

APA Newsletters

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NEWSLETTER ON PHILOSOPHY AND LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ISSUES

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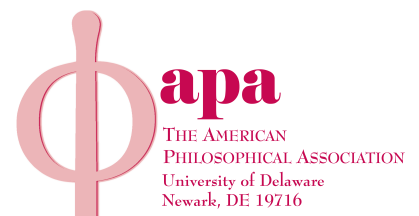
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APA NEWSLETTER ON

Philosophy and Lesbian, Gay, Bisexual, and Transgender Issues

Carol Quinn, Editor

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FROM THE EDITOR

Carol Quinn

Miami University of Ohio

I am excited to present a terrific newsletter, which I hope the reader will enjoy. Featured in this newsletter are four important, controversial articles. First I include two papers given for the LGBT session at the Eastern APA in Atlanta. In his paper, "AIDS, Crisis, and Activist Science," Robert Hood looks at the role of values in shaping research on HIV/AIDS and medical treatment of people living with HIV/AIDS. Drawing on a recent controversy concerning the crisis of HIV/AIDS in developing countries, Hood explores how different understandings of "crisis" lead to different views of ethical obligations of scientists and medical caregivers concerning research and treatment.

Next, in his paper "Biotechnology and the Social Constructive Debate," Patrick Hopkins argues that the debate over the nature of gender differences is often polarized into a science v. culture conflict. A different perspective might be obtained by approaching the issue from technological viewpoint. A technology—and especially a biotechnology—perspective can show that some of the fears each side has of the other are overstated. By combining a serious respect for biological causation with a serious appreciation of the possibility of change and modification, biotechnology cuts across the debate in interesting ways.

I also include a paper by Timothy Murphy, which summarizes a mini-conference he held at University of Illinois at Chicago, entitled "Sex/Change: Technology and the Transformation of Gender." There were three speakers: Alice Dreger, Deirdre McCloskey, and C. Jacob Hale.

Finally, I include Sean McAleer's paper "Taking the Hate Out of Hate Crime." McAleer has three aims in this paper, corresponding to its three sections. First, he argues that much opposition to hate crimes legislation rests on a philosophical mistake—specifically, conflating intent and motive; second he argues that ascribing to hate the crucial motivational role obscures the nature of racism and homophobia and the violent acts that all too often express them; third, he suggests that reflecting on how hubris functioned in classical Athenian law might provide a salutary lesson for current reflection on hate crimes legislation.

Contributions Invited

The editor encourages contributions to the newsletter, especially essays that might fall through the cracks elsewhere for being untraditional in scope or content. Pieces may range from opinion pieces to book reviews to short articles. Commentary on issues important to professional life – teaching, research, and service – are especially welcome. Early contact with the editor is strongly encouraged. Please contact Carol Quinn at Department of Philosophy, Miami University, Oxford Ohio, 45056 or quinnccv@muohio.edu.

FROM THE CHAIR

Mark Chekola

Minnesota State University, Moorhead

At the APA meetings in Atlanta December, 2001, Committee members present had a meeting at which we discussed ideas such as seeking to publish a collection of some of the papers presented at APA sessions sponsored by the Committee, and continued cooperation with the Society for Lesbian and Gay Philosophy.

The new Committee on Inclusiveness had several meetings in Atlanta to inaugurate it as a new standing committee of the APA. One of the meetings was a joint meeting of the Committee on Inclusiveness with Diversity committee chairs. At that meeting we discussed concerns about how the Committee on Inclusiveness, whose chair, as chair of a standing committee, is a member of the APA Board, can effectively represent the concerns of the Diversity committees. At Atlanta the Committee on Inclusiveness, together with the Diversity Committee Chairs and the Committee on the Status of Women sponsored a workshop, "Mentoring for Diversity: A Workshop for those Interested in Recruiting and Retaining a Diverse Faculty and Student Population in Philosophy." Similar workshops are planned for future APA meetings.

I have received a communication from someone about concerns about homophobia in the refereeing of articles by journals. This will be a topic the Committee will consider. In the meanwhile I ask that if you have experienced homophobia in having a paper reviewed by a journal, please write to me about it. (chekola@mnstate.edu)

Current LGBT Committee Membership

Chair

Mark G. Chekola (2002)

Department of Philosophy
Minnesota State University Moorhead
Moorhead, MN 56563

Email: chekola@mnstate.edu

Committee Members:

Pamela M. Hall (2003)

Department of Philosophy
Emory University
Atlanta, GA 30322

Email: philph@emory.edu

Joseph Sartorelli (2004)

Stanford Humanities Center
Mariposa House, Stanford University
Stanford, CA 94305-8630

Email: jsart@quapaw.astate.edu

Christopher Horvath (2002)

Department of Philosophy
Illinois State University
Normal, IL 61761-4540

Email: chorvath@ilstu.edu

Kayley Vernallis (2004)

223 East Calaveras Street
Altadena, CA 91001

Email: kvernal@calstatela.edu

Kelly Oliver (2003)

Old Chemistry Building, #105
SUNY
Stony Brook, NY 11794-3456

Email: koliver@ms.cc.sunysb.edu

Ralph N. Wedgwood (2004)

Department of Linguistics
and Women's Studies Philosophy
Massachusetts Institute of Technology
77 Massachusetts Avenue
Cambridge, MA 02139-4307

Email: wedgwood@mit.edu

Ex Officio:

Editor of Newsletter on LGBT Issues in Philosophy

Carol Quinn

Department of Philosophy
Miami University
Hall Auditorium
Oxford, OH 45056

Email: quinnqv@muohio.edu

FEATURES

Aids, Crisis, and Activist Science

Robert Hood

Middle Tennessee University

Introduction

HIV/AIDS activists, both in the United States and internationally, have charged that existing norms of research are unresponsive to the challenges of the epidemic. Activists suggest that the science of HIV/AIDS is different from other medical research, and should be considered a discipline of crisis. This claim of activists that the science of HIV/AIDS is a crisis discipline should be taken to mean that a crisis exists: because of the number of new cases; because of high mortality; because of a limited time between diagnosis and death; and because of the high economic and social costs. These factors are particularly the case in developing countries, home to the majority of people living with HIV/AIDS.¹ To explore how the notion of crisis shapes the role of values in science, I focus largely on a recent controversy concerning international research about HIV/AIDS in developing countries.

Crisis Science

To the extent that the application of medical science to policy questions is “messy” and involves assessments of the likelihood of outcomes and the risk they pose, often under conditions of some uncertainty, how much evidence and how much certainty should be required? How much uncertainty and how much risk should researchers and policy-makers tolerate in the design of research trials?

In general, medical researchers share a disposition to avoid one kind of error (false positives), where their analysis mistakenly shows that treatment is safe or effective when it is in fact not. Normally, this disposition is socially desirable—because, for example, it inclines the research community to not mistakenly declare a treatment safe when it is in fact unsafe. Yet the concern to avoid false positives potentially makes researchers more likely to commit another type of error, where a procedure mistakenly shows that treatment is not safe or effective when the treatment is in fact safe and effective (false negatives). Normally, the disposition of medical researchers to avoid false positives helps avoid disasters (e.g., thalidomide). But in a situation which is already a disaster, in a crisis situation where there is an urgent need for results, are there grounds for thinking that these dispositions should be reevaluated, particularly if a community demands it?² It should be noted that errors are possible in both cases, so the distinction here is not between “careful science” and “incompetent science” or between “neutral science” and “politically motivated science” but a normative question of which sort of error is preferable. That is, there is no dispute about the importance of scientific rigor. Rather the issue concerns what sorts of study designs would best achieve the goal of scientific rigor, and which study designs would achieve these results the fastest, helping people sooner, and which designs would best protect the

rights of research subjects. At issue in particular is how to cope with situations where the uncertainty that results from trying to avoid false positives yields foreseeable harms that are of substantial magnitude and irreversible. The debate is particularly complex because the dispute involves both ethical and scientific disagreements concerning how best to discharge obligations under conditions of uncertainty, and the discussion that follows will wander back and forth between normative and scientific issues. The case that follows is intended to help diagnose and clarify these issues.

Controversy over Clinical Trials

Clinical trials were initiated in 1994 to address the problem that the standard of care in industrialized countries is not affordable to the majority of people living in developing countries—to the majority of people in the world.³ The purpose of the trials in question was to test a shorter, less expensive, and less intensive regimen of treatment in the hope that the short course would be safe and effective—and, most importantly, would be affordable to people in developing countries.⁴ Starting in 1994, clinical trials involving over 12,000 pregnant women in developing countries were initiated by representatives of two international groups, the World Health Organization and UNAIDS (a United Nations agency that coordinates efforts to combat AIDS), and two agencies of the United States government, the National Institute of Health and Centers for Disease Control and Prevention. In addition to this international support, the studies also had the support of local government officials in the study locations (Bloom 1998). The research protocols involved giving \$80 or less of AZT, compared to the standard treatment, known as ACTG 076, which involves about \$800 of AZT. In addition, the trials administered the treatment later in pregnancy for about one month, or only a fraction of the time required by the ACTG 076 standard of care in the United States.

Conflict emerged over the trial design—in particular, on the appropriate comparison group. Mothers in the trials in developing countries were given either the short course of AZT or a placebo—that is, the women and infants in the control group received no AZT. The fact that women from developing countries in the control group would get a placebo rather than the standard clinical treatment struck some as a straightforward ethical violation.⁵ Researchers stopped using placebo-controls in these particular studies a year after they began, when results emerged from a study in Thailand that showed the use of AZT in only the last four weeks of pregnancy can cut transmission rates by 50% (Marc Llemant and Vithayasai 1995; Strolberg 1998). However, the general question remains unanswered as to whether global inequities in health care justify placebo-controlled trials when an effective alternative treatment exists.

The majority of the literature on this controversy has focused on ethical issues, such as whether there should be a single international standard for research subjects or whether global inequities in the allocation of health care resources justify placebo-controlled trials when an effective treatment exists but is unavailable in the host country (Schüklenk 1988; Angell 1997; Lurie and Wolfe 1997; Bloom 1998; Crouch and Arras 1998; del Rio 1998; Grady 1998; Lie 1998; Resnik 1998; Luna 1999; Schüklenk and Ashcroft 2000; Benatar 2001). In the discussion of the case that follows I touch on ethical issues briefly, but the main focus is how the

notion of crisis shapes the practice of science. The two sides to the debate over international placebo trials reflect the distinction made above concerning crisis science: those in favor of placebo trials were trying to avoid false positives and argued the placebo trials were necessary in order to show the degree to which the short course treatment would be effective, whereas those opposed to the placebo trials seemed willing in this case to forgo seeking additional evidence and argued that the dynamics of the HIV/AIDS crisis made this a special case on both scientific and ethical grounds.

Critics argued that placebo research in developing countries was not justified in this case. Representatives of the activist group Public Citizens Health Research Group were the first to attack these clinical trials on the grounds that randomized placebo-controls should not have been used when there was already an established standard of care for minimizing the transmission of HIV from mother to infant in industrialized countries, namely, the ACTG 076 protocol (Lurie and Wolfe 1997). The debate has been quite heated, with one editorial claiming that the placebo trials are morally equivalent to the Tuskegee experiments (Angell 1997). The critics contend that as soon as the research community has good evidence that a treatment is more effective than a placebo, then researchers have an ethical obligation to discontinue use of placebos. They believe such evidence exists concerning ACTG 076, and moreover believe that research in industrialized countries concerning mother-to-infant HIV transmission applies in developing countries. Critics contend that studies that use placebos when effective treatment is available subordinate the welfare of human subjects to questionable research goals. Instead of placebo trials, they advocate study comparative studies where subjects would get either the short-course treatment or the standard ACTG 076 protocol—that is, they advocate that the research in developing countries be conducted as it would be in industrialized countries.

The critics interpret international agreements governing conduct of clinical research as clearly proscribing placebo trials. The Helsinki Declaration, for example, grants subjects the right to receive “best proven diagnostic and therapeutic method” (World Medical Association 2001).⁶ The *International Ethical Guidelines for Biomedical Research Involving Human Subjects* adopted by the Council for International Organization of Medical Sciences states that “researchers working in developing countries have an ethical responsibility to provide treatment that conforms to the standard of care in the sponsoring country, wherever possible” (Council for International Organizations of Medical Sciences 1993; see also Weijer and Anderson 2001). In addition, it is well established that for a trial to be ethical a state of genuine uncertainty (“clinical equipoise”) as to the comparative merits of the treatments under study must exist within the expert clinical community (Freedman 1987). The purpose of a trial is to disturb this, and consequently alter clinical practice. This means that for a trial to be ethical there must be a strong likelihood its results will be made available to the population in the host country. Since the per capita health expenditure in the region in question is often less than \$10, the critics charge that those conducting clinical trials knew the treatment would only in the most unlikely circumstances be made

available to subjects in developing countries, and so were unethical from the start.

In addition to these ethical arguments, critics also contested the scientific merits of the trials. They contend the use of placebos was unnecessary. First, they argued that the performance of AZT in pregnant mothers is well understood (based on trials and clinical practice in industrialized countries). Those in developing countries are not, in their view, significantly different from those in industrialized countries. Furthermore, they contend that the use of placebo trials was unnecessary, for two reasons. First, an analysis of subgroup data from previous studies demonstrated that a short course was safe and effective (Lurie and Wolfe 1997). Second, they noted that a previous study in Thailand had already shown a shorter AZT regime to be safe and effective compared with the 076 protocol, and that consequently additional testing was unnecessary—especially when those getting placebos would not be getting any treatment. The Thailand study showed it was possible to reduce amounts of AZT while still achieving the efficacy of the ACGT 076 protocol. Notably, the Thailand study's directors refused to include a placebo group in the research because they thought using placebos would be unethical. Even without using placebos, the Thailand study showed the short course AZT treatment resulted in a 50% reduction in mother-to-infant transmission (Marc Llemant and Vithayasai 1995; Lurie and Wolfe 1997). In sum, based on their analysis of the 076 subgroup data, and on the Thailand study, the critics concluded sufficient evidence exists indicating the placebo trials were unnecessary.

The argument of those defending the study is that placebo trials are the gold standard of clinical research and are most likely to yield the clearest results in the shortest period of time. Defenders respond to the moral arguments that, consistent with the general lack of health care in the developing countries of the study, the vast majority of the women in the study would not have gotten any medical treatment outside the study. Participation in the placebo-controlled study did not deny them treatment they otherwise would have received, nor did it increase their risk of transmitting HIV to their infants. As Grady notes, "By participating in the study the women are not being *denied* treatment in the interests of science" (Grady 1998). Thus, the study did not deny access to anything because it did not otherwise exist. The justification for this turns on several distinctions, between clinical treatment and research on the one hand, and between misfortune and injustice on the other. Although it is unfortunate that people in developing countries cannot afford treatment, people who cannot afford treatment are not in this position because they were wronged, thus they have no right to health care (Crouch and Arras 1998).

Second, those defending placebo study argue that placebo-trials are necessary for scientific proof because the subject populations in developing countries are sufficiently different from people studied in the 076 protocol. Harold Varmus and David Satcher, for example, argue that randomized clinical trials are the best way of answering questions of safety and efficacy because the subject population of pregnant women in developing countries has a higher incidence of anemia, malnutrition, and various diseases, and "we do not have reliable data about safety and efficacy in populations from developing countries" (Varmus

and Satcher 1997). The defenders do not address the concern that some patients in industrialized countries are also anemic and have multiple disorders. To the extent there is uncertainty about subjects in developing countries, then it is not clear why there wouldn't be uncertainty about similar patients in industrialized countries. Be that as it may, there are other uncertainties—for example, the clades of the HIV virus in the industrialized countries of Europe and North America are different from those on the African continent and then again different from those in Asia. These differences in the virus could yield differences in drug behavior. Another concern has to do with the question of whether a short course of treatment might possibly increase the likelihood of drug resistant strains of HIV. Drug resistance is emerging as an enormous problem in the United States, and it is not an inconsequential concern to avoid exacerbating this problem.

David Resnik also claims that placebo trials are necessary for science, arguing that "once scientists chose to tackle this research problem, empirical and methodological considerations support the case for using placebo-controls to meet the demands of scientific rigor" (Resnik 1998). Resnik and other defenders of placebo trials raise questions about the effectiveness of comparative studies. The concern is that while a comparative study might have shown that the short-course treatment was less effective than ACTG 076, it would not have shown *how* much less effective or the degree to which it would still be worth implementing (Grady 1998). More to the point, a comparative study would have to involve larger numbers of research subjects and could potentially take longer to show significant results. Thus another reason defenders argue for placebo trials is that they will provide the clearest results faster than other study designs, such as comparative studies. Interestingly, this attempt to answer the urgent need for results is consistent with what aids activists have asked for—namely, that science move quickly due to the urgency of the epidemic. Be this as it may, the most important point to make in response to this line of argument concerns the Thai study. Given the Thai study demonstrated that a comparative study could show the degree of safety and efficacy with placebos, and given that other researchers dispute the need for placebo trials as essential to rigorous research, I am inclined—though I'm open to suggestions of alternatives—to understand the remarks by those defending placebo trials as indicating a value preference for avoiding false positives in the conduct of research. That is, they are concerned to know whether there might be unknown differences among the research population that might affect the safety or efficacy of the short course treatment in developing countries.

Conclusion

The placebo studies discussed above would likely not have been allowed in an industrialized country such as the United States. The debate continues about the obligations of researchers concerning international research subjects, with a recent article lamenting that the debate has been reduced to a "war" characterized by the "effluvia of cynical political maneuvering" (Weijer and Anderson 2001). It is possible that this intensity of feeling stems from a deep recognition that currently none of the options concerning international research are adequate to the global HIV/AIDS pandemic is adequate.

The point of this paper has been to suggest that that notion of crisis influences values internal to the practice of science. How should we cope with situations where the uncertainty that results from trying to avoid false positives yields foreseeable harms that are of substantial magnitude and irreversible? As the discussion of the case above indicates, on one hand some are inclined to favor placebo trials in an attempt to get the clearest possible results in the shortest period of time, even at the risk of appearing morally callous. Interestingly, this appears to be consistent with requests of HIV/AIDS activists for science to respond quickly to the urgent nature of the HIV/AIDS crisis. On the other hand, others are inclined to view the epidemic as a crisis requiring special consideration to protect, among other things, the rights of research subjects, particularly in the case of international subjects in developing countries.

My purpose in the paper has not been to settle the matter of what would be an appropriate attitude toward crisis science and the value questions internal to the practice of science concerning dispositions to avoid false positives rather than false negatives under conditions of crisis and uncertainty. I think that the situation would be helped if the parties to the current debate could see it as turning on values in the design of research studies, that both camps are concerned with rigor, and that both camps are concerned with ethics, just that their sense of the values internal to the practice of sciences leads in different and incompatible directions. For one group it concerns whether to focus on avoiding false positives and using placebo trials to get the clearest results as soon as possible so that treatment can go forward, for others, whether to adopt more complex and potentially time consuming comparative research which grants each research subject the minimum standard of clinical care.

Works Cited

Ainsworth, M. and M. Over (1994). "AIDS and African Development." *The World Bank Research Observer* 9(July): 203-240.

Angell, M. (1997). "The Ethics of Clinical Research in the Third World." *New England Journal of Medicine* 337: 847-849.

Benatar, S. R. (2001). "Justice and Medical Research: a Global Perspective." *Bioethics* 15(4): 333-340.

Bloom, B. (1998). "The Highest Sustainable Standard: Ethical Issues in AIDS Vaccines." *Science* 279: 186-199.

Centers for Disease Control and Prevention (1994). "Recommendations of the U. S. Public Health Service Task Force on the Use of Zidovudine to Reduce Prenatal Transmission of Human Immunodeficiency Virus." *MMWR Morbidity and Mortality Weekly Reports* 43: 1-20.

Centers for Disease Control and Prevention (2001). 25 Notable HIV and AIDS Reports Published in the Morbidity and Mortality Weekly Report (MMWR), Morbidity and Mortality Weekly Report (MMWR). 2001.

Council for International Organizations of Medical Sciences (1993). *International Ethical Guidelines for Biomedical Research Involving Human Subjects*. Geneva, CIOMS.

Crimp, D. and A. Rolston, Eds. (1987). *AIDS: Cultural Analysis, Cultural Activism*. Cambridge, MIT Press.

Crimp, D. and A. Rolston (1990). *AIDS Demo Graphics*. Seattle, Bay Press.

Crouch, R. A. and J. D. Arras (1998). "AZT Trials and Tribulations." *Hastings Center Report* 28(6): 26-34.

del Rio, C. (1998). "Is Ethical Research Feasible in Developed and Developing Countries?" *Bioethics* 12(4): 328-330.

Freedman, B. (1987). "Equipose and the Ethics of Clinical Research." *New England Journal of Medicine* 317(3): 141-5.

Grady, C. (1998). "Science in the Service of Healing." *Hastings Center Report* 28(6): 34-38.

Grmek, M. D. (1990). *History of AIDS: Emergence and Origin of a Modern Pandemic*. Princeton, Princeton University Press.

Kinsella, J. (1989). *Covering the Plague: AIDS and the American Media*. New Brunswick, Rutgers University Press.

Lie, R. K. (1998). "Ethics of Placebo-Controlled Trials in Developing Countries." *Bioethics* 12(4): 307-311.

Luna, F. (1999). "Corruption and Research." *Bioethics* 13(3-4): 22-271.

Lurie, P. and S. Wolfe (1997). "Unethical Trials of Interventions to Reduce Perinatal Transmission of the Human Immunodeficiency Virus in Developing Countries." *New England Journal of Medicine* 337: 853-856.

Marc Llemant, M. and V. Vithayasai (1995). *A Short ZDZ Course to Prevent Perinatal HIV in Thailand*. Boston, Harvard School of Public Health.

Matthews, R. (1997). "AIDS Epidemic Warning for South Africa." *Financial Times*(May 9): 4.

Resnik, D. B. (1998). "The Ethics of HIV Research in Developing Nations." *Bioethics* 12(4): 286-306.

Schüklenk, U. (1988). "Unethical Perinatal HIV Transmission Trials Establish Bad Precedent." *Bioethics* 12(4): 311-319.

Schüklenk, U. and R. Ashcroft (2000). "International Research Ethics." *Bioethics* 14(2): 158-172.

Shilts, R. (1987). *And the Band Played On: Politics, People, and the AIDS Epidemic*. New York, St. Martin's Press.

Strolberg, S. (1998). Placebo Use is Suspended in Overseas AIDS Trials. *New York Times*. New York: A16.

UNAIDS (1999). *The Children Left Behind: UNICEF and UNAIDS Issue New Report on AIDS Orphans*, UNAIDS. 2001.

UNAIDS (2000). *Report on the Global HIV/AIDS Epidemic*, UNAIDS. 2001.

Varmus, H. and D. Satcher (1997). "Ethical Complexities of Conducting Research in Developing Countries." *New England Journal of Medicine* 337: 1000-1005.

Weijer, C. and J. Anderson (2001). "The Ethics Wars: Disputes over International Research." *Hastings Center Report* 31(3): 18-20.

World Bank Policy Research Report (1999). *Confronting AIDS: Public Priorities in a Global Epidemic*. New York, Oxford University Press.

World Medical Association (2001). *Declaration of Helsinki*. Cedex, France, Ferney-Voltaire.

Notes

1. Approximately 36 million people are infected with HIV/AIDS in developing countries, with 25.3 million living in sub-Saharan Africa. About fourteen thousand people are infected with HIV every day; the majority of whom live in developing countries. Overwhelmingly HIV/AIDS is concentrated in the world's poorest countries: 95 percent of all AIDS cases are in developing countries, and 89 percent of the world's HIV infected population lives in the poorest ten percent of countries. Approximately 5,500 people per day die from AIDS in sub-Saharan Africa. Approximately ten million African children have been orphaned by the epidemic. According to Carol Bellamy, UNICEF Executive Director, "[b]efore AIDS, about 2 per cent of all children in developing countries were orphans. By 1997, the figure had jumped to 7 per cent in many African countries-in some countries the figures run as high as 11 per cent" UNAIDS (1999). *The Children Left Behind: UNICEF and UNAIDS Issue New Report on AIDS Orphans*, UNAIDS. 2001.. The large-scale economic effects of the epidemic can be seen, for example in South Africa, where economic growth is estimated to be reduced by 0.3-0.4% annually. By 2010 there will be an estimated 17% reduction in GDP compared to what it might have been without HIV/AIDS UNAIDS (2000). *Report on the Global HIV/AIDS Epidemic*,

UNAIDS. 2001. The situation is expected to continue to get worse Ainsworth, M. and M. Over (1994). "AIDS and African Development." *The World Bank Research Observer* 9(July): 203-240, Matthews, R. (1997). "AIDS Epidemic Warning for South Africa." *Financial Times*(May 9): 4, World Bank Policy Research Report (1999). *Confronting AIDS: Public Priorities in a Global Epidemic*. New York, Oxford University Press, UNAIDS (2000). Report on the Global HIV/AIDS Epidemic, UNAIDS. 2001.

2. In the early days of the HIV/AIDS crisis, gay activists fought for greater opportunities for participation in research. Groups such as ACT-UP and Gay Mens' Health Crisis (GMHC) also argued for—and even paid for—alternate models of research. There are a number of differences between the current issues concerning research in developing countries and activist movements by gay men in the early stages of the HIV/AIDS epidemic. Currently there are standards of clinical practice, whereas in the early days of HIV/AIDS much less was known. Gay men and others at the time were asking for opportunities to participate in finding something, anything, that would work. Currently a treatment is known and works, but is too expensive. Second, to a large extent the people in question in groups such as ACT-UP were extremely well informed about their care and about research, and so there was greater confidence in the ability to consent. Consent in developing countries is a more complex matter. Crimp, D. and A. Rolston, Eds. (1987). *AIDS: Cultural Analysis, Cultural Activism*. Cambridge, MIT Press, Shiltz, R. (1987). *And the Band Played On: Politics, People, and the AIDS Epidemic*. New York, St. Martin's Press, Kinsella, J. (1989). *Covering the Plague: AIDS and the American Media*. New Brunswick, Rutgers University Press, Crimp, D. and A. Rolston (1990). *AIDS Demo Graphics*. Seattle, Bay Press, Grmek, M. D. (1990). *History of AIDS: Emergence and Origin of a Modern Pandemic*. Princeton, Princeton University Press, Centers for Disease Control and Prevention (2001). 25 Notable HIV and AIDS Reports Published in the Morbidity and Mortality Weekly Report (MMWR), Morbidity and Mortality Weekly Report (MMWR). 2001.

3. A number of strategies have emerged to address this problem. Pharmaceutical companies in industrialized countries have reduced prices on HIV therapies to help make developing-country access more realistic. Governments in developing countries have adopted compulsory licenses to allow cheaper production of HIV therapies. Researchers have looked for ways to develop HIV vaccines and therapies that are less expensive and easier to implement than existing treatments common in industrialized countries. Each of these strategies has provoked significant controversy. For example, industrialized countries have resisted lowering prices on HIV treatments, with some drug makers going so far as court to block reductions. So far the reduction of prices by Western pharmaceutical companies has not significantly improved access to HIV therapies in developing countries. The attempted use of compulsory licenses by governments in developing countries sparked conflict between such governments, Western pharmaceutical companies, and the United States.

4. The issue of HIV transmission from mother-to-infant is a serious health problem in developing countries, where some 1,600 HIV-infected babies are born every day. Estimates indicate mother-to-child HIV transmission accounts for 5 to 10 percent of infections worldwide, with higher rates of 20 percent or more in regions with widespread heterosexual epidemics such as in sub-Saharan Africa World Bank Policy Research Report (1999). *Confronting AIDS: Public Priorities in a Global Epidemic*. New York, Oxford University Press.. In 1994 researchers demonstrated an effective way for minimizing mother-to-infant transmission of HIV, known as AIDS Clinical Trials Group (ACTG) Protocol 076, which reduced transmission rates from 25 percent to less than 8 percent. According to this protocol, mothers are tested for HIV early in pregnancy, receive oral and intravenous doses of the antiviral drug zidovudine (AZT), and forego breastfeeding; in addition, AZT is given to the infant for 6 weeks. In the United States and other industrialized countries ACTG 076 has remained the standard of care. Unfortunately there are a number of problems in applying ACTG 076 to developing countries. Expense is one prohibiting factor: it costs more than \$800 per mother, a sum that is several hundred times more than what many developing

countries are able to spend in an entire year per capita on healthcare. It requires a substantial healthcare infrastructure and substantial compliance to be effective because it must be started early in pregnancy and must be continued after birth. Centers for Disease Control and Prevention (1994). "Recommendations of the U. S. Public Health Service Task Force on the Use of Zidovudine to Reduce Prenatal Transmission of Human Immunodeficiency Virus." *MMWR Morbidity and Mortality Weekly Reports* 43: 1-20.

5. Researchers stopped using placebo-controls in these particular studies a year after they began after results emerged from a study in Thailand that showed the use of AZT in only the last four weeks of pregnancy can cut transmission rates by 50% Marc Llemant, M. and V. Vithayasai (1995). A Short ZDZ Course to Prevent Perinatal HIV in Thailand. Boston, Harvard School of Public Health, Strolberg, S. (1998). Placebo Use is Suspended in Overseas AIDS Trials. *New York Times*. New York: A16. However the general question remains unanswered as to whether global inequities in health care justify placebo-controlled trials when an effective alternative treatment exists.

6. The Declaration of Helsinki has been redrafted since these trials so as to clarify the conditions under which placebo trials may be used. Principle 29 now states: "The benefits, risks, burdens, and effectiveness of a new method should be tested against those of the best current prophylactic, diagnostic, and therapeutic methods. This does not exclude the use of placebo, or no treatment, in studies where no proven prophylactic, diagnostic, or therapeutic method exists." This means that trial enrollment into studies may be offered only where there is no consensus concerning treatment in the community of medical practitioners, and refers to genuine uncertainty about the best course of treatment. World Medical Association (2001). *Declaration of Helsinki*. Cedex, France, Ferney-Voltaire.

Biotechnology And The Social Construction Debate

Patrick D. Hopkins
Millsaps College

Recently, the National Science Foundation and the APA worked together to sponsor a panel on the connections between gender diversity and science from a humanities perspectives. When I was asked to participate in this panel, I immediately started thinking about the debate over recent scientific studies of the nature of gender identity and sexual orientation. Not surprisingly, the language that came to me about how the debate was being framed was the language of biology versus social construction—Is gender/sexuality biologically determined, social constructed, or something in between? I decided it would be a nice project for me to settle that whole issue. Of course, as the scope of that presumptuous task began to dawn on me, I realized it was a bit more daunting than was merited for a 30 minute talk at an APA panel. So, while I may yet take up that larger task one day, for now, I decided to narrow my objectives down to making three fairly straightforward observations about the science and social construction debate, including some from the unusual perspective of thinking technologically, rather than scientifically. I am happy to be able to share these thoughts with others through this Newsletter, and though a longer, traditional journal article would no doubt be more rigorously argued and documented than this preliminary paper, I suspect my basic observations would remain essentially the same.

I. What is the social construction debate about?

Simply put, we know what the debate is about, or at least how it is characterized. Are gender identity, gender roles, and sexual orientation biologically determined or are they the local products of socialization and culture? This language of construction v. essentialism (or culture v. biology) has been around so long that by now it has seeped into virtually every discussion of gender. For some, it is just a matter of established truth, or at least faith, that social construction is the correct way to think about gender issues. You run into this all the time in casual statements about the wrongheadedness of looking for genetic origins of sexual orientation or in dismissing biologists' claims about brain differences between men and women. For some others, often reacting to these sorts of casual claims, social construction is a fancy motivated by politics rather than evidence, and is itself evidence of the intellectually bankrupt anti-science bias of humanist scholars.

Part of the problem is a confusion over the meaning of the term "social construction" and perhaps even the term "biological." So first, we need to look into those terms. But what I want to do here is not try to settle on a clear definition of those terms, but rather to look at the rhetorical oppositions they are put in—how they are used to respond to each other. I think this may tell us more about the debate as a phenomenon itself. So here's a simplistic view of how these terms are polarized:

On the one side, we have the position that all gender identity, gendered behavior, and sexual orientation is biologically determined, mostly fixed and fixed in this way because of evolutionary success that would be dangerous to mess with—this is a view I call "naïve biologism", in order to parallel the concept of naïve realism and emphasize that in this view gender properties are basically unmediated, simple facts, produced by the objective qualities of the real world. On the other side, we have the position that gender identity, sexual behavior, and sexual identity are all socially learned, organized under historically specific concepts, undetermined by biology, and infinitely malleable by culture—a view I have termed "naïve social constructionism." Now, I'm not putting these positions in such stark terms thinking that a lot of people actually claim them as their own. Probably most people would be at least somewhat more nuanced in their position, and I suspect that few readers would recognize themselves as clearly on either of these "naïve" sides. However, in my experience, I've found that a significant number of people hold that these are pretty decent descriptions of the *other sides'* position. That is, some social constructionists think my description of naïve biologism pretty much gets the "other side" right, and some essentialists (or whatever they would call themselves) think that my description of naïve social constructionism is an accurate portrayal of the "other side" they worry about.

But if this is the case for at least some people, why do they hold this understanding of the other camp? What might motivate their straw person characterization? A major part of it seems to me to be fear—a fear of what the other side represents and what would happen if their views became dominant. For the social constructionist side, it seems that naïve biologism represents a lack of freedom, or a kind of domination, on several different levels. On one level, naïve

biological determinism seems to say that the "real world", our own bodies, make us robots. We are at the command of our evolutionary history, our neurobiology, and genes. We are what we are, we don't make ourselves, we are slaves, freedom (personal or political) is an illusion. On another level, because our evolutionary history is established, our genetic inheritance settled, and our neurobiology developmentally fixed, we are not really open to change except in relatively minor ways. We, and our societies, are not really open to doing things that differently. We can't change the biological and physical realities that define us, so fundamental social change in gender roles and gender identity is pointless, revolutionary social reform is hopeless. And on yet another level, there is the fear of is = ought. Since we are this way—male and female, separate gender roles, heterosexual family oriented, etc.—we should be this way. This is the way nature, God, evolution, whatever, made us to be and if we try to resist our true natures we only endanger the smooth functioning of society and encourage the necessary unhappiness that comes from perversion in its technical sense—using things in incorrect ways. Irrespective of whether the naïve biologists are correct, the belief that they are would institute a profoundly conservative attitude, considering major social change to be futile and even dangerous. So some social constructionists see biology as representing domination, fixity, or political quietism.

On the other side, what fears do more essentialist types have of naïve social constructionism? At one level, they seem to fear that social constructionism is an anti-science, anti-intellectual movement that wants to undercut the validity of the most powerful and successful intellectual enterprise in the history of humanity—science. In a simple sense, they fear that sloppy faddish thinking, dominating the education curriculum, will win out over hard, demonstrable truth and the fact-generating methods of science will be traded in for mere "ideology." On another level, they might fear that if social constructionists come to dominate, they will enact stupid and dangerous policies that threaten the fabric of human society—such as insisting on the formally equal treatment of men and women in inappropriate places (such as the military), or in encouraging society-eroding practices like homosexuality or single motherhood as perfectly healthy ways of living. Just as human society can't continue to function well if we all eat tree bark and try to live in the ocean (for biological reasons), neither will we function well if we ignore the psychological and sociological constraints placed on us by biology.

So that's the heart of it—social constructionists think the naïve biologists represent domination through preaching determinism, fixity, and a radical conservatism (no change). Biologists think the naïve social constructionists represent mushy thinking and dangerous social policies based on unrealistic understandings of human malleability.

II: A Technological Perspective on this Debate

Sometimes ways of looking at this debate and others like it can be divided between a social outlook and a scientific outlook—simplistically meaning that the scientific (or scientific) way of seeing is conceived by its practitioners as simply trying to objectively discover the way the world is, while the social (or sociological) way of seeing is to recognize science as just another social practice influenced by culture

which can never be truly objective, so its conclusions must be read politically.

I however, am neither a scientist nor a philosopher of science nor a postmodern sociologist, but rather a philosopher of technology (among other things). So I wondered if thinking technologically rather than scientifically or sociologically would shed any different light on this issue. And while I don't pretend that a technological outlook solves these issues, I do think it has something valuable to say.

So, I thought about a term I use all the time, since I teach, read, and write about it—"biotechnology." The term is an interesting one all unto itself. It's a fairly new term and represents something somewhat (though not completely) new in human culture. The "bio" part of the word gives a nod to the given realities of bodies, brains, genes, and evolutionary history and their causal connections to what humans are and what we do. However, the "technology" part of the word indicates by its very nature, the possibility of change, control, manipulation, alteration. The "bio" part of the word points toward studying how behavior, concepts, and perceptions (such as gender roles, gender identity and sexual orientation) are caused/influenced/produced by biology, but the "technology" part of the word points toward studying how behavior, concepts, and perceptions might be changed by changing the biology that underlies them.

So what to make of this? Well, the first thing that comes to mind is that even faith in the most stringent type of biological determinism does not mean that things cannot be changed. Technology is about change and manipulation. Even if behaviors and identities were completely controlled by biology, that would not mean that they are fixed as long as the biology could be altered—and altering biology is precisely what biotechnology seeks to do.

So, the technologist in at least one way can stand outside this debate and say that even if biology is determinative of behavior and identity, that does not imply fixity and unchangeableness—and that calls for change in gender roles and gender treatment are not pointless or hopeless, even if naïve biologism was correct, though what needs to be altered for changes to occur may not simply be social policies or educational curricula. The given state of things that biology looks at does not imply fixity. Change is always possible and we are not perpetually dominated by biology.

Now, briefly back to the concepts of biological determination and social construction themselves. As do many others, I would argue that the two naïve positions I described earlier are both wrong. Naïve biologism ignores the social context in which scientific knowledge about gender is produced, but more importantly also ignores the extent to which an evolutionarily successful complex organism must be behaviorally flexible and environmentally interactive. Naïve social constructionism treats human beings as pure minds that are mysteriously immune to the genes and evolutionary development that affects all other animals but are mysteriously vulnerable to pop culture. The more accurate picture almost certainly has to be somewhere in between, which is increasingly the majority opinion. Biology constrains us—I can't jump straight up 50 feet or calculate pi in my head to the millionth decimal no matter how hard I try, no what consciousness raising pamphlets I read, no matter what counter-hegemonic ideology I might cling to. Biology

channels and limits me. However, biology is interactive within those constraints. My brain interacts with my environment and through a combination of genetics, nutrition, and experience, becomes the brain that generates my ability to read and write, my distaste for collard greens, and my love of Star Trek. I term this a "biosocial constructivist" view, hoping that the term captures the essential idea that biology is interactive with environmental stimuli, limiting our malleability but not predetermining all our specifics.

The difficult thing is this picture of course, is the degree to which certain traits are constrained, and that's where the science and sociology can continue to debate. Is sexual orientation as constrained as eye color? Or only as constrained as height? Or only as constrained as dietary preferences? We don't really know yet, but this is where technology can come back in. Low-level technology can change our experiences and thus move our predisposed traits around within the biological constraints we already have. Through the technology of lifting weight, for example, we can change our muscle mass, within constraints. Through the technology of better nutrition, we can change our blood pressure, or if started early enough, our final height (within constraints). Through the technology of fundamentalist sermons we might make someone who is somewhat predisposed to be homosexual turn out to be predominately heterosexual, while the same technology might turn someone with a stronger predisposition to be homosexual a self-loathing introvert.

But higher level biotechnologies could actually change our constraints. Given enough biotechnology, perhaps we could just straight up 50 feet, or calculate pi...or something else.

III: The Promises and Perils of Biotechnology for Gender

This brings me to the third and final point. Technology is about manipulation and control. And while in some ways it is liberating to find out that biology does not imply fixity, it is also unsettling. There are obviously ways in which biotechnology could be used to do scary and disconcerting things to and with gender. When the "gay gene" research was in the press, there were certainly worries about—and a few calls for—trying to "cure" homosexual embryos *in utero* by excising the bad gay gene. Biotechnology could be used to further limit our constraints rather than expand them. Biotechnology might be able to limit the constraints of sexual orientation down to the narrowness of eye color.

Now it is not the purpose of this paper to delve into the which and what of biotechnology, though that is fascinating. Rather I just want to point out that a technological outlook demonstrates a blind spot in both naïve social constructionism and naïve biologism. For biologism, a technological perspective points out that knowing how things work does not tell us how things should work, nor that things can't work differently. Biological knowledge about how brains and bodies work is precisely what technology wants so that it can manipulate brains and bodies. There is no safe conservatism built into biology. Biology is providing the very material for changing that which might at first be perceived as fixed. For naïve social constructionism, a technological perspective points out that a politically motivated response to the determinist claims of biologists may ignore that technology

can change things, for the better or the worse. To the extent that social constructionists refuse to take biological causation seriously, they are complicit in ignoring what biotechnology might do to determine what people and culture become. That is, fears that biological ideologies are inherently about domination and control and the resulting conviction that they should therefore be resisted may lead some to ignore the possibility that biotechnology could force certain behaviors/ desires/identities into or out of existence. So, if you are teaching a queer theory class at your university insisting on social constructionism as a way to resist biological ideology while across the country somewhere fetuses are getting experimental homosexuality inoculations, you might be overlooking something very important.

But I do not want to end with only the sense that gender biotechnology is dangerous and scary. Biotechnology might also be very useful and liberating. Certainly some people already find it so. Transsexuals who choose to have sex reassignment surgery are essentially trying to alter their bodies to match their neurologically based gender identities (if recent research on transsexual brains is to be believed). With increased biotechnological powers, there might be other potentially useful gender alterations to make. If we allow the research and take the possibility seriously, might we find that men do have a biological predisposition to violence—higher in some than others? Might we want to develop some sort of screening and develop preventive medicine for potential sociopaths? Obviously this sort of suggestion is incendiary. When you get down to the nuts and bolts of possible biological connections to a behavior like violence things get dicey, but if the reason such research programs make people angry is because they supposedly suggest that violence is natural, or justified, or inevitable, the technological outlook says no, it suggests none of those things. A strong desire to eat fat and sugar may be a biological drive left over from early evolutionary history when food was scarce—but that doesn't mean it is useful now and if we can biotechnologically change it, so much the better. Similarly, if a strong desire to fight and compete and control women is a biological drive left over from early evolutionary history, that doesn't mean it should be tolerated now—or even be allowed to remain in our biological heritage. In summary: a biotechnological outlook on gender issues agrees with science that biology is causative and important, but also agrees with social construction that change is possible and often desirable. It is important that we revise our essentialist v. social constructionist debates to take account of biotechnology so that we do not ignore the vastly powerful options that are going to become available.

Sex/Change: Technology And The Transformation Of Gender

Timothy Murphy

University of Illinois College of Medicine

On October 17, 2001, I convened a panel of nationally prominent scholars at the University of Illinois at Chicago (U.I.C.) to discuss the relationship between gender, medical concepts, and technology. This program was sponsored by a University of Illinois grant to promote analysis of the impact of technology on society. The instigator of this grant money was Sylvia Manning, now Chancellor of U.I.C. The prime mover of the program was Andy Pickering of the University of Illinois at Urbana-Champaign who, together with colleagues like myself from across the University of Illinois system, planned a two-year seminar series. The panel was held at the Institute for the Humanities at U.I.C.

After thanking Manning and Pickering for their initiative, I opened the program by noting that many social ideas and practices run downstream from medical conceptions. For example, when I wrote the entry for “Gender Identity and Gender Identity Disorder” for the *Encyclopedia of Bioethics*, I relied on the work of the psychologist John Money to report that there is evidence that gender identity — one's sense of oneself as male or female — could be manipulated by interventions after birth. Many times over in his voluminous career, Money had reported success in treating a child born male in a way that left the child with a female identity. In fact, he had not done any such thing, but his failure to do so was uncovered by independent researchers only some *thirty years* after his first reports of success. I have no way of knowing how many mistakes my own encyclopedia entry — which relies on the false science — will cause. We will have to wait until the next edition to retract the mistake. Errors like mine are understandable in the sense that they rely on scientific reports, but as this instance shows, there can be less to scientific reports than meets the eye. Moreover, scientific misconceptions about gender shape not merely text but people's lives. And we have no way to know how long it will take to correct those.

* * * * *

Alice Dreger, Associate Professor of Science and Technology Studies in the Lyman Briggs College of Michigan State University, spoke first in the program. She is known most recently for her *Hermaphrodites and the Medical Invention of Sex* (Harvard University Press, 1998). A picture of herself and her smiling son are to be found on the net at www.msu.edu/unit/lbs/personnel/fac_bios/dreger.html.

Dreger first spoke about the way in which it was customary to involve physicians in determinations about sex at the birth of a child. These decisions, she said, almost always reflect prevailing social opinions. These social views do not accommodate people whose anatomy and felt gender identity differ from expected norms. She stated quite firmly that shame and secrecy with which these people are treated are greater problems than those associated with reassignment surgery. She then offered a slideshow that offered a wide range of depictions from medical texts.

Dreger believes that the prevailing approach to intersex conditions operates on these assumptions (1) that gender

identity is formed by nurture, not nature; (2) that genitals must always be unambiguous, and (3) that intersex conditions are shameful. She noted that 90% of intersex children are assigned to the female sex. One of the reasons for this is the inability of medicine to be able to fashion male genitalia successfully: “You can poke a hole, but you can’t build a pole,” she said. Once gender assignment is carried out, a conspiracy of concealment follows. Medical records must be kept from children. All discussion about the child’s sex must be policed to be unambiguous about the child’s assigned gender. Indeed, even the intersex condition — whatever it is — may be concealed from the parents who are told only that there is a developmental problem with the child’s sex which can be remedied.

Dreger then showed a short segment of a surgery training video produced by the American College of Surgeons. In this video, a physician calls genital ambiguity a “medical and social emergency” and proceeds to describe how to deal with it: by surgical interventions. Dreger said the analysis went forward almost entirely as if the cosmetic problem — how the genitals look — was more important than future reproductive abilities or sexual sensation.

She then iterated a number of general problems with gender assignment. She called the practice an experiment, but one carried out without any kind of follow-up. Because the consequences of these interventions are not studied, there is no evidence that they work and no evidence that they don’t work. By contrast, she notes that there *is* evidence that the interventions may not be necessary in the first place. To make this point, she showed segments of the video, “Hermaphrodites Speak.” In this video, people with various intersex conditions or atypical genitalia assert acceptance of their traits and object to involuntary treatment.

Dreger went on to identify a number of additional ethical problems with gender assignment practices, saying they violate principles of informed consent insofar as parents are not told what their full range of options might be in regard to their children. The interventions certainly limit the future choice of the children and are thus corrosive of autonomy.

Gender surgeries do not either eliminate parents’ feelings of confusion, shame, and grief, Dreger went on to say. On the contrary, these surgeries may *amplify* these feelings. In any case, there is reason to worry that the kind of concealment thought necessary is in fact even possible. Sooner or later, someone is going to slip up. The culture of concealment also invokes a kind of paternalism that is being repudiated elsewhere in medicine. This paternalism has long-term consequences in any case. Many intersex folks come to see physicians as adversaries and withdraw from the health care they may need. It is to be noted, too, that assignment often fails. That is, as adults, people who have undergone gender assignment interventions sometimes transition to the gender to which they were not assigned. This problem is all the more problematic because surgical outcomes are often poor cosmetically and functionally.

Most of all, Dreger said, this culture of concealment works against peer support and information. What intersex children or children with atypical genitalia need is support. She urged that practitioners in the area work harder to distinguish medical from social issues; many children with atypical genitalia do not have medical concerns as such. She said that medicine should refocus its efforts to distinguish between

what parents want and what a child needs. She did argue that children should be assigned to a gender as girl or boy, based on likely gender identity. It is too hard on children to do anything else. But above all, she cautioned, benign anatomical variation should be treated as acceptable and not pathological.

C. Jacob Hale is Associate Professor of Philosophy at the California State University at Northridge and was the second speaker. Jake holds a doctorate in philosophy from the University of North Carolina and has previously worked in the philosophy of science and mathematics. He has been involved with the Society for Lesbian and Gay Philosophy and the American Philosophical Association Committee on Lesbian, Gay, Bisexual, and Transgender Issues in the Profession. He now works primarily in the areas of feminist, queer, and transgender theory. He is currently working on a book called *TrannyTalk: Philosophical Reflections on Transsexual and Genderqueer Discursive Agency*. Further information is available at www.trans-art.org/jhale.htm.

Jake excerpted his presentation from an article he is writing, “Biomedical Ethics and the Regulation of Gender Variance in the United States.” Jake opened his talk by describing the Benjamin standards, which health professionals use to make judgments about the eligibility of people to have gender therapies (e.g., hormones, surgery). For example, there must be a waiting period, the person must spend time living in the desired gender, a formal diagnosis of the psychiatric disorder of Gender Identity Disorder may be required, and further evidence of the consolidation of gender may be required.

He went on to argue that these standards are unjustified when assessed by standards of contemporary bioethics. To make this case, he relied on the classic bioethics text, *Principles of Biomedical Ethics*, by Tom Beauchamp and James Childress, to make the case that these principles violated standards of autonomy, beneficence, non-maleficence, and justice. In the main, he argued that requests for gender interventions parallel other treatments for which health professionals do not set high standards for monitoring and control. In this regard, for example, he mentioned requests for sterilization. In these instances, health professionals educate patients but do not see it as appropriate for themselves to pass judgment on whether an individual should or should not receive the vasectomy or tubal ligation. The same situation applies with regard to breast augmentation and other interventions with serious and perhaps irreversible consequences. Hale is not persuaded either that the social risks of transgender assignment are decisive enough to justify leaving decisions to health professionals. Treatment, he noted, *can* open one to risks of rejection, harassment, and violence, but so can non-treatment.

Ultimately, he believes that mental health evaluations are different only in degree, not kind, from other medical evaluations. When it comes to gender treatments, health professionals should follow an approach that is most supportive of autonomy — and not arrogate to themselves the right to make final decisions. The Benjamin Rules work against such an approach. In short, Hale argued, medical practitioners have not met the burden of proof to show that the Benjamin Rules are required, that they prevent harms greater than those that would be caused if there were no such

rules and people made decisions about gender modifications for themselves. There is an additional burden of proof to show why autonomy should not prevail with gender modifications as it does elsewhere across the spectrum of medical treatments. There is also a burden of proof as to why psychosocial incapacity of people seeking gender modifications should be assumed — until otherwise proven.

Deirdre McCloskey earned — as Donald McCloskey — a doctorate in economics from Harvard University and, thereafter, littered the published literature with such weighty tomes as *Economic Maturity and Entrepreneurial Decline: British Iron and Steel, 1870 - 1913* and *Knowledge and Persuasion in Economics*. To be sure, she is the author of any number of books and articles. She has written about her transgender experiences in *Crossings: a Memoir*. The *New York Times* named this memoir of the notable books of 1999. More recently, she has written *How to be Human, though an Economist*. Deirdre is Distinguished Professor of Economics, History, and English at U.I.C. Further information may be found at her website: <http://tigger.uic.edu/~deirdre2>.

As the third speaker, McCloskey gave a talk that interwove personal history with social commentary. She noted that in her gender transition she has taken advantage of a number of surgical advances. Since 1995 — then at age 53 — she has had 9 procedures requiring anesthesia. She noted that cosmetic surgery for the face is treated as acceptable in this society, but cosmetic surgery for the genitals is treated as crazy. She pointed out that in many cases, surgery is as uncertain as economics — which should frighten anyone, she joked. Nevertheless, she noted that there is very little well-established science behind existing standards for the medical and social treatment of children with intersex conditions. She also noted that prevailing notions that transgendered identities are disordered allow involuntary commitment, which is what happened to her twice. These conceptions are grounded in very poor science as well, and she traced the origins of prevailing views in this regard to Johns Hopkins University.

She went on to argue that surgeries to effect male or female characteristics are important to safety. She noted that dressing as a woman but not having surgeries could invite greater violence than the surgeries that make transgendered individuals less conspicuous. In any case, the nature and extent of genital surgery is not the point, she said, gender presentation is. Presentation of oneself in society as male or female is independent of one's genitalia. That's why, she said, it is not a medical emergency if a child is born with ambiguous genitalia.

She also noted that the internet has changed the way in which it is possible to communicate and form transgender communities. She underlined the importance of this kind of communication to personal well-being and to the disruption of social misperceptions.

* * * * *

A longish question and answer period followed these presentations, and it was as much a social gathering as an academic interrogation. In addition to many audience members from the U.I.C. community, many participants came from all over Chicago, including Rikki Swin, Director of the Rikki Swinn Institute which is a private organization dedicated to education and research about gender identity issues (www.rs.institute.org). I closed the program by thanking the speakers for their efforts and by apologizing for not introducing

the only Yorkshire Terrier present at the meeting, Deirdre McCloskey's ever-present companion, Jane Austen.

Taking The Hate Out Of Hate Crime

Sean McAleer

Central Michigan University

This is just the bare beginning of a work in progress; no doubt it contains confusions and mistakes, and wants more clarity. Still, I hope it's philosophically interesting and worth developing further. I would gladly welcome comments, thoughts, praise, scorn, & c.

* * * * *

I have three aims in this paper, corresponding to its three sections. First, I argue that much opposition to hate crimes legislation rests on a philosophical mistake—specifically, conflating *intent* and *motive*; second I argue that ascribing to hate the crucial motivational role obscures the nature of racism and homophobia and the violent acts that all too often express them; third, I suggest that reflecting on how *hubris* functioned in classical Athenian law might provide a salutary lesson for current reflection on hate crimes legislation.

§1 Motive, intent and hate crimes legislation

One principled line of opposition to hate crimes legislation is that such legislation penalizes the offender's motive, and thus criminalizes offensive thought—and the very idea of a thought crime is anathema to a free society. Thus, the objection goes, even if hate crime legislation were effective, it dishonors the core value the First Amendment is designed to protect. Though much opposition to hate crimes legislation is surely the product of bigotry and false consciousness, the objection in question is quite clearly principled: in the criminal law, motive is not an element of a crime, and hate crimes legislation illegitimately seeks to make it so.

One finds the idea that hate crimes legislation turns on the offender's motive in both the popular and academic press. In an article in the *Washington Post*, for example, we are informed that, “according to the experts... [h]ate crimes are defined by motive, not by the acts themselves” (Castenada 1998). In a recent law review article the author states that:

The most frequently debated hate crime issue that touches upon criminal jurisprudence is the issue of motive. As shall be discussed later, the American system of criminal justice punishes acts when accompanied by requisite intent; motive is not an element of crime in this system. However, hate crime legislation explicitly punishes motive, in that it requires the victim to have been selected because of a characteristic he or she possesses against which the perpetrator is prejudiced. (Uhrich 1999: 1490-1)

I think this understanding of hate crimes legislation, and the objection it undergirds, rests on a philosophical mistake—namely, confusing *motive* and *intent*.

According to *Black's Law Dictionary*, “Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.” In a seminal article on hate crimes legislation, Susan Gellman quotes this with approval, adding that “[m]otive is nothing more than an actor's reason for acting, the ‘why’ as opposed

to the ‘what’ of conduct. Unlike purpose or intent, motive cannot be a criminal offense or an element of an offense” (1991: 364). She distinguishes them with the following helpful example. If *A* breaks into *B*’s home in order to steal *B*’s property, *A* has committed burglary, regardless of her motive—i.e., her reasons for stealing *B*’s property: perhaps she steals *B*’s property in order to pay a debt, feed a habit or give to the needy. From the perspective of criminal law, her motive is irrelevant. Burglary is a “specific intent crime”: the agent’s *purpose*—the end she aims to realize by her action—determines the nature of the crime. If *A* breaks into *B*’s home in order to recover her own property, then she has not committed burglary, but rather breaking and entering—even if her motive is the same in both cases—because she did not break into *B*’s home to realize a criminal end. Notice that whether *A* has committed burglary depends on intent and purpose, not motive. Suppose that *A* breaks into *B*’s home to steal *B*’s property so *A* can pay a debt and *A** breaks into *B*’s home to recover *A**’s property so *A** can pay a debt; *A* and *A** have the same motive, but since their purposes differ, they perform different acts and thus commit different crimes.

Christine Korsgaard employs a similar distinction when explaining (and defending) Kant’s claim that right actions done from sympathy have no moral worth, since only actions done from duty have moral worth. When they encounter someone in need and come to her aid, “the sympathetic and dutiful persons both have the purpose of helping others, [but] they have adopted this purpose on different grounds” (1996: 58). The sympathetic person adopts the end of helping because she is moved and pained by the needy person’s plight; the dutiful person because she regards the needy person’s plight as making a valid claim on her that obligates her to help, regardless of whether she feels sympathy for the one in need. We can even imagine the self-interested person adopting the end of helping because she thinks it’s in her interest to do so—if private charity fails, a cumbersome and inefficient government bureaucracy which will be instituted, for example.

It’s worth noting that the objection I am considering has some affinity to the distinction Kant draws in the introduction to the *Metaphysics of Morals* between *legality* (*Legalität*) and *morality* (*Moralität*):

The mere conformity or nonconformity of an action with law, irrespective of the incentive to it, is called its *legality* (lawfulness (*Gesetzmäßigkeit*)); but that conformity in which the idea of duty arising from the law is also the incentive to the action is called its *morality*. (6: 219; Gregor 1996: 20)

An agent’s motive for performing an act is irrelevant as far as its rightness or legality is concerned: whether *fing* is a duty or not can be determined without reference to the agent’s motives, though motive *is* relevant to evaluating her (action’s) moral worth. While doing the right thing without the proper motive is not praiseworthy, it’s never blameworthy (*verschuldet*), either. Similarly, the objection goes, our criminal law concerns what a person does, not what sort of person she is, so we should not make motive an element of any crime.

And let us note that this is not a peculiarly Kantian view: Mill warns against conflating motive and intent in the second chapter of *Utilitarianism*, when defending his claim that “the

motive has nothing to do with the morality¹ of the action” (1979: 18) against the objection of the Rev. J. Llewellyn Davies:

Mr. Davies, by an oversight too common not to be quite venial, has in this case confounded the very different ideas of Motive and Intention... The morality of the action depends entirely upon the intention—that is, upon what the agent *wills to do*. But the motive, that is, the feeling which makes him will so to do, if it makes no difference in the act, makes none in the morality: though it makes a great difference in our moral estimation of the agent, especially if it indicates a good or bad habitual *disposition*—a bent of character from which useful, or form which hurtful actions are likely to arise. (1979: 18n; italics original)

It would certainly be objectionable *if* hate crimes legislation criminalized motive. Our criminal law does not and should not punish someone for having a “bad habitual disposition” or thinking bad thoughts. But hate crimes legislation does not criminalize motive, though perhaps we need a richer understanding of *intent* than the principled opponents allow. Imagine that *A* is an anti-Semite who beats up *B* because *B* is (perceived to be) Jewish. The objection to hate crimes legislation seems to be that *A*’s intent is *to beat up B*, and his motive or reason for acting, *that B is Jewish*, should be irrelevant. The crime is the physical assault on *B*, regardless of *A*’s motives. (Notice that there’s no mention of *hate* here; *B*’s motive is characterized without reference to it.) For my part, I think that this obscures what should be made clear. In many if not most cases, it seems far more accurate to say that *A*’s intent is *to beat up a (this) Jew*, and that his motive, if the moniker “hate crime” is accurate (a subject I’ll turn to in the next section), is that *A hates Jews*.

Imagine a carload of gay-bashers, cruising a gay neighborhood, looking for a victim. Though one could say that their intent was to beat up *B* and their motive was that *B* is (perceived to be) gay, the imagined scenario—all too real and too little imaginary, I’m afraid—suggests that their intent was to beat up a gay person; it was under the description *gay person* that *B* was stomped; it could’ve as easily been *C*, whom *B* was on his way to meet. This way of accounting for the offender’s intent more accurately reflects the ugly reality of homophobia. Indeed, by itself *because he was gay* really can’t be the basher’s motive; it doesn’t really explain his action. What we want to know is why a person’s being gay or black or Jewish or “Arab-looking” is a reason to attack her. Perhaps when we get to “I hate fags” we’re getting to the offender’s motive, because that explains why he has attacked *B*. His intention, motive aside, was to beat up a gay person.

Though a pair of examples can’t conclusively support my contention, it’s worth noting that Benjamin Smith’s July 2000 killing spree on Chicago’s north side and the 1998 dragging death of James Byrd, Jr. in Jasper Texas both fit the bill: in neither case were the victims known to their attackers; they were not what we might call *de re* victims but rather we *de dicto* victims: they were killed under the description *black man*, *Korean man*, etc.

The lesson culled from Gellman’s example was that the crime remains the same so long as the intent remains the same, even if the motive differs. Suppose *A* and *B* separately intend to beat a gay person, but that *A* adopts this intention

because he hates gays, while *B* adopts this intention because he wants to impress his older brother, who, let us imagine, hates gays, though *B* himself does not. Though *A*'s and *B*'s motives differ, their crimes are the same, since they have the same intent, to beat a gay person.

Perhaps I've been unfair in claiming that the objection I've been considering rests on a confusion, for the notions of *intent* and *motive* are not easy to get a hold of: what is now the agent's intent is now her motive, as the following suggest:

- (1) I intend to beat him up because he's Jones (motive);
- (2) I intend to beat Jones up because he's gay (motive);
- (3) I intend to beat up a gay person because I hate gays (motive).

The motive in (1) becomes the intent in (2), whose motive becomes the intent in (3). Thus the distinction can be difficult to keep hold of; one is reminded of Socrates' complain that Euthyphro's arguments "seem to move about instead of staying put" (*Euthyphro* 15b). While it's true that hate crimes can be described in a way that makes it appear that motive is being criminalized, as in (2), it's also true that they can be described so that this is not the case, as in (3). It's worth noting, in this connection, that Gellman, following (and quoting) LaFave (from whom she draws her distinction between motive and intention), holds that

intent relates to the means and motive to the ends, but where the end is the means to yet another end, then the medial end may also be considered in terms of intent. Thus, when *A* breaks into *B*'s house in order to get money to pay his debts, it is appropriate to characterize the purpose of taking money as the intent and the desire to pay his debts as the motive. (1991: 364)

Presumably, then, when *A* beats up *B* in order to beat up a gay person because he hates gay people, it would seem to be appropriate to characterize *B*'s being gay as part of the intent.

Moreover, I think that (3) more accurately reflects not only cases where homophobes, racists, etc., cruise for victims, but reflects the important, ugly truth that violent homophobes, racists, etc., see their victims not as individuals, as (2) suggests, but as members of a despised group, as (3) suggests. It's not *qua* Jones that the homophobe wants to beat up Jones, as in (2), but *qua* gay person, as in (3). Thus I think that, generally, (3) is truer to the facts than (2) is, and thus is preferable.

Now there may be practical difficulties in determining just what an agent's intent is—similar problems famously beset Kant's universalizability test for rightness. I don't mean to minimize the nature of this difficulty, though addressing it is far beyond the ambit of this paper. It is worth noting, though, that this is not the objection we started with, and an opponent of hate crimes legislation who makes it has tacitly admitted that such legislation does not make motive an element of the crime.

§2 Hate crimes legislation?

Even if the foregoing response to the principled objection is mistaken, we might well call into question the claim that hate is the offensive motive. Indeed, several authors do raise just this question, though I think their analyses are not completely

helpful. For example, James B. Jacobs and Kimberly A. Potter argue that

The term "hate crime" is a misnomer. The term actually refers to criminal behavior motivated, not by hate, but by prejudice, although there is undoubtedly some overlap. Generically, "hate crime" is meant to distinguish criminal conduct motivated by prejudices from criminal conduct motivated by lust, jealousy, greed, politics, and so forth. Unlike theft, burglary, or assault, hate crime emphasizes the offender's attitudes, values, and character. Lobbyists for special hate crime laws believe that prejudice is worse than all other criminal motivations (1997: 2).

Notice that though Jacobs and Potter deny that *hate* is the motive in question, they understand hate crimes legislation as criminalizing motive. Similarly, Anthony Dillof suggests that

'Bias crimes' is a more accurate term than 'hate crimes'. The statutes under consideration likely apply to many criminal acts in which hate, understood as a particular subjective emotion, is not involved. For example, a White youth who attacks a Black in order to gain the admiration of the youth's racist peers will be liable under these statutes even if he personally does not hate Blacks... Likewise, the statutes under consideration do not apply to many criminal acts based on hate. For example, an employee who assaults his overbearing supervisor will not be liable under these statutes even if the assault was motivated by hate for the supervisor. (1997: 1061n)

This is surely correct, but I think that replacing 'hate' with 'bias' or 'prejudice' tends to obscure something that is worth bringing out clearly—namely, the emotional core of racism and homophobia.

In "Contempt and Ordinary Inequality" (1999), David Kim argues that, though enlightening, both Anthony Appiah's and Adrian Piper's accounts of racism leave out something crucially important: the emotional core of racism. Kim locates *contempt* at the core, and defines it thus: "contempt is a sense of offense toward an object or target in virtue of perceived base and infectiously debasing qualities of that target, accompanied by a drive to effect an elevated distance" (1999: 113). One important distinction between contempt and hatred or resentment is that the former's phenomenology is vertically or hierarchically organized, while the latter's need not be—it is, typically, horizontally organized: in hating or being angry at *B*, *A* need not feel better than or above *B*. Contempt, on the other hand, is "a world-ordering emotion" (1999: 118): when *A* feels contempt for *B*, *A* feels that *B* is less worthy than she, is beneath her—and that *A* might be contaminated by *B*'s baseness.

It seems likely that ordinary racists and homophobes feel contempt rather than hatred and are unlikely to express their racism or homophobia violently. But it also seems likely that contempt is at the core of violently expressed racism or homophobia—contempt fueled by hatred, no doubt, but still primarily contempt. Thus calling violent expressions of racism, homophobia, anti-Semitism, etc., "*hate* crimes"

seems to be something of a misnomer. While “bias crimes” is an improvement of sorts, it too fails to draw our attention to an important structural feature of the emotions that drive such behavior.

§3 Hate Crimes Legislation and the Athenian law of *hubris*

Though there is an interesting connection between the classical Athenian law on *hubris* and the contemporary debate on hate crimes legislation, we shall be easily misled if we attend to the sense of the *English* word ‘hubris’. The OED defines ‘hubris’ as “Presumption, orig. towards the gods; pride, excessive self-confidence,” but as N. R. E. Fisher is at pains to point out, in the classical world

Hybris is clearly not in fact a general attitude that a man may adopt towards the gods ... not simple over-confidence or failure to recognize limitations; it necessarily involves actions that dishonour others, outrage justice, and bring disaster upon a family, or, if allowed to flourish, upon a whole society. (1979: 39)

Thus the Athenian law against *hubris* does not criminalize mere arrogance but rather violent, outrageous—indeed, outraging—conduct. The law against *hubris*, quoted by Demosthenes (*Against Meidias*), begins:

If anyone treats with *hubris* any person, either child or woman or man, free or slave...let anyone who wishes, of those Athenians who are entitled, submit a *graphe* to the thesmothetai...(MacDowell 1978: 129).

While defining anger (*orgê*) in the second chapter of the second book of the *Rhetoric*, Aristotle discusses *hubris* because it is one of three species of slight (*oligôria*), the cause of anger—the other two are contempt (*kataphronêsis*) and spite (*epêreasmos*). He defines *hubris* as

doing and speaking in which there is shame to the sufferer, not that some advantage may accrue to the doer or because something has happened but for the pleasure of it... The cause of pleasure to those who give insult (*tois hubrizousin*) is that they think they themselves become more superior by ill-treating others... (1174b23-8)

Earlier, Aristotle points out that merely striking another does not constitute *hubris*, since *hubris* requires that “he has done so for a certain reason” (1174a13-5). (Both of these passages from the *Rhetoric* are cited by MacDowell 1979: 130.)

For example, Demosthenes claims that Konon committed *hubris* against him by knocking him down into the mud, stealing his cloak, and then “crow[ing] in imitation of victorious cocks, [while] the rest urged him to flap his elbows against his sides by way of wings” (54. 8-9; in Carey 1997: 86-7). *Hubris*, then, is a sort of second-order offense: there must be an underlying crime, such as battery or seduction, which is done in a particular way. The same goes for hate crimes: merely hating *A* isn’t criminalized; but attacking *A* in a particular way—*qua* gay person, for example—is.

It’s worth noting that Ariston (for whom Demosthenes wrote the speech) did not formally accuse Konon of *hubris*, but rather of battery (*aikêia*), even though he begins his

speech by claiming “I was outrageously assaulted (*hubristheis*) by this Konon” (54.1; Carey 1997: 84). Indeed, prosecutions for *hubris* seem to have been quite rare, perhaps because of the difficulty of proving that the offender’s intent was to humiliate and shame the victim (MacDowell 1979: 131; 1976: 29).

Another reason may well be a striking feature of the Athenian law concerning *hubris*, one especially relevant to my task here. A prosecution for battery was a *private* action (*dike idia*), while a prosecution for *hubris* was a public action (*graphe*). Another well-known *graphe* was the prosecution of Socrates, which, as the law quoted above makes clear, could be brought by a third party, whereas a prosecution for battery had to be brought by the victim. If the person bringing a *graphe* failed to get one-fifth of the jury to vote him, he faced a significant penalty (one thousand drachmae), as Socrates points out at *Apology* 36b (see also MacDowell 1979: 64; Carey 1997: 95). We must bear in mind that the Athenian distinction between public and private cases does not match our distinction between criminal and civil cases (MacDowell 1979: 54). Indeed, the closest thing we have to the Athenian law regarding *hubris* is a tort of outrage (the intentional infliction of emotional distress), which belongs of course to the civil, rather than the criminal, law.

Why would any Athenian citizen be able to bring a prosecution for *hubris*? Demosthenes says in his oration *Against Meidias* that “it is not being beaten that is terrible for free men (*eleutherioi*), terrible though it is, it is being beaten in *hubris* (*to eph’ hubrei*)” (54.72; quoted in Fisher 1976: 180-1). *Hubris* is, quite literally, the adding of insult to injury. This explains why one should be able to prosecute for *hubris*, but it doesn’t yet account for why the prosecution is public. Nor does Isocrates’ remark (in *Against Lochites*) that “all other crimes harm a part of one’s life, while *hubris* ruins the whole of one’s affairs” (20.9; Carey 1997: 99), quite do the trick: though it explains the seriousness of *hubris*, it doesn’t yet explain why its prosecution was a public matter. Earlier in *Against Lochites* Isocrates reminds the jury that “*hubris* ... is of public concern” (20.2; Carey 1997: 97). Fisher argues that *hubris* concerns “behavior that causes dishonor to individuals, to groups, or to the values that hold a society together” (1979: 45). Now clearly a core value in Athenian culture is honor; it’s less clear that honor plays a similar role in our culture—indeed, insofar as the crucial moral emotion in the modern West is guilt rather than shame, it seems fairly clear that honor does not play a similar role.² To the extent that Athenian culture is held together by honor, an attack on a person’s honor strikes at the community, as well. It’s worth noting, in this connection, that Isocrates tries to connect the *hubris* of his attacker, Lochites, with the outrages committed by The Thirty Tyrants, even though Lochites is too young to have been one of the Thirty (20.10-1; Carey 1997: 99).

So, if *hubris* is of public concern because it strikes at “the values that hold a society together” (Fisher 1979: 45), then we might do well to follow the Athenians in making hate crimes, which share with *hubris* a violent expression of contempt for another, a public rather than a private matter. For though honor is not the value holding our society together, it seems plain that equality is one such value, and I trust that it is equally as plain that hate crimes militate against this value in a particularly pernicious way. By violently expressing contempt for some individual *A* not *qua* individual *A* but *qua*

member of some historically oppressed group, hate crimes seek to violently promote a hierarchy of worth that strikes at the heart of equality.

References

- Carey, Christopher. 1997. *Trials from Classical Athens*. London: Routledge.
- Castaneda, Ruben. 1998. "Hate Crime Laws Rely On Motives, Not Targets." *Washington Post* October 26, 1998; p. D1.
- Dillof, Anthony. 1997. "Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes." *Northwestern University Law Review* 91: 1015-81.
- Fisher, N. R. E. 1976. "Hybris and Dishonour: I." *Greece and Rome* 23: 177-93.
- Fisher, N. R. E. 1979. "Hybris and Dishonour: II." *Greece and Rome* 26: 32-47.
- Gellman, Susan. 1991. "Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence?" *UCLA Law Review* 39: 333-96.
- Jacobs, James and Kimberly Potter. 1997. "Hate Crimes: A Critical Perspective." *Crime and Justice* 22: 1-49.
- Kant, Immanuel. 1996. *The Metaphysics of Morals* (tr. M. Gregor). Cambridge: Cambridge University Press. (Originally published 1797; page references are to Volume 6 of the Prussian Academy edition of Kant's work.)
- Kennedy, George, tr. 1991. *Aristotle: On Rhetoric*. New York: Oxford University Press.
- Kim, David. 1999. "Contempt and Ordinary Inequality," in S. Babbitt and S. Campbell, eds., *Racism and Philosophy*. Ithaca: Cornell University Press.
- Korsgaard, Christine. 1996. *Creating the Kingdom of Ends*. Cambridge: Cambridge University Press.
- MacDowell, Douglas. 1976. "Hybris in Athens." *Greece and Rome* 23: 14-31.
- MacDowell, Douglas. 1979. *The Law in Classical Athens*. Ithaca: Cornell University Press.
- Mill, John Stuart. 1979. *Utilitarianism* (ed. G. Sher). Indianapolis: Hackett. (Originally published 1861.)
- Uhrich, Craig. 1999. "Hate Crime Legislation: A Policy Analysis" *Houston Law Review* 36: 1467- 1529.

Endnotes

1. Here, of course, Mill is not using 'morality' in Kant's sense; what he is referring to, the rightness of the action, Kant calls "legality"; "morality" for Kant concerns the moral worth of the action, not its rightness.
2. On this general issue see Bernard Williams, *Shame and Necessity* (Berkeley: University of California Press, 1993).