This is the formulation of an artificial binary between "us" and "them", the process of marking the "other" as a contrasting effect that permits self-definition.[18] Examples of this abound in contemporary anti-gay policies in the United States.[19] As David Goldberg argues in reference to the racial state, "[t]he creation and promotion of difference is the necessary condition of reproducing homogenized sameness: and (re)producing homogeneity necessarily promotes the externalization of difference to produce its effect."[20]

The legal production of the "other" *is not in itself* a practice of erasure, but creates the context for it. In other words, through the ideological production of the "other", the state draws the lines of identity between "us" and "them" creating the conditions for the "success" of exclusionary practices.[21]

As I stated before, exclusionary practices --as acts aimed at *erasing* difference-- are full of ambiguity. On the one hand, hate crimes, as research shows, are attempts to "suppress" what the perpetrator perceives as a menace to his or her worldview. But, on

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[16] An excellent account of this phenomenon can be found in Iris Marion Young 's "Throwing like a Girl" in See also Sandra Bartky *Femininity and Domination.* Until 1973 "homosexuality" was indexed by the American Psychological Association as a mental illness.

[17] Eskridge, *op.cit.,* p. 82.

[18] From Hegel to Freud, from Marx to Lacan, and contemporary authors like Zizek, Derrida, Butler and Laclau, among others, have explored the vicissitudes of this process.

[19] It can be identified in legal decisions such as *Bowers v. Hardwick*, in the current existing sodomy laws in 13 states, 5 of them banning homosexual anal sex exclusively, in the "don't ask, don't tell policy" in the military, and in the still alive gay panic defense, among others. On March 26, 2003 the US Supreme Court heard the case of two gay men convicted for sodomy in Texas. This decision will be very influential in shaping the legal status of gay and lesbians in the future. Gay advocates expect that the Court revokes *Hardwick* 's decision mainly on the right to privacy grounds.

[20] Goldberg, *op.cit.,* p. 31.

[21] I am here in the terrain of the performative as established by Austin and reinterpreted by Judith Butler. The success of the performative depends on the context of its enunciation. This is also developed by Zizek and Laclau in relation to the non-absolute character of the ideological interpellation.

the other hand, the perpetrator, by performing the violent act in order to eliminate the threat, is simultaneously "fixing" both his or her identity and that of his/her victim[22].

This is especially clear in anti-gay violence. A good proportion of hate crimes are defined by experts as self-defensive or based on material interest,[23] but anti-gay violent crimes however, do not always fit under these two types of explanation. Research has found that anti-gay hate crimes are often the result of fear and anxiety experienced over sexual ambiguity. Sociological research identifies the profile of "gay-bashers" as young males acting in groups and generally strangers to the victim.[24] The fear of difference expressed in anti-gay violence,[25] in homophobic violence, is explained as corresponding to a double logic: an external reaction to protect the "self" from his own –internal-- homosexual drives. By marking his difference from those who are or are perceived as gay, the perpetrator collects himself as an cohesive heterosexual identity.[26] Indeed, the perpetrator tries to erase the "difference" as a means for affirming what Gail Mason calls "his masculine credentials."[27]

This is well known, but the important question remains, why are homosexual drives something to be afraid of? The answer, if we depart from psychology, and turn to other perspectives such as the one by Michel Foucault and by Monique Wittig, relies on the construction of heterosexuality *as a political regime* in which male privilege is achieved through the subordination of women and women's bodies.[28] The fear of

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[22] For many postmodern theories, identity is impossible but, in spite of its impossibility, it constitutes an indeclinable task for the –fragmented-- self in constant fear of disintegration. For an excellent account of the question of identity and identifications in Lacanian theory see, Iannis Stavrakakis, *Lacan and the Political,* New York: Verso, 19XX.

[23] See for example the work of Jack Levin and Jack McDevitt (2002) *Hate Crimes. American War on Those who are different,* Boulder, Colorado: Westview Press, 2002. See also, Frederick Lawrence (1998), *Hate Crimes Under American Law,* Cambridge, Harvard University Press, 1999.

[24] See Kevin T. Berrill, "Anti-Gay Violence and Victimization in the United States: An Overview" in *Hate Crimes: Confronting Violence Against Lesbians and Gay Men, e*dited by Gregory M. Herek and Kevin T. Berrill, Newbury Park, California: Sage Publications, 1992.

[25] Much of the literature explaining hate crimes motivations combines sociological research with social psychology or psychoanalytical theory. Gregory Herek's work on social psychology and anti-homosexual violence is specially relevant in the U.S.

[26] See the work of Gail Mason for an introduction to the different aspects of anti-gay (and as we see) of anti-lesbian motivation in hate crimes. "Not Our Kind of Crime" in *Law and Critique,* the Netherlands: Kluwer Academic Publishers, Les Moran editor, vol. 12, 2001.

[27] Mason, "Not Our Kind of Crime" p. 268. Cf. J. Harry " Conceptualising Anti-Gay Violence" in *Journal of Interpersonal Violence* 5(3) ,1990.

[28] Monique Wittig in *The Straight Mind and Other Essays*, Boston: Beacon Press, 1992. Also Adrienne Rich calls 'compulsory heterosexuality' "a political institution which disempowers women." Adrienne

homosexuality is the anxiety of losing privileges and the power those privileges convey. However, even as exclusionary practices these violent acts against gays and lesbians reflect the logic of functional exclusion, that is to say, that of an homogeneous totality: heterosexual/homosexual whose meaning depends on the mutually constitutive poles.

What is a *radical exclusion?* A *radical exclusion* is the 'residue' that the system is unable to assimilate when it performs the dynamics of identification through differentiation.[29]

A well-known example of *radical exclusion* is found in Marxist's category of the *lumpenproletariat.* Peter Stallybrass states in his insightful piece "Marx and Heterogeneity: Thinking the *Lumpenproletariat*", that "Marx's category of the "proletariat" emerges from the relations of production and constitutes necessarily a *relational* category since a class can only be defined by its relations to other classes: the proletariat and the bourgeoisie are mutually constitutive."[30] However, Stallybrass's essay attempts to show that the lumpenproletariat is a "surplus" whose appearance results from the limits of the relations of production to assimilate their elements in a homogeneous totality.[31] The industrial proletariat to which all workers and potential workers belong makes a pole of the binary with the bourgeoisie on the other pole, and the lumpenproletariat, named by Marx as "the refuse of all classes … a mass sharply differentiated from the industrial proletariat, a recruiting ground for thieves and criminals

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Rich, "Compulsory Heterosexuality and Lesbian Existence", in *The Lesbian and Gay Studies Reader*, Henry Abelove, Michele Aina Barale, David M. Halperin eds., New York, Routledge, 1993, p.227. Michel Foucault was pioneer with his genealogy of the history of sexuality. For an interesting account of heterosexuality as a political regime see also, Marie-Héléne Bourcier, *Queer Zones. Politiques des identities sexuelles, des representations et de saviors*, Paris: Éditions Balland, 2001. An extensive body of feminist work has developed this argument.

[29] For this notion of radical exclusion I consulted Laclau, *Emancipations,* New York: Verso, 1996., but also Peter Stallybrass' analysis of the notion of lumpenproletariat in Marx and Engels. "Marx and Heterogeneity: Thinking the Lumpenproletariat" in *Representations* 31, Summer 1990.

[30] Peter Stallybras, in *Representations* 31, Summer, 1990. p. 84.

[31] In *The Capital,* Marx distinguishes four categories of the surplus population in accordance to their availability as labor force and the ability of the system to employ them: the floating (temporarily out of work and migrating in search of employment), the latent (agricultural producers without means), the stagnant (able bodied urban people with extremely irregular employment) and the paupers (permanently unemployed and many of whom are unemployable). Karl Marx, *The Capital,* Volume One, 1857-8, p. 796.

of all kinds, living on the crumbs of society…"[32] becomes the excess that challenges Marx's binarism of class struggle. As Jeffrey Melhman comments,

"a specular –or reversible- relation is exceeded by a heterogeneous, negatively charged instance whose situation is one of deviation or displacement in relation to one of the poles of the initial opposition. The dialectic between *bourgeoisie* and *proletariat* is congealed to the advantage of the sub-proletariat."[33]

But why is the notion of the lumpenproletariat a radical exclusion? It represents an inassimilable heterogeneity that subverts the homogeneity of the capitalist system of production. The signifying system relies in its "totality" and such a "totality" is grounded on the binary opposition between bourgeoisie and proletariat. But the lumpenproletariat is not another difference able to be assimilated in capitalist relations of production – paupers are unemployable- but the "interruption or breakdown of the process of signification."[34] The lumpen, therefore, represents the limits for the signifying system. However, the limits of a signifying system involve a paradox, because they are at the same time the possibility and the impossibility of the system. Laclau argues,

"…true limits can never be neutral limits but presuppose an exclusion. A neutral limit would be one which is essentially continuous with what is at its two sides, and the two sides are simply different from each other. As a signifying totality is, however, precisely a system of differences, this means that both are part of the same system and that the limits between the two cannot be the limits of the system. In the case of an exclusion we have, instead, authentic limits because the actualization of what is beyond the limit of exclusion would involve the impossibility of what is this side of the limit. True limits are always antagonistic."[35]

In sum, a radical exclusion is the socially produced "heterogeneity" that a specific signifying system is unable to assimilate and that challenges the "totality" that gives the system identity. The differences *within* the system are variations of the two poles and susceptible to assimilation, the exclusion, by contrast, is pure heterogeneity and unmasks

[32] Karl Marx and Frederick Engels, "The Class Struggles in France, 1840 to 1850", in *Collected Works,* 10:62. cited by Stallybrass, *op.cit.,* p. 84. See also, Karl Marx, *18th Brumaire,* part V. See also, Tom Bottomore, "lumpenproletariat", in *A Dictionary of Marxist Thought,* Bottomore et al. eds., Cambridge: Blackwell, 1991.
[33] Jeffrey Mehlman, *Revolution and Repetition*: *Marx/Hugo/Balzac,* Berkeley, 1977, p.14, cited by Stallybrass, *op.cit.,* p. 80-81.
[34] Laclau, *op.cit.,* p. 37.
[35] Ibidem.

the impossibility of the system's closure. The exclusion is not another difference within the system but the limit of the system's process of signification.

Discrimination and exclusion are ideal types that, in empirical settings, frequently combine and sometimes overlap. In creating the "other", discrimination and functional exclusion do not differ. They do differ, however, in their expressions along the continuum from discrimination to criminal violence, and above all, in the remedies they demand. Incidents of hate crimes begin on the discrimination end of the continuum -- from labeling the 'other' as inferior-- and escalate to the pole of exclusion when a person or group is chosen as a "legitimate" target for physical violence and intimidation.

In 1972 the city school board demanded that Canarsie, a Brooklyn neighborhood

> "accepted into its school a few dozen Black children from neighboring Brownsville. But Canarsie's residents, the majority of whom were lower-middle-class Whites, refuse to comply. The forces of reaction became swiftly mobilized in an effort to protect the community from what some residents regarded as an invasion by outsiders. A number of Canarsie residents marched through the streets, boycotted the schools, fire-bombed the home of a Black family, and hurled rocks at buses carrying Black children into the neighborhood."[36]

In this example, the continuum is clear, from discrimination in schools the conflict escalates into physical attacks and a bomb.[37] So while for definitional purposes it is possible to argue that even say that discrimination is a subset of exclusion, when it comes to legal remedies, the parallel between discrimination and exclusion leads to an impasse.

The Discrimination/Hate Crimes Statutes Parallel[38]

Dobbins v. State of Florida (1992), introduces the notion of hate crimes laws as *parallel* to antidiscrimination laws. By doing so, it hopes to solve the thorny issue of defining *motive* in hate crime laws. Here I review the "emerging" meanings for the notion of "discrimination", and how it connects to the question of defining hate crimes.

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[36] *Ibid.*, p. 83.

[37] An important debate has to follow this example, I mean the debate on the limits between hate speech and hate crime. The first is constitutionally protected the second is legally punished. The problem is that in many cases, it is speech what permits identification of a conduct as prejudice. See AnnJannette Rosga, "Deadly Words: State Power and the Entanglement of Speech and Violence" in in *Law and Critique,* the Netherlands: Kluwer Academic Publishers, Les Moran editor, vol. 12, 2001.

[38] I only present here problems related to the hate crime statutes.

In the previous section, I focused on illustrating how the notion of "discrimination" has been employed to describe hierarchy and to stress the superiority of some groups over other. In this sense of "discrimination" the *prejudice* component is the clue to understand the hierarchical status of the groups.

In *Dobbins* the meaning of "discrimination" stresses the act of *making distinctions* rather than the prejudice element. *Dobbins* highlights that independently of the perpetrator's motive, independently of his or her "subjective mental process", that is to say, the type of prejudice he or she is "acting from", hate crime statutes punish "objective acts of discrimination"[39], "It does not matter *why*[40] a woman is treated differently than a man, a black different than a white, a Catholic differently than a Jew; it matters only that they are."[41]

The parallel between antidiscrimination laws and hate crime statutes operates under several premises: first, that both types of law convey the "compelling state interest" in reducing discriminatory practices and hate crimes respectively;[42] second, that

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[39] See also *Wisconsin v. Mitchell*, (June 11,1993) Supreme Court of the United States. 508 U.S. 476; 113 S. Ct. 2194; 124 L. Ed. 2d 436; 1993 U.S. LEXIS 4024. In the opinion of the Court there is a reference to the specific process in which the Wisconsin statute was overturned by the Wisconsin Supreme Court on the ground that the penalty-enhancement statute punishes the " 'subjective mental process' of selecting a victim because of his protected status, whereas antidiscrimination laws prohibit "objective acts of discrimination." (Two Wisconsin justices dissented: Abrahamson, J. and Bablitch, J., *Id., at 176, 485 N.W. 2d at 817.* n3). The U.S. Supreme Court overturned the Wisconsin Supreme Court decision: "Mitchell argues that the Wisconsin penalty-enhancement statute is invalid because it punishes the defendant's discriminatory motive, or reason, for acting. But motive plays the same role under the Wisconsin statute as it does under federal and state discrimination laws, which we have previously upheld against constitutional challenge. [cases followed]."

[40] My emphasis.

[41] This argument is also relevant in relation to contemporary theories of recognition, in particular, to Nancy Fraser's critique of the psychological perspectve in Axel Honneth's theory. She states, that independently of the "mental processes" of individuals suffering misrecognition, injustice is wrong …."an objective act of discrimination". See, Fraser, Nancy, *Justice Interruptus : critical reflections on the "postsocialist" condition,* New York : Routlege, 1997. Also Honneth, Axel, *The Struggle for Recognition : the moral grammar of social conflicts*, Cambridge, Mass. : Polity Press, 1995 and Axel Honneth, "Integrity and Disrespect: Principles of a Conception of Morality Based on a Theory of Recognition" in *The Fragmented World of the Social*, Suny Albany Press, 1995, p.249.

[42] I cannot do here a proper critique of antidiscrimination laws beyond its role as the referent of comparison for hate crime laws. There is an extensive body of work dealing with the inefficacy of antidiscrimination laws to bridge the gap between substantive and formal equality. See for instance, Freeman, Alan, *op.cit.*, and also Crenshaw, Kimberlé, "A Black Feminist Critique of Anti-discrimination Law and Politics" in *The Politics of Law. A progressive critique,* in David Kairys ed., New York: Perseus Books Group, 1998. I do not argue that antidiscrimination laws fully achieve the purpose of reducing discriminatory practices, however, I do think that they represent an important instrumental and symbolic step toward justice in democratic societies. They might represent a partial remedy and they might be even dangerous for

antidiscrimination laws require little scrutiny of motives and hate crimes statutes might be in a similar situation; third, that both types of laws protect classes as "universal categories" rather than specific groups, and that those protected classes, however, embodied historically vulnerable groups or "social fissures lines".[43]

The Compelling State Interest: The purpose of hate crimes statutes, is to introduce an antidiscrimination measure; namely, to recognize that certain individuals because of their membership in certain groups are likely to be selected as victims of a crime, as targets of human rights violations:

"…the statute … is narrowly tailored to serve the compelling state interest of ensuring the basic human rights (not to be a target of a criminal act) of members of groups that have historically been subjected to discrimination because of membership in those groups."

This portion of the Court opinion emphasizes that hate crime statutes have as a goal to introduce an antidiscrimination measure by ensuring historically vulnerable groups with basic human rights. The state interest[44] is to ensure that individuals have the right to not be discriminated as victims because of membership in a group historically under attack.

In this sense hate crimes statutes are seen as antidiscrimination measures oriented to guarantee protection to vulnerable groups against violent crime. However, the notion of *(anti)discrimination* implied in the compelling state interest argument refers to a remedy for inequality. Every person has the right of being equally protected from discriminatory selection. So the state proceeds with an antidiscrimination measure – a hate crime statute- to restore/create equal protection for vulnerable groups. My problem is that this measure is seen as a remedy for a practice that, I argue, is not discriminatory but exclusionary. Hate crimes do not only pretend to instrumentally select a victim to mark the 'other's' inferiority, they are mainly aimed to expel the 'other' from the system, to suppress difference.

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substantial justice if not complemented with a constant critique of the institutional practices at large but still they are aimed to benefit vulnerable groups by re-establishing equality within the system.

[43] I borrow this expression from Lawrence, Frederick M, *op.cit* .p. 20.

[44] With the emergence of the so called "epidemic of hate crimes" in the last two decades, Courts and politicians have argued the state compelling interest in reducing hate crimes.

The difficulties of such a measure become more evident facing the notion of penalty-enhancement as a remedy for curbing hate crimes.

Motives and Prejudices: In discriminatory practices understood as the act of selecting the victim, the law does not punish the specific prejudice or motive but the mere act of discriminating among possible targets motivated by "whatever" prejudice:

> "The purpose of section 775.085 [Fla. Hate Crimes Statute] is to discourage through greater penalties the discrimination against someone (by making such person the victim of a crime) because of race, color, or religion."

In this sense, the court emphasizes the objective act of discriminating rather than the subjective motive for the selection. Courts define the accuracy, the meaning and domain of the laws. Stressing the *objective* act rather than the *subjective* motive for the crime, the Florida Court in *Dobbins* and later the U.S. Supreme Court in *Wisconsin v. Mitchell* attempted to eliminate the problem of defining prejudices for purposes of identifying hate crimes.

Universal Categories or Identities Under Attack: The third premise grounding the parallel is that the law protects universal categories such as sexual orientation or race rather than specific groups or political identities, such as gays or blacks. By drawing on universal categories the statutes prevent challenges on equal protection grounds.[45] Some questions, however, emerge from this assumption: what is the purpose of having special provisions, penalty-enhancement, to fix "social fissure lines" or "long-standing axis of discrimination"[46] if both privileged and vulnerable groups are equally "protected"? Would it not be more in accordance with the equal protection principle to judge all perpetrators with the already existing laws and penalties?[47] The addition of universal categories has depended historically on efforts from identity politics' friendly politicians and social movements. Are these efforts reinforcing privileges when trying to eliminate vulnerabilities as a collateral result of using universal categories?

Complicating the Premises

[45] Cf. Jennes and Grattet, *op.cit.*, p. 122.
[46] Lawrence, *op.cit.*
[47] As opponents of hate crime laws have argued. See. Jacobs, James B., & Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics,* New York: Oxford University Press, 1998. p.p. 128, 133.

Frederick Lawrence argues that not every crime that is motivated by hatred for the victim is a bias crime. A crime is a bias crime only when hate-based violence is connected with prejudice or animosity towards a specific group or individual because of his or her membership in that group. He uses the term "bias crime" rather than "hate crime" to emphasize that hate directed at the victim is not enough for making a bias crime, the key factor in these crimes is not hate but prejudice toward the victim.[48] Elaborating on this distinction, in which the focus is clearly on the role of *prejudice* in the crime, he defines two analytically different models for bias crimes statues: the discriminatory selection model, as formulated in *Dobbins* and confirmed with constitutional authority by the Supreme Court in *Wisconsin*, and the racial animus model that has been adopted by the FBI. The two models, he warns us, constantly overlap and "the majority of the bias crime statutes cannot be unambiguously placed in one category or the other."[49]

As we know, in the discriminatory model, bias crimes are defined in terms of the perpetrator's selection of the victim.[50] By contrast, the racial animus model privileges the animus towards a specific identity as the perpetrator's motivation for committing the crime. In this sense, all racial animus cases are discriminatory but not the converse.[51] In the racial animus model the perpetrator's *motivation* in prejudice acquires the central role for defining a crime as a bias crime.

It is meaningful that the discriminatory model be the one constitutionally confirmed by the Supreme Court while the racial animus model is the one privileged by the FBI. The former model solves the problem of dealing with prejudices as subjective motivations for the crime without concern of which specific "societal fissures" the statutes are trying to recognize. Antidiscrimination is *formally* defended as a value without asking for the concrete expressions, namely, the concrete values that are under attack. The latter model privileges the motivation factor. But determining when a violent

[48] Cf. Lawrence, op.cit., p. 9. See also, Dillof, Anthony M., "Punishing Bias: An Examination of the Theoretical Foundations of Bias Crimes Statutes." In *Northwestern University Law Review*, 91 (3): 1015-81, p. 1016.
[49] Lawrence, *op.cit.* p. 35.
[50] *Ibid.,* p.30
[51] *Ibid., pp. 30, 35.* Examples of both types of statutes can be found in Appendixes B and C. The formulation of the statutes varies from state to state.

conduct is motivated totally or in part by prejudice is very difficult. Figures in FBI reports are often lower than those coming from anti-violence organizations reports. These differences can be traced down to police precincts, the first state agencies in dealing with and in charge of identifying when a crime is a hate crime. In general, I have found that incidents that begin with the police precinct and make it to the court's sentence are relatively few. That is to say, most incidents are not identified as hate crimes and few are sentenced as such. At least this is so in New York City and for the gay community. [52]

One of the most debated issues on hate crimes legislation is the addition of target groups as protected classes under the statutes; that is to say, the selection of the categories that better represent "societal fissures lines", in particular, sexual orientation, gender, and lately gender identity. If the motivation element were simple enough to be solved by stressing the objective act of discriminating rather than the prejudice at stake, then the political and legal question of what groups should be protected and under which categories would be less contested.

There are no neutral statutes[53], that is to say, that there is not a *mere selection of the victim* as *discrimination*. States and federal legislatures express values precisely by making decisions on which groups "deserve" special state recognition and which do not. If this is so, why the insistence on using universal categories to express recognition for those groups that are under attack?

The exploration of the particular prejudices at stake in hate crimes is very useful for social justice. Prejudices not only speak of the particular inter-group dynamics but more importantly, they are indicators of what hegemonic values are shaping exclusionary practices in a society.

The Turn to the Law

> "Like the civil rights movement, the gay rights movement necessarily turned to the law, which had recently targeted them for erasure."[54]

[52] "E' and "F" interview, January 12, 2003.
[53] Lawrence, *op.cit.*, p. 20.
[54] Eskridge Jr., *op. cit.*, p. 99.

"By pointing to the law as a legitimate cultural resource to be invoked in response to anti-gay and lesbian violence, gay and lesbian-sponsored victim assistance programs and their advocates affirm anti-gay and lesbian violence as a criminal act."[55]

The role of social movements has been pivotal for the understanding of violence based on prejudice and the existence of hate crimes statutes.[56] Social movements and their anti-violence organizations have lobbied politicians, built coalitions and created support networks for victims of hate crimes since the early 1980's.

The most compelling argument for invoking the law as a remedy lies on both the symbolic character of the crime and the symbolic force of the law. Advocates of hate crime statutes argue that a crime committed because of prejudice is not an individual crime but a collective threat to all members of the group for what they are and therefore it requires explicit condemnation by the society and the state. The way in which the majority of hate crimes statutes operate is by increasing penalties to perpetrators.[57]

The penalty-enhancement provision in hate crimes statutes, however, reveals at its worst the contradictions stemming from the problems presented in previous sections. The type of practice that hate crimes represent is exclusionary rather than discriminatory. While antidiscrimination measures offer the vulnerable groups remedies at the level of equality through rights, hate crime statutes "envision" as a remedy the penalty-enhancement for individual perpetrators.

The compelling state interest through statutes is curbing hate crimes. Is penalty-enhancement an efficient instrumental tool to do that?

The instrumental difficulties of the statutes speak about the identification of the crime as a hate crime. Such difficulties do not originate only from the process of creating

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[55] Jenness, Valerie & Kendal Broad, "Anti-Violence Activism and the (In)visibility of Gender in the Gay/Lesbian and the Women's Movement." In *Gender and Society* 8(3): 402-23, 1994, p. 414.

[56] For an excellent account of this relation see Jennes and Grattet, *op.cit.*.and Jacobs and Potter, *op.cit.* For the particular case of anti-gay and anti-lesbian violence see Comstock, Gary David, *Violence Against Lesbians and Gay Men,* New York: Columbia University Press, 1991. Also D' Emilio, John, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970.* Chicago: University of Chicago Press, 1983. Katz, Jonathan, ed. *Gay American History: Lesbians and Gay Men in the U.S.A.: A Documentary.* New York: Harper & Row, 1983.

[57] Because of space limitations, I cannot describe, just name, the different legal strategies in States' Hate Crime legislation: Criminalization of Interference with Civil Rights, "Freestanding" statutes, "Coattailing" Statutes, Modification of a preexisting statutes and Penalty Enhancement Statutes. Cf. Jennes and Grattet, *op.cit.*, pp.80-86.

judicial meaning for the notion of "hate crime" or training law enforcement officers to recognize the crime. They also involve the historical tensions between the police and the groups under attack. Because the police are frequently the first state office to be in contact with the crime, and therefore, to identifying it as a hate crime, the role of these tensions are fundamental in determining the instrumentality of hate crimes statutes. The problem is that the police have a reputation of being prejudiced themselves. Cases as the beating of Rodney King in Los Angeles in 1991, Abner Louima in 1997 and Amadou Diallo in New York City in 1999 are only a few examples of a long history of reported and unreported use of "excessive force" by law enforcement agents. So there is a well grounded fear coming from victims of violence that resist reporting the crimes.

In the gay community for example, I interviewed an opponent[58] of hate crime laws who echoing some legal scholars[59] and public defenders I spoke to, argued that perpetrators "don't even know about the statutes and the penalties when they commit the crime." In this sense, not only the instrumental but the symbolic goals of the statutes are dubious. A feminist leader and advocate for the statute made her point by stressing the symbolic character of the law as mainly directed to law enforcement agencies.[60]

Is penalty-enhancement a symbolic gesture of "recognition" for groups under attack?

The symbolic force of the law refers to a conscious strategy employed by legislators and judges to privilege objectives implicit in the norms over their explicit declared normative goals. In principle the instrumental function is irrelevant if the norm has the ability to be received in a way that allows the recipient to re-enact a conflict or a practice through which he or she gets access to the "cure" for or the regularization of an action.[61]

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[58] "C", October 22, 2002.

[59] I will keep my interviewee's identities under cover since I committed myself to quote them only after they review my account of their comments. And since this is a work in progress I haven't made final decisions about the information I want to highlight.

[60] "D", November 8, 2002.

[61] Cf. Garcia Villegas, Mauricio, "Función Simbólica del Derecho", in *Etica y Conflicto. Lecturas para una transición democrática*, Cristina Motta, ed. Bogota: Tercer Mundo Editores & Ediciones Uniandes, 1995. p. 303-305. For the symbolic efficacy of criminal law, see. F. Ost and M. Van Kerchove, "Les lois pénales sont-elles faites pour etre appliquées?" in *Jalons pour une théorie critique du droit*, Brussels: Facultés Universitaires de Saint-Louis, 1987. Also, Edelman, Murray, *The Symbolic Uses of Politics*, Urbana:

The symbolic efficacy of the hate crimes statutes is endangered by multiple contradictions originated in the state's history of exclusionary practices. Difference is at once tolerated and severely resisted. The legal, political, economic and cultural achievements of social movements coexist with state and non-state practices of resistance. This coexistence consistently endangers the symbolic force of the law.[62] Hate crime statutes are seeing as a political achievement for anti-violence organizations. They announce to society at large that violence based on prejudice is not going to be tolerated. But their symbolic force suffers the contradiction of several gestures of resistance.

In American legal system criminal law is predominantly a task of the states, they control a significant portion of the power to decide which classes are protected and which are not. Although 45 states have some type of hate crime statutes, not all of them protect the same classes. For instance, Lawrence comments,

"states which exclude sexual orientation from bias crime statutes are making a normative statement about the nature of homosexuality and the treatment of gays and lesbians. …Failure to include sexual orientation implies that gays and lesbians are not as deserving of protection as racial, religious, or ethnic minorities, and that sexual orientation is not as serious a social fissure line as race, religion and ethnicity."[63]

The debate is also alive at Federal level where for instance, in the formulation of the Hate Crimes Statistics Act of 1990, the addition of sexual orientation as a protected class was negotiated (with Jessie Helms as the leading opponent) only under the condition of including the following statements:

"Nothing in this section creates a cause of action or a right to bring an action, including an action based on discrimination due to sexual orientation. As used in this section, the term "sexual orientation" means consensual homosexuality or heterosexuality…"
"the American family life is the foundation of American Society, …Federal policy should encourage the well-being, financial security, and health of the American family,…school should not de-emphasize the critical value of American family life…"

University of Illinois Press, 1976, Bourdieu, Pierre, "La Force du Droit" in *Acts de la Recherche en Sciences Sociales 64,* 1986.

[62] I am not able to develop all the consequences of this argument here, in particular, the double face of the law as functional and as a system of domination. I am thinking of Jacques Derrida's perspective as expressed in "The Force of Law" in *Deconstruction and the Possibility of Justice,* edited by Drucilla Cornell, Michel Rosenfeld, David Gray Carlson. New York : Routledge, 1992.

[63] Lawrence, *op.cit.,* p. 20.

"Nothing in this Act [this note] shall be construed, nor shall any funds appropriated to carry out the purpose of the Act [this note] be used, to promote or encourage homosexuality."[64]

Examples of the state's schizophrenia on homosexuality abound. Since prejudices have permeated social life through multiple state regulations and practices, the re-creation of exclusion in the form of hate crimes appears as legitimate to its perpetrators. A striking proportion of the offenders believe they are not doing any wrong. They are basically "preserving the American way of life", "cleaning the streets from scum", a task that, in their eyes, *the state is failing to perform*.

"…the members of organized hate groups have broadened the meaning of the term "defense" to include aggressive behavior attacking innocent victims. In a recent issue of his WAR newspaper, for example, Tom Metzger[65] asserts: 'We have every right to use force in self defense, in retaliation, and in *prevemptive strikes against those who openly threaten our freedom'*"[66].

The state responds to this "defiance" through penalty-enhancement or, in some cases, alternative prevention and rehabilitation programs aimed to *altering the behavior* of offenders to prevent future acts of violence. The alleged symbolic efficacy of hate crime statutes attempts to send the message to the society at large and to the groups under attack in particular that the state "will not tolerate violence based on prejudice". If this is so, what "message" does penalty-enhancement and "normalization" treatments convey? Is this a form of recognition for the victims?

The message becomes suspicious not only due to the contradictions mentioned above, but through the nature of the remedies. They are exclusively oriented to the *treatment* of individual offenders, as if their behavior were an exceptional sign of *irrationality* performed in an environment free of prejudice. Even the medical metaphor

[64] Hate Crimes Statistics Act. 104 Stat. 140 amending 28 U.S.C. 534.
[65] Tom Metzger and his son John run a white supremacist organization (White Aryan Resistance-WAR). Tom hosts a cable TV program, has a newspaper and a hot line in D.C. Among other things, he served in the 1970's as California Grand Dragon of the Knights of the Ku Klux Klan. In 1980 won the Democratic nomination to the House of Representatives and later run unsuccessfully for the Senate. He was accused of being liable for the murder of Ethiopian immigrant Mulugeta Seraw in Portland, Oregon by three local skinheads and had to pay millions in civil compensation.
[66] Levin & McDevitt, *op.cit.*,p.101. There are defensive hate crimes where material interest are at risk, crimes performed by organized hate groups in "self-defense", hate crimes that express the mission of eradicate evil from the world, and crimes for the thrill of it. See also Chapters 5, 7,8,14.

of an "epidemic of hate crimes" used by advocates and politicians is problematic because it suggests that there is a clear, although at risk, division between the ill and the healthy and that the "treatment of the diseased body" would lead to a cure.[67] I am not denying that an increase of violence based on prejudice may be taking place, but it certainly does not come from the spread of "evil" to an, up to now, "good" part of the society. A consequence of this, as Alan Freeman notes in relation to racial discrimination, is that "those who, under applicable legal doctrines, are not labeled perpetrators have every reason to believe in their own innocence and noninvolvement in the problem."[68]

Jacobs and Henry, opponents to hate crime statutes, sustain that those statutes gain popular support but let unattended the more demanding task of "formulating specific remedies to carefully defined problems."[69] Journalist Alexander Cockburn and many others in the gay media and community oppose the statutes by arguing that they are "a cheap, quick-fix solution…[that] politicians love hate crime bills because they let them off the hook so easily. Why not go after something that would actually give some gays in Wyoming, for example, some rights—some anti-discrimination legislation?"[70] There are also voices in the gay and lesbian community that denounce the repressive character of the remedies and refer to the anti-violence organizations favorable climate towards the legislation as a "collective amnesia [that] has wiped out a critique of the criminal justice system."[71]

In sum, the enhancement of sentences as a remedy unmasks the insufficiency of the state to deal with violence based on prejudice beyond gestures of increasing repression with no further social, economic or cultural commitments.[72]

On Lesbian Exclusion[73]

[67] I am, of course, in the Foucaultian lexicon here.
[68] Freeman, *op.cit.*, p. 288.
[69] Jacobs, James B., & Jessica S. Henry, "The Social Construction of a Hate Crime Epidemic", in *Journal of Criminal Law and Criminology*, 86(2): 366-91, 1996.
[70] Alexander Coburn, *New York Press*, June 21, 2000. p. 4
[71] *Ibidem*.
[72] In my opinion, death penalty and the 'war on drugs' are two good examples of the futility of penalty-enhancement to control crime rates but also a good example to illustrate state's exclusionary practices and the increment of profiling strategies in the criminal system. Examples of state profiling strategies and other exclusionary practices abound in president George W. Bush's Patriotic Act of 2001 and the war on terrorism.

In the last two decades politicians and activists, joined by social scientists and criminologists, have developed a strong body of public policy and a consolidated field of scholarly work on hate crimes. But while the scholarly work on criminal violence based on race, ethnicity, gender and religion in the United States is extensive, scholarly work on hate crimes against gays is relatively small and studies dealing specifically with hate crimes against lesbians are practically non-existent.[74] This is the case, in spite of public statements by the politicians, advocates, health professionals, and the media that violence against gay men and lesbians is strikingly cruel and pervasive.[75]

The majority of violent incidents against gays and lesbians are not reported or are not indexed as hate crimes by law enforcement officers.[76] Statistical figures[77] however suggest that anti-gay violence incidents are more frequent than anti- lesbian incidents,[78]

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[73] In my dissertation at large I explore the political negotiation of lesbian identities in hate crimes politics as a case to compare the logic of discrimination as developed in notions of recognition as social justice and the logic of exclusion as formulated by theories of ideological interpellation.

[74] There are two landmark books on hate crimes against gay and lesbians by Herek and Berrill, 1992 and Gary Comstock 1991, both published in the early 1990's as well as copious research and publications by Herek and collaborators. Organizations like GLAAD and gay media around the country contributes significantly to the public knowledge of anti-gay –lesbian violence. There are also valuable books on specific incidents such as Mathew Sheppard, Claudia Brenner and Rebecca Wight. While scholarly articles from academics and legal scholars are growing very few focus on the specificity of anti-lesbian hate crimes. The work of Ruthann Robson on lesbian legal studies is pioneer and sheds light on the multiplicity and specificity of lesbians' experiences of violence. Contrasting the lack of specific research on anti-lesbian violence in the U.S., the EU has recently funded research on this phenomenon in the European Community. Also Australian scholars such as Gail Mason have done research specifically on lesbians. See Constance Ohms "*I don't mind lesbians, But…" Violence against lesbians,* Internet Document, Frankfurt, Germany 2001. www.lesbians-against-violence.com. See also, Constance Ohms and Karin Muller, "In good hands? The status quo of psycho-social assistance for lesbians victims of violence and or/discrimination: a European comparison", Frankfurt (M) Berlin: Anti Violence Project LIBS e. V., 2000. internet document. See also Gail Mason, *The Spectacle of Violence: Homophobia, Gender and Knowledge*, London: Routledge, 2001 . I am aware of the differences between violence and crime. Most of anti-lesbian and anti-gay violence cannot be contained in existing notions of hate crime. This is a debate about the limits of regulation of public/private violence, my impression is that the political transformative elements of such a discussion are constantly endangered when definitions of violence collides with existing legal categories of discrimination and hate crimes.

[75] See. Amnesty International 2002, Comstock, 1991.

[76] Interview with D , Nov. 19/02.

[77] See NAVP reports 1999, 2000, 2001.

[78] The most common explanation for this difference is the question of visibility. Gay men tend to "come out" earlier making their "out" life span longer so the chances of being targets of violence at some point in their lives are higher. Gay men are reportedly more likely to gather in the streets around bars and restaurants and are more prone to bond with strangers. Also gay men tend to report violent incidents more often than lesbians do (Berrill, 1991, Comstock 1991, Ganu 1998).

and anti-women violence is strikingly higher than anti-gay violence.[79] Efforts by anti-violence organizations are inclusive of all types of sexual crimes and attempt to honor a common struggle. However, most research on hate crimes and sexual orientation focuses on anti-gay male violence, explaining anti-lesbian violence in relation to it.[80] What this suggests to me is that anti-lesbian violence is only partially explored, not because lesbians are more tolerated than gay men,[81] but rather, because there are conceptual and empirical difficulties in identifying anti-lesbian violence. The difficulties of such an 'identification' stem from the intersection between gender and sex, the continuum between sexism and homophobia.[82] Is a lesbian attacked because she is a lesbian or because she is a woman?[83]

The question of the intersectionality of categories in antidiscrimination laws is very useful to understand all forms invisibility. We have learnt from the important work of critical race theorists[84] that legal remedies to subordination are constructed from the perspective of the privileged as a single issue. As Kimberlé Crenshaw argues "gender discrimination, imagined from the perspective of white men, is what happens to white women; race discrimination is what happens to Black men." Where are black women located in this scenario? They are left with the burden of proof of their invisibility and forced to "translate" their experiences into those of white women or black men. This

[79] *2003 National Crime Victim's Rights Week Resource Guide*. The Bureau of Justice Statistic's National Crime Victimization Survey.
[80] The list is extensive, but remarkable is the book on hate crimes by leading advocates of the hate crimes legislation, Levitt and MacDermott, *op.cit.*,
[81] The rate of anti-lesbian violence unreported incidents is almost 90%.
[82] It is almost impossible to distinguish the limit between an anti-woman attack and an anti-lesbian attack. Usually it happens through verbal insults.
[83] Robson criticizes the violence against lesbians manifested in the Hate Crimes Statistic Act (1990) in the "strategies of categorization of our identities" This violence is exerted through the category of "sexual orientation" because the inclusion of heterosexuality "operates to obscure power differentials between heterosexuals and lesbians or gay men." Also the "omission of the category of gender …artificially isolates lesbianism." If a man rapes a lesbian and does not say any "word" indicating prejudice, the rape is not a hate crime, lesbians and not women are protected. Another element of violence is "the insistence on categorization itself [that] violent atomizes us into separate identities." See. Robson, Ruthann, *Lesbian (Out)law : survival under the rule of law*, Ithaca, N.Y. : Firebrand Books, 1992, p.147. Also, *Sappho Goes to Law School : fragments in lesbian legal theory*, New York : Columbia University Press, 1998. pp. 20-21. The VAWA was drastically modified in 2000. In the current preparatory debate for the Local Law Enforcement Enhancement Act, a reviewed version of the Hate Crimes Prevention Act of 2001, the tendency is to eliminate *gender* as a protected class, as a political strategy to succeed in Congress.
[84] See for instance, Kimberlé Crenshaw, Neil Gottanda, Gary Peller, Kendall Thomas, eds., *Critical Race Theory: The Key Writings that Formed the Movement.*, New York: New Press, 1995.

situation places black women's political articulations in a difficult dilemma, sometimes facing accusations of being divisive of their own communities. [85]

Is this also the case of anti-lesbian violence[86]? Is sexual violence, imagined from the perspective of the heterosexual paradigm, what happen to women; and is homophobic violence what happen to gay men?

This question deserves to be formulated for all those who are marginalized and "underrepresented" in legal arrangements such as antidiscrimination laws and hate crime statutes. Which are the axes of invisibility in the intersections of race, class, sex, age, sexual orientation and how are they combined and narrated in legal arrangements?[87] The importance of this question relies on the recognition that prejudice(s) and not prejudice are behind hate crimes and that unmasking their diversity is the only way of starting correcting them.

If we can say that hate crimes are crimes based on prejudice(s) then we are also saying that there are different kinds of hate crimes.[88] Although anti-lesbian violence shares elements with anti-gay violence, it also exposes specificities. In anti-lesbian violence what is at stake is the core of compulsory heterosexuality, the availability of women and what Zizek calls although in relation to racial conflict "the theft of enjoyment."[89] Following Zizek, Gail Mason observes that "when we characterize the other as a menace to our "way of life" the thing that is usually at stake is the way in which a community "organizes its enjoyment." Therefore, lesbians are hated not only because they are unavailable to men as sexual beings but because they are seen as "stealing heterosexual forms of enjoyment" and enjoying themselves in a way that precludes men's participation. [90]

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[85] Crenshaw, Kimberlé, "A Black Feminist Critique of Anti-discrimination Law and Politics" in *The Politics of Law. A progressive critique*, David Kairys ed., New York: Perseus Books Group, 1998.p. 358.
[86] For a very interesting case on the intersection of sexual orientation and gender discrimination in antidiscrimination laws in the New York State see. *Dawson v. Bumble & Bumble*, 2003. I thank Paisley Currah for this reference.
[87] In my dissertation I explore the possible combinations for lesbian invisibility.
[88] The Gail Mason's work on anti-lesbian hate crimes is the only work I know that focuses on this issue.
[89] See Slavoj Zizek , *Tarrying with the Negative:Kant, Hegel and the Critique of Ideology*, Durham: Duke University Press, 1993. p. 206. cited by Mason, n.82, p.274.
[90] Mason, ibid.

My final comments are for the possible formulation of this question: can "lesbian existence" illustrate the role of a radical exclusion? Do the prejudices involve in anti-lesbian violence help to this formulation?

Three elements are required for identifying a radical exclusion: 1. an inassimilable deviation from one of the poles of the initial opposition. 2. this deviation cannot be another difference within the system but the interruption of its process of signification, its limit. 3. the tension with the deviation is the tension with what makes the system impossible. These elements might be supplied by lesbian existence if[91]:

The heterosexual system is one in which the binary opposition men/women is presented as condition for the constitution of society. Feminism has widely shown and challenged the dynamics of the oppression of men over women.[92] To be a man is to be located in the privilege pole of the hierarchy and this location gains its privilege through the control/subordination of the other side of the pole: women and women's bodies.[93]

Wittig argues that the need of establishing a different/other is represented by the "straight mind" as ontological. However, she claims, there is no such an "ontological need" since the different/other is noting but the dominated of heterosexual society[94] –"not only lesbians and gay men, it oppresses all women and many categories of men"[95]- and

[91] I base this scenario in the work of Monique Wittig. I am aware of the difficulties and criticisms to her notion of "lesbian existence". Still I find her theory compelling to discuss the notion of lesbian existence as radical exclusion. The category of "lesbian existence" that Wittig presents conveys the political potential for articulations that lead, in the long run, to the subversion of the binary heterosexuality/homosexuality. This of course, has been widely debated in recent formulations of queer theory.

[92] The literature on this subject is extensive. I do not have the space here to discuss this at length but I am thinking of works as diverse as Iris M. Young, *Throwing like a Girl*, Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence", Katharine A. MacKinnon, *Only Words*, Simone de Beauvoir, *The Second Sex*, Carol Gilligan *In a Different Voice*. In spite of the critiques we can raise to particular explanations of difference between the sexes, these feminists show how the heterosexual paradigm is built on the assumption of (male)"values" as (universal)"facts". Monique Wittig in *The Straight Mind and Other Essays*, Boston: Beacon Press, 1992, calls not for a mere critique of patriarchy, that is to say, the oppression of men over women, but for the suppression of the binary itself under which heterosexuality is constructed.

[93] Of course, this is nothing knew and many critiques have been elaborated including those that challenge any notion of male or female fixed identities and those that show the intersection of any female or male identity by other subordinated categories such as race, class, national origin an so on.

[94] Wittig, "Preface" p. XIII. Heterosexual society is grounded on the category of sex understood not as being but as relationship. Men and women are the result of relationships but the category of sex is used to 'naturalize' the making of women as (hetero)sexual beings available to men and submitted to heterosexual economy. Cf. p.7. Also Adrienne Rich calls 'compulsory heterosexuality' "a political institution which disempowers women." Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence", in *The Lesbian and Gay Studies Reader*, Henry Abelove, Michele Aina Barale, David M. Halperin eds., New York, Routledge, 1993, p.227.

[95] Ibid., p. 29.

the "ontological need" is "only the way that the masters interpret a historical situation of domination". Arguing for the deconstruction of the binary men/women, she states that,

"Lesbian is the only concept I know of which is *beyond* (my emphasis) the categories of sex (woman and man), because the designated subject (lesbian) is not a woman, either economically, or politically, or ideologically. For what makes a woman is a specific relation to a man, a relation that we have previously called servitude, a relation which implies personal and physical obligation as well as economic obligation…a relation which lesbians escape by refusing to become or to stay heterosexual."[96]

What does it mean that "lesbians are not women"? How can we illustrate such affirmation as a socially constructed exclusionary limit? "Lesbians are not women" is a political statement that announces that lesbians are *beyond* the categories of women and men at their own risk. Lesbians are escapees of the heterosexual contract that implies submission and acceptance to the making of women as sexual beings available to men. To say that "lesbians are not women" is a form of encouragement oriented to the destruction of the class [not an essentialist concept] of women[97] as the subordinated other. Because the class "women" only makes sense in relation to "men", lesbian's survival

"demands that we contribute all our strength to the destruction of the class of women within which men appropriate women. This can be accomplished only by the destruction of heterosexuality as a social system which is based on the oppression of women by men and which produces the doctrine [myth] of the difference between the sexes to justify this oppression." [98]

Lesbians are "escapees, fugitive slaves" of the heterosexual contract and therefore they are not functional to the heterosexual system. If "lesbian existence" embodies a major challenge to the heterosexual system is because they not only represent an interruption for the process of signification of the system as such –lesbians reject

[96] Wittig, "One is not borne a Woman (1981)", in *The Straight Mind and Other Essays*, Boston: Beacon Press, 1992, p. 20.
[97] I cannot develop here the materialist view of Wittig and her critique of Marxism. It should suffice by now to say that she defines important portions of her work as "materialist lesbianism" and argue for the opposition between men and women in terms of class struggle.
[98] Ibid. p.20.

submission to heterosexual economy—but also because they are "thefts of enjoyment"[99] and "role models" for the destruction of the class of women. "Heterosexuality …can ensure its political power only through the destruction or the negation of lesbianism."[100] Only by articulating politically to abolish the heterosexual system, lesbian communities avoid to be "another difference" within the system.

[99] Zizek..
[100] Louise Turcotte, "Changing the Point of View", *Foreword* to Wittig, *op.cit.,* p. IX.