


# Neglect, Marginalization, and Abuse: Hate Crime Legislation and Practice in the Labyrinth of Identity Politics, Minority Protection, and Penal Populism

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## Abstract

Using Hungary as a case study and focusing on legislative policies and the practical application of hate crime legislation, this article shows the various ways legal policy can become misguided in the labyrinth of identity politics, minority protection, and penal populism. The first mistake states can make, the author argues, is not to adopt hate crime legislation. The second error arguably pertains to conceptualizing hate crimes as an identity protection but not a minority-protection mechanism and instrument. The third fallacy the author identifies concerns legislative and practical policies that conceptualize victims based on self-identification and not on the perpetrator's (or the wider community's) potential perception and classification. The fourth flaw concerns the abuse of the concept of hate crime when it is applied in interethnic conflicts wherein members of minority communities are perpetrators and the victims are members of the majority communities. The fifth is institutional discrimination through the systematic underpolicing of hate crimes.

**Keywords:** hate crimes; identity politics; vulnerability; ethnicity; minority rights; race

## Introduction

Focusing on legislative policies and patterns surrounding the practical application of hate crimes, this article contributes to the ever-complex puzzle of how law conceptualizes and operationalizes race and ethnicity as well as ethno-racial identity. The article will begin by introducing the concept, rationale, and uniqueness of hate crimes. This is followed by an overview of the history of the development of legislative implementation of hate crime provisions worldwide, followed by an identification of some essential questions pertaining to the concept and definition of hate crimes that trigger academic interest and professional (practical) debates. Building on these, as well on the author's personal experiences as an academic involved with the work of a human rights NGO coalition in Hungary, the author sets forth the definitive issues and dilemmas regarding the concept and definition of hate crimes that are arguably (1) instrumental for theoretically sound and practically efficient policy making and (2) the cornerstone of law enforcement and judicial practice.

As for methodology, despite references and examples brought from this country, the article is not an empirical analysis or critical assessment of the legal practice in Hungary, but rather an inquiry on the general conceptual framework and context of a “politically and socially significant term [...] and] an umbrella concept with the capacity to unite disparate social movements and to direct attention toward the collective experiences of minority groups and the commonalities in their victimization” (Chakraborti and Garland 2012, 500).

The second part of the article shows the various ways law (and the state) can be misguided in the labyrinth of identity politics, minority protection, and penal populism. The first mistake states can make is not to adopt hate crime legislation. The second error arguably pertains to conceptualizing hate crimes as an identity-protection and not a minority-protection mechanism and instrument. The third fallacy concerns legislative or practical policies that conceptualize victims based on self-identification and not the perpetrator's (or the wider community's) potential perception and classification. The fourth issue concerns institutional discrimination through the systematic underpolicing of hate crimes. And the fifth problem is an abuse of the concept of hate crime when it is applied in interethnic conflicts wherein members of minority communities are perpetrators and the victims are members of the majority.

The core argument of the article is that hate crimes are and should only be minority—and not identity—protection mechanisms. The discussion is necessitated by the fact that inappropriate tailoring of criminal measures can both raise rule of law concerns and impede the initial goal of the legislative measure. Although more and more states legislate against hate crimes and the catalogue of protected characteristics as well as the formats of the legislation are diversifying, the rudimentary question of whom hate crime legislation targets is still under consideration in the literature, as well as in the political discourse.

Triggered by experiences in Hungary, a country with an extensive hate crime legislation record followed by a very controversial operationalization, the goal of the article is to present some of the ongoing debates and persistent pitfalls, while also providing an addition to the scarce literature on the legislation and practice, as well as conceptualizations of hate crime outside of the Western, English-speaking world.

This article considers the question of whom hate crimes legislation should target from a doctrinal perspective and agrees with Bakalis (2017) that a principled way of deciding the characteristics of hate crime is required. It will conclude that the core concern of hate crime legislation is with the furthering of the broader minority rights agenda.

### ***Hate Crimes: Conceptualizations and Definitions***

Defining hate crimes is not a straightforward task. This is especially true for the purposes of this article, which struggles with the paradox that, while it raises general points for discussion, talking about legislative policies will always need to have specific jurisdictions and textual language as points of reference. It is often said that hate crimes are more a concept than a strict legal definition. The general idea is simple: the state introduces stricter penal sanctions for criminal activity with a specific type of motivation. Thus, hate crimes will entail a base crime, an already punishable criminal offence (e.g., intimidation, threats, assault, murder, property damage, vandalism, arson, etc.), and a specific motivation of bias or hatred against certain predefined groups with protected characteristics (e.g., race, religion, ethnicity, nationality, sexual orientation, disability, etc.). Technically, hate crime provisions can constitute separate criminal offences or take the form of penalty enhancements, aggravating sentencing clauses or aggravating circumstance clauses. Even though “hate” is most commonly used as a signifier for the offense, the intention to cause harm is understood to include motivations led by an emotionally neutral bias, when the victim is selected because of her presumed (either actual or mistaken) membership in a specific group.

Acknowledging apparent similarities and overlaps, academic literature habitually distinguishes between broader and narrower conceptualizations of hate crimes, the latter not including terrorism, genocide, various forms of hate speech, and gender-based violence, thereby also excluding honor crimes and domestic violence. This article limits the discussion on hate crimes to physically violent behavior targeting members of vulnerable minority communities (identified as such by the offender).

### ***The Rationale***

The reason why legislators opt for enhanced sanctioning of hate (or bias) crimes is manifold: such violence is always oppressive in the sense that it reconstructs the prevailing structures of oppression

and reinforces the boundaries of difference. Hate crimes are message crimes, “reminders” of the victim’s “place” in society. Hate crimes are also considered toxic because the victims are interchangeable—being targeted because of *what* and not *who* they are. And since they are usually only “at the wrong place at the wrong time,” traditional crime prevention measures are particularly ineffective. Hate crimes may intimidate entire communities through harm caused to individual victims and, by causing unrest, harm the entire society. A further argument for introducing hate crime provisions is that racism, homophobia, xenophobia, and the like are among the beliefs that cannot be tolerated in liberal democracies, and states have a duty to combat these with all applicable means.

Schweppe (2012, 174–176) argues that hate crimes are the ultimate victim-led offences, as generally criminal law ranks offenses by assessing objective severity (e.g., assault, assault causing harm, assault causing serious harm). Hate crimes are punished more harshly due to the motivation of the offender, the subjective experience of the victim, and the impact the crime has on the community with which the victim identifies. Thus, hate crimes differ from other crimes most of all from the perspective of victims, in that they target offenses where victims were chosen not because of who they are but rather because of their actual or presumed membership in a particular group. As for the perpetrator, the specific victim is deindividualized and immaterial, and victims are interchangeable.

According to Chakraborti and Garland (2012, 500), there is no universal definition for hate crimes, but leading authority Barbara Perry argued that “it involves acts of violence and intimidation, usually directed toward already stigmatised and marginalised groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order” (2001, 10).

Critics of hate crime legislation argue that the very concept is built on policing thought and punishing (more severely) one’s values and bad character, which, principles aside, are actually not necessarily within the control of the individual and thus lack culpability, a general requirement for criminal sanctioning. They also claim that bad character is bound for criticism, not punishment, which is essentially illiberal and violates state’s commitment to political neutrality, and criminal law, being an ultima ratio tool of social control, is not adequate to remedy to such social problems (Swiffen 2018; Weinstein 1992).

### Debates and Critical Issues

As we will see, the concept of hate crimes raises many theoretical questions with practical implications: (1) What is the moral and political basis of this heightened legal protection? That is, are hate crimes essentially minority- or identity-protection mechanisms? Is there a requirement for the protected characteristic to be inducing some sort of social vulnerability, or is any form of victimization related to any form and type of characteristic the individual considers relevant to her personality worthy of protection? (2) Even if we single out certain identities, such as race, ethnicity, religion, or sexual orientation, does belonging to the majority exclude victimization? In other words, if a group of African Americans attack a white person (because of her being white), should the perpetrators be sentenced more severely? Also, what happens if the group happens to be the majority locally but a minority in the national setting? Furthermore, can members of right-wing majority extremist hate groups qualify as hate crime victims if attacked by members of an ethno-racial minority group? (3) How should membership in the predefined protected groups be ascertained? That is, does self-identification of the victim or the (even potentially mistaken) perception of the offender or the majority community matter more? (5) Furthermore, how are open-ended lists or vaguely defined criteria for protected characteristics, as often and laudably applied in antidiscrimination legislative frameworks, compatible with the principle of *nullum crimen sine lege*?

It should be emphasized that legislators are not in an easy position, as group sensitivities, the complexities of identity politics, and the struggle for symbolic recognition create a political minefield. In what follows, the article will first elaborate some of the above issues and questions and subsequently provide a list of recommendations for legislators on how to avoid political, ethical, and conceptual mistakes.

## The History of Hate Crime Legislation

The concept (and policy) of hate crimes has triggered fierce debates in legal theory and criminology since the 1990s, with dozens of monographs, edited volumes, and hundreds of articles being published on this topic (e.g., Aaronson 2014; Altschiller 2015; Bean 2017; Chakraborti 2010; Chakraborti and Garland 2014; Hall et al. 2015; Hudson 2009; Jacobs and Potter 2001; Jenness and Grattet 2004; Kelly 1993; Levin and McDevitt 1993; Perry 2001). Yet this academic activity has failed to generate a similarly intense public debate. In fact, hate crime legislation is an international success story, with more and more states adopting such provisions, and it is safe to say that it has reached the level of international custom.

International organizations such as the OSCE (Organization for Security and Co-operation in Europe) and the EU have been committed advocates to promote hate crime legislation.<sup>1</sup> According to the UN Interregional Crime and Justice Research Institute training manual,

the concept of hate crime firstly emerged in Europe in the year 1990. In the *Copenhagen Document*, States participating in the Conference on Security and Co-operation in Europe (CSCE) pledged to take effective measures to provide adequate defense against acts that can constitute incitement to violence against individuals or groups based on national, racial, ethnic or religious discrimination, hostility or hate. [...] The term *hate crime* was officially used for the first time in 2003 by the Organization for Security and Cooperation in Europe (OSCE), at the Ministerial Council Meeting in Maastricht, when States underlined the key role that hate crime legislation plays in ensuring that the criminal justice system has the authority to investigate, prosecute and impose sentences for crimes fuelled by intolerance and discrimination. In 2010, the *Astana Declaration* issued at the end of the *OSCE High-Level Conference on Tolerance and Non-discrimination* reiterated commitments and concerns about hate crimes, including those based on racism or xenophobia. (UNIERI n.d., 7)

Hate crime legislation seems to be a standard, though not universal, part of criminal legislation. For example, in the USA, the federal government and 48 states have now adopted different variations of hate crime statutes (Walker 2017, 1417).

The first wave of hate crime legislation was introduced to combat violence motivated by racism and xenophobia. While in the USA these laws emerged out of the civil rights movement, in Europe it was a response to the victimization of ethnic groups during the Second World War. Following their institutionalization, and as a result of claims made by other minority groups, western democracies further expanded the catalogue of protected grounds (Godzisz n.d., 1; Gerstenfeld 2004). Following, race, ethnicity, religion, sexual orientation, gender identity, disability, alternative subcultures (e.g., Garland 2011), homelessness (e.g., Newburn and Rock 2004), sex workers (e.g., O'Doherty 2011), age, political affiliation, and personal appearance was recognized by legislatures and academic literature. The boundaries of hate crime have also been tested by Gail Mason's (2013) scholarship on violence against pedophiles.

## Whom to Protect?

As we can see, most of the questions pertain to the issue of whom should hate crime legislation address.

Schweppe (2012, 177, 185) lists the most commonly protected classes across a wide range of hate crimes legislation: age, citizenship, class, color, disability, economic status, ethnicity, family responsibility, gender, matriculation, membership in a labor organization, marital status, national origin, personal appearance, political orientation or affiliation, race, religion, sex, sexual orientation, social status, physical infirmity, drug addiction, criminal record, pedophile tendencies, mental infirmity, membership of the travelling community, marriage and civil partnership, pregnancy and maternity, and being a physician engaging in performing abortions.

Groups included in hate crime legislation have specific “tools of political and legal persuasion: a well-recognized history of oppression; an established currency in human rights discourse; the backing of an influential social movement; and the capacity to establish empirical credibility for the targeted violence they experience” (Mason 2013, 162). This has led to fierce political and academic debates concerning the “hierarchy of legitimate victims.”

Citing Jacobs and Potter (2001), Schweppe observes that hate crime laws are appealing to politicians: “Except for the inclusion of sexual orientation, politicians faced a no lose proposition. By supporting hate crime legislation, they could please the advocacy group without antagonizing any lobbyists on the other side [...] without making hard budgetary choices. The hate crime laws provided an opportunity to denounce two evils—crime and bigotry—without offending any constituencies or spending any money” (2012, 179). Arguing against the inclusion of the occupation of police officer in hate crimes statutes, as advocated under the Blue Lives Matter movement, Walker (2017, 1422, 1427) warns about the dangers of overexpansion of hate crime laws emerging from increasing advocacy efforts by special interest groups leading to a slippery slope of legal favoritism. She claims that occupation does not belong in a hate crime statute, as hate crimes should be reserved for victimization based on fundamental features of identity. Such identities need to include some shared self-consciousness or collective identity, implicating societal fissure lines, or “divisions that run deep in the social history of a culture.” Hate crime statutes, which are largely expressive, she argues, are only meant to target prejudice with a recognized social context. For example, in the case of violence against police officers, there is no evidence suggesting that these crimes would be underreported or insufficiently investigated. Thus, to continue her argument, lacking a minority protection justification, such expansion of hate crime statutes is unfounded.

Schweppe (2012, 179, 185, 191) on the other hand argues that developing “moral fault lines” in distinguishing between victim groups and the failure to include demands for recognition actually amounts to exclusion and leads to the further marginalization of the groups and reinforcement of public prejudices. She makes the case for promoting social equality through the criminal justice system and reiterates that by creating hierarchies of victims in hate crimes statutes the criminal justice system actually discriminates arbitrarily between social groups. In line with this, from the perspective of sexual citizenship, Richardson and May (1999) argue that not including sexual orientation in hate crime legislation means that gay people are denied full citizenship as the heteronormative culturally biased society reinforces and reproduces the vision of gay people as nondeserving. Godzisz and Pudzianowska hold that an opposition “to the inclusion of sexual orientation in hate crime laws can be seen as part of the general anti-LGB (or homophobic) discourse” (2016, 176).

Chakraborti and Garland (2012) argue that hate crimes should be seen through the lens of vulnerability and difference rather than group identity and history of marginalization, as this will enable the law to also tackle crimes targeting people because of their alternative looks (e.g., Goths or people who are facing homelessness) as hate crimes.

The subsequent part of the essay shows the various ways law (and the state) can be misguided in the labyrinth of identity politics, minority protection, and penal populism.

### **Misapprehension No. 1: Neglecting Hate Crime Legislation**

Philosophical challenges aside, the conceptualization of hate crimes raises numerous technical questions. For example, can victims and perpetrators be members of the same group? What happens if ultra-Orthodox Jews attack nonreligious Jews for not observing the Sabbath? If we recognize domestic violence as a form of hate crime, do we exclude same sex partnership violence? Also, how should nontypical, opportunistic victim-selection models be dealt with: does a perpetrator who specializes in robbing Chinese small-business owners, presuming that they carry a larger amount of cash, meet the criteria for racial bias? What about robbers targeting customers leaving

gay bars in intolerant societies because they have a reason to believe that reporting to the police will be less likely in order to avoid homophobic stigmatization? Is this homophobic hate crime? What about “thrill seeking” offenders, where the motivation (e.g., spraying swastikas on buildings) roots in a desire for excitement and provocation as an antidote for boredom? Given all these, should not the state simply opt for not having hate crime legislation in place at all? Let us bear in mind that hate crimes presuppose a preexisting base crime. Thus, all hate crime offenses will be sanctioned. It is merely this extra, and not entirely uncontroversial, symbolic element at stake.

An adequate answer may be that the genie has already left the bottle; hate crime legislation has become a part of international standards and good practices for policing and criminal justice.<sup>2</sup> For example, by using the theory of Europeanization as an explanatory frame (and fundamentals first as an operational guideline), Godzisz (2019) explains how hate crime laws are enacted as part of the democratization process, with the support of the OSCE and NGOs, and under EU influence.

To eradicate preexisting legislation or to disregard soft law (and in the case of the EU actual legal commitments), recommendations and guidelines by professional organizations, NGOs, and other groups are a blatant rejection of firmly established demands for progressive criminal justice, where talk of the town has for long now been about how to monitor hate crimes and the debate whether to have such legislation is long passé.

Once it has been established that it is the zeitgeist to have hate crime provisions, this leaves us only with the question of how to do it right. It needs to be emphasized that the failure to include a specific community among the protected groups logically cannot be equated with discrimination, as the symbolic and political decision to recognize atrocities against certain groups as more serious crimes does not devalue other groups’ participation in the politics of justice.

### ***Misapprehension No. 2: Conceptualizing Hate Crimes as Identity-Protection and Not as a Minority-Protection Mechanism and Instrument***

Consider the following cases in Hungary, where, with an extremely low immigration ratio, especially from outside Europe, the Roma are practically the only visible ethno-racial minority. In March 2009 in Miskolc, a city with a high Roma population, around the time when a series of targeted murders against Roma was ongoing in the country, members of the extreme right-wing paramilitary group the Hungarian Guard—an association later dissolved by the Supreme Court for carrying out racist activities—were marching around in nearby Hungarian villages. Text messages circulated among the local Roma, alleging that skinheads were planning attacks. At around 1 a.m., a car cruising in a Roma neighborhood was attacked by 25–40 Roma locals who assumed that the people in the car were skinheads or members of the Hungarian Guard. The perpetrators had no firearms and they used wooden sticks and stones. The damage caused to the car was HUF 104,000 (approx. EUR 350). 11 perpetrators were identified by the police and taken into pretrial detention—the rest fled and were never identified. A wooden stick was found at the crime scene with “Death to the Hungarians” written on it; however, it unclear by whom the stick was prepared or used. One of the victims had right-wing ties, and the passengers carried several liters of gasoline with them (Index.hu 2013a). In the case, which Petra Bárd calls “fear crime” (2014, 36), the court found all perpetrators guilty of “violence against [members] of a community,” some getting six years’ imprisonment (Gaál 2010). In 2013, the appellate court changed the legal qualification of the case to “antisocial behavior,” which had a significantly lower penalty.<sup>3</sup> The appellate court found that members of the Hungarian Guard and skinheads are not protected by the hate crime statute, while “Hungarians” are protected. But the two are not necessarily synonymous, and there was insufficient evidence of racist motivation.

In November 2009, a similar incident happened in Sajóabony, a small town close to Miskolc, where, following a public forum organized by the racist far-right Jobbik party, some 100 members of the New Hungarian Guard (the “successor” of the dissolved Hungarian Guard) were attacked by Roma locals; one of their cars was seriously damaged by wooden sticks and axes with the passengers

suffering light injuries. The victims claimed that their Hungarian ethnicity was the cause of the attack, while the defendants argued that they only wanted to protect their families from the neo-Nazi paramilitary vigilantes. In 2013, nine Roma defendants were sentenced up to four years' imprisonment. This time the appellate court raised the sentences (Index.hu 2013b).<sup>4</sup> This was despite the fact that in a 2011 case involving a physical assault against persons who belonged to the far-right paramilitary Hungarian Guard the Supreme Court took the position that "members of groups established in opposition to national, ethnic, racial, religious or other social groups, and in obvious conflict with legal provisions, clearly cannot enjoy special criminal law protections."<sup>5</sup> Although the high court is committed to the position that hate crime provisions cannot be applied to members of hate groups, judicial practice is uneven.<sup>6</sup> And in 2015, the Kúria (formerly Supreme Court) reiterated that members of the majority community can be victims of hate crimes.<sup>7</sup>

According to the Hungarian Civil Liberties Union, the aforementioned practice fuels worries about cases where Roma are accused of racially motivated hate crimes: "Whereas Roma are the main target of racist violence in Hungary [...], hate crimes against Roma are systematically underclassified if procedures are at all started [...], and] cases get thrown out during inspection. The [...] Court failed to take into account a long history of exclusion, severe discrimination, and inequality that affects the Roma [...], a population that had been traumatized by a series of murders by racist extremists" (HCLU 2012). The Hungarian courts' take on majority-minority dynamics is not out of line with international practice. The British Association of Chief Police Officers' tactical guidance defines hate crimes as "any incident perceived by the victim to be motivated by hate or prejudice" (ACPO 2005).

This article argues that nevertheless the second fallacy legislators can make is classifying and conceptualizing hate crimes as instruments that protect core identities, regardless of whether the personality traits around which these identity claims evolve lead to marginalization and vulnerability. An important and defining characteristic of identity politics is that certain crucial identities are worthy of recognition and symbolic appreciation for two reasons: (1) for dignity reasons, because these are simply essential elements of the core of human personality; and (2) for equality reasons, due to the current, or at least historical experience of, systematic marginalization that occurred in relation to these identities.

Recognition is thus intertwined with claims for symbolic justice. The peculiarity of criminal law, however, is that it is the most intrusive form of social engineering, and it has always been understood as the last resort, an *ultima ratio legal* (and social) control measure. This article argues that even if we allow criminal law to be a tool of social policy and social justice, it should only be allowed to be utilized when combatting actual marginalization and documented vulnerability. It should therefore be conceptualized as a minority-protection mechanism and not part of the broad stock of social and political tools available to recognize core identities.

As Heyes puts it, "identity politics starts from analyses of oppression to recommend, variously, the reclaiming, redescription, or transformation of previously stigmatized accounts of group membership" (2016). The proliferation of protected characteristics arguably transforms identity politics into a form of penal populism. Bottoms, referring to it as "populist punitiveness," saw it as the "notion of politicians tapping into and using for their own purposes, what they believe to be the public's generally punitive stance" (1995, 40; see also Pratt 2007, 2).

But again criminal law should be applied in the most restrictive way only, remedying or preventing further marginalization of members in vulnerable minority communities. Several technical consequences emerge from this: (1) the prudent and theoretically consistent road to follow for states is to declare vulnerability (of protected groups and characteristics) as a requirement for heightened criminal sanctioning, and this should be made explicit in legislative wording; (2) legislators should enumerate all potential protected characteristics that are habitually connected to the vulnerability; (3) states should be prepared to address political and ethical questions raised by activists and advocates pertaining to legal conceptualization; and (4) legal conceptualization should nevertheless address the question of mistaken identities and victimization by association.

*(1) Vulnerability as a Tool to Define and Accentuate “Minority-ness”*

Let us first explore the concept of “vulnerability.” The UN Department of Economic and Social Affairs defines vulnerability as a state of high exposure to risks and uncertainties, in combination with a reduced ability to protect or defend oneself against those risks and uncertainties and cope with their negative consequences, describing both a universal aspect of the human condition and a peculiar relational condition of individuals or groups (Macioce 2018, 474). Group vulnerability is related to social, historical, and institutional forces, and prejudice and stigma can perpetuate the vulnerability of a particular group of people as well as affect the individual enjoyment of fundamental rights and social goods. For example, Macioce shows how in *D.H. and Others v. the Czech Republic*—a case concerning Roma students who were assigned to special schools for children with learning difficulties where they received an inferior education based on a simplified curriculum—the European Court of Human Rights found that the applicants suffered discrimination when denied their right to education and stated that Roma have become a specific type of vulnerable minority as “a result of their turbulent history and constant uprooting” (2018, 474).<sup>8</sup> The Court also held that people with mental disabilities are a particularly vulnerable group in society due to the considerable discrimination they suffered in the past, where the main indicator of such a particular vulnerability is the harm produced by historical forms of prejudice, misrecognition, and patterns of cultural devaluation that produce specific forms of discrimination, social disadvantage, or material deprivation.

The concept of vulnerability attracted a considerable group of enthusiasts who see it as a novel and promising way to encapsulate substantive equality, even a means to shift policies of recognition from protection to empowerment (Malloy 2014; Macioce 2018, 481; Young 1997) as well as to shift relations of privilege and oppression between majority and minorities. According to Macioce,

this approach blurs the opposition between majority and minorities, so as to avoid (or to lessen) populist criticisms about the politics of recognition: Identities and group needs are considered only to the extent that they give rise to some specific vulnerability. From this point of view, majorities and minorities are on the same side of the river, because many factors can produce conditions of vulnerability, and every individual can find him/herself in a condition of vulnerability. No resources are taken away from the majority for the sake of minority recognition, nor is there an opposition between insiders and outsiders: Both can be vulnerable, depending on specific situations. (2018, 482)

Pertaining to criminal law, Chakraborti and Garland (2012, 505) adopt the definition for vulnerability insofar as it refers to the perception of exposure to danger, a loss of control over the situation, and a perceived inadequate capacity to resist the direct and indirect consequences of victimization. They also add that vulnerability will typically involve groups or individuals who are impoverished, disenfranchised, or subject to discrimination, intolerance, subordination, and stigma. The instructive feature of vulnerability is that it points to the situational nature of othering and underlines that it stems not primarily for group membership and identity but for a particular situation. Applying this concept in hate crime legislation would prevent the abuse or disfiguration of hate crime legislation if it were to protect members of the majority community, even racist hate groups when being victimized by minorities. Furthermore, should this be the legislator’s intent, following Chakraborti and Garland (2012, 500–501) by moving away from identity, groupism, and a fixation on grand patterns of oppression, it allows for a more inclusive framework for victims and an entire reconceptualization of hate crime victimization.

Chakraborti and Garland (2012, 504) also point out that traditional hate crime frameworks can fail to recognize the diversity within the broad labels that are used to denote categories of hate crime victims. Citing Ahn Lin, they emphasize the rich diversity of ethnic groups associated with the term and label “Asian American” (Asian Indians, Cambodians, Chinese, Filipinos, Hmong, Japanese, Koreans, Samoans, Thai, and Vietnamese), whose experiences are homogenized by scholars and



policy makers, as is also done with the overbroad categories of BME (black and minority ethnic), LGBT (lesbian, gay, bisexual, and transgender), and “disabled” communities. They also underline that “accounts of hate crime need to be more attuned to the intersectional nature of identity. For example, the harassment of lesbians may be caused by homophobia and by misogyny [...] The higher level of victimization incurred by male-to-female (MtF), as opposed to female-to-male (FtM) transgender [people,] has been explained by gender oppression” (Chakraborti and Garland 2012, 504).

Chakraborti and Garland (2012, 503) argue that rather than conceptualizing hate crime victimization through group identity and perceived vulnerability, “difference” should feature more prominently in the ways in which scholars and policy makers across the world think about hate crime in order to enable overlooked and vulnerable victims of targeted violence to receive the recognition. Such groups would include the homeless, elderly and isolated victims, people with mental health issues or drug and alcohol dependency, members of alternative subcultures (e.g., goths or nu-metallers), sex workers or foreign nationals, refugees, asylum seekers, migrant workers, or overseas students (see Blake 2001; Garland 2011; Jenness and Grattet 2004; Herek and Berrill 1992; Newburn and Rock 2004; O’Doherty 2011; Sherry 2010; Wellman 2006). These groups, “lacking either the support of lobby groups or political representation, and typically seen as ‘undesirables’, criminogenic or less worthy than other more ‘legitimate’ or credible victim groups” (Chakraborti and Garland 2012, 503) are commonly excluded from the view of hate crime. This would provide enhanced protection to victims stereotypically perceived as “easy” or “soft” targets of hate crime. It needs to be underlined that vulnerability is not a panacea. Chakraborti and Garland are cognizant of the “paternalistic process of powerful majority group members designating another as vulnerable” and recognize that the term is not entirely uncontroversial, as “references to the disabled as vulnerable, for example, have been criticized for being inherently disablist in automatically conflating disability with vulnerability [...] and for casting victims of disablist hate crime as ... weak.” (2012, 507).

While vulnerability has the advantage of contextualizing migration policy, as it draws attention to the concrete experiences lived by migrants, refugees, and asylum seekers, Hruschka and Leboeuf (2019) point out how in legal and policy discourse on asylum and migration it also has exclusionary effects that may amount to a restriction on accessing existing rights if actual access to these preexisting rights is restricted only to those deemed vulnerable (see also Atak et al. 2018; ECRE 2017; IOM 2017; “Vulnerabilities” 2015).<sup>9</sup> The introduction of discretionary decision-making competences in immigration and refugee law not only makes the process less transparent but also relativizes “need” and worthiness, reifies victimhood, and fuels a victimhood and vulnerability Olympics.

It is also problematic that the introduction of the term led to an increase in the number of sociopolitical and legal categories that actually lack a common definition and systematic understanding. “Asylum seekers with mental disorders, for example, are recognized as vulnerable under Polish and Italian national law, but not under French and Spanish law. Victims of human trafficking are considered vulnerable in the context of the asylum procedures in Belgium and Greece, but not in Ireland or Croatia. EU Member States seem to apply their own understanding of the concept of ‘vulnerability’” (Hruschka and Leboeuf 2019, 3).

As Hruschka and Leboeuf (2019, 3) point out, the imprecise meaning of the term is further blurred by the fact that it may refer to questions of status as well as to specific personal profiles. In the last reform of the CEAS (Common European Asylum System) directives in 2016, the European Commission proposed to replace vulnerability with “special reception needs,” (European Commission 2016), which represents a shift from a categorizing refugees, migrants, and asylum seekers by asking about vulnerability to a procedural approach focuses on how vulnerabilities are being addressed.

Despite the points above, this article argues that the vulnerability criterion is nevertheless adequate and appropriate in the field of hate crimes because there is an important difference between asylum law and criminal law in the context of narrowing the scope of applicability. In the

former, it actually leads to restricting the beneficiaries of certain preexisting rights and protections. On the other hand, in the latter this cannot happen since, as argued before, criminal law provides a heightened, but foremost symbolic protection to victims of crimes not specifically recognized as hate crimes. Therefore, setting forth limitations for collective and individual criteria does not create a zero-sum game, nor a group of “nondeserving” victims.

The claim of this article is that hate crimes should be defined as particular minority-protection instruments, where vulnerability is a core and unique concept used to define the protected groups, but it should not be applied on the level of scrutinizing individual victimization. In other words, vulnerability should be applied to accentuate and define the marginalized minority condition that triggers heightened, symbolic criminal protection. Actual, personal vulnerability of the victims could and should be institutionalized as a penalty enhancement, or as aggravating sentencing or the circumstance clause, but it should not be the prism through which hate crimes are conceptualized. Vulnerability, it is asserted here, should serve the purpose of defining, explaining, and elaborating, but not narrowing, the scope and concept of hate crime protection, a quintessentially minority-protection mechanism. While, as it will be elaborated below, even explicitly racially motivated violence by members of the majority community should be excluded from hate crime conceptualization, vulnerability may serve as a tool for fine-tuning the concept of “minority-ness” and explaining the source of heightened protection. Hence, members of structurally disadvantaged communities, marginalized on the national level, but forming a majority, or being in a dominant position locally, may be found to lack vulnerability in the specific context. Thus, they can conceptually be recognized as perpetrators of hate crimes. Thus, this article endorses the inclusion of vulnerability in statutory definition making, insofar as it is applied for the enumeration of the protected groups. The claim is that, instead of using concepts like *difference*, an unqualified and undefined *vulnerability*, *group hostility*, *disadvantage*, or *equality* (Al-Hakim 2015), hate crime victims should be: members of predefined disadvantaged minority communities, where some sort of vulnerability is also detectable. In a slight disagreement with Bakalis, as well as Harel and Parchomovsky (1999), a socially disadvantaged position in general should be the basis of hate crime legislation, accentuating a broader societal concern for the specifically vulnerable. “Social identity,” similar to the broad notion of equality, are insufficient grounds for heightened protection under criminal law, as access to the criminal justice process is in theory guaranteed to all victims of crime in a democratic society governed by the rule of law. And criminal law is not a tool tailored to encourage citizens to think of themselves as members of identity groups or to “celebrate difference,” even if Bakalis (2017) correctly points out that identity groups seeking recognition in hate crime statutes all have in common that they “have historically been oppressed in one way or another, and hence require the strong arm of the law to enable them to lead free and equal lives” (732). Bakalis also correctly refers to Solanke, arguing that “equality law is designed to address oppression rather than just promote diversity” (732). However, hate crimes statutes should not be seen as simply parts of the broader equality agenda, where the list of protected characteristics may, and, arguably should, be much longer than those to whom additional protection under criminal law is afforded. As to be argued below, members of the majority community need not be included in hate crime protections.

To rephrase Bakalis, a doctrinally solid hate crime statute needs to provide clear justifications and normative explanations for the additional harm or wrong involved in the targeted offences. They also need to fit within traditional criminal law structures, which require a narrowly tailored legislative phrasing and a reflection of the *ultima ratio* character and doctrine of criminal legislation. Vague formulations for groups with recognizable justice needs and open-ended lists with a wide discretion for judges to establish vulnerability without a legislative predetermination and enumeration of the protected groups, do not meet these criteria.

The position argued in this article is thus incompatible with Bakalis, who claims that “if a characteristic has been deemed to be sufficiently persecuted or subjugated that it requires civil law protection under the Equality Act [...], then it is justifiable in principle to extend this protection

through the criminal law” (2017, 734). It is asseverated here that criminal law needs more and can only encapsulate less.

The key to hate crime legislation is the genuine impact it has on victims, particularly its effect to participate in public life. As Carmody et al. (2015, 22, 27) point out, those who have experienced hate offences report a wider and longer-lasting range of negative psychological impacts. Such impacts include, though are not limited to, loss of confidence, suicidal ideation, panic attacks, trouble sleeping and/or concentrating, nervousness, hyper-sensitivity in relation to repeat victimization, powerlessness, and social withdrawal. Furthermore, strategies to avoid repeat victimization impede and inhibit the exercise of minority identity, as the terroristic effect of hate crime often leads to self-segregation and self-imposing limitations on participation in public life.

In sum, I advocate here for a theoretical framework and principled rationale for hate crime legislation that is best accommodated within criminal law principles.

## (2) Enumeration

As Bakalis (2017, 721) points out, a separate issue concerns what should be done once the rationale for victimhood has been established: should the identities be exclusive or inclusive? An exclusive approach requires the victims to be specifically named in advance by legislation. An inclusive approach would give discretion to a judge or jury to decide in each case whether the victim falls into the general category of hate crime victimhood. Schweppe (2012) argues for the latter and advocates an open definition for the victims of hate crime, recommending that the jury be given discretion to convict defendants whenever it can be shown that they exhibited group hostility toward a victim because of their personal characteristics, which they share with an identifiable social group. This article argues otherwise.

Following from above, it is contended here that legislators should enumerate all potential—mostly visible, immutable, and fundamental—protected characteristics that are habitually connected to the vulnerability. It needs to be underlined that criminal law is very different from antidiscrimination law. In antidiscrimination legislation, more protected characteristics is better, and the law will be more inclusive and potent. In fact, even open-ended lists are progressive, allowing to outlaw discrimination for previously undefined characteristics. In criminal law, less is more: legal certainty requires narrowly tailored, thoroughly circumscribed definitions. Otherwise, the “no crime without law (legislation)” (*nullum crimen sine lege*) principle would be violated.<sup>10</sup> Thus, criminal legislation should resist the identity politics driven lobby for recognizing more and more identities and should not give in to accusations of unethical or politically insensitive creation of a hierarchy of valued identities. Being an investment banker maybe an identity that a violent globalization-critical protester targets with hate; yet, the general vulnerability of the group cannot be established. Even if neoliberal economists are being attacked by an angry mob of protesters, it is unwise to qualify this as a hate crime based on bias targeting political opinion. Let us always bear in mind: violence and vandalism are criminal offences and victims are not unprotected or abandoned, even if no special hate crime provisions are applied in their case. If we expand the list of protected characteristics, we actually effectively marginalize the vulnerable ones by relativizing their vulnerability.

It needs to be added that it poses a technical, codification challenge for vulnerability to be included in the statutory criminal provision, as, due to the above elaborated requirement of strict conceptualization in criminal law, the actual assessment and circumscription of such groups and communities should not be left to the judiciary or law enforcement agencies. Instead, the legislator needs to take up this role by relying on social science evidence, similar to how country risk assessment is set forth by government agencies in asylum procedures.

The rationale for advocating a strict enumeration policy is also supported by arguments referring to the increased operational burden on the criminal justice system, especially on law enforcement agents who would then have less guidance for navigating in the maze of conceptualization. An even

more robust argument, however, pertains to the moral and political responsibility of the legislator to take sides in the politics of justice and the hierarchies of hate.

### *(3) Preparing for a Sensitive Public Discourse*

Continuing the stance set out above, states—or rather governments—should be prepared to address political and ethical questions raised by activists and advocates inquiring about the peculiarity of standards applied in criminal justice and pointing to the asymmetry in relation to other fields of law and public policy. For example, race, ethnicity, nationality, religion, political opinion, sexual orientation, and gender identity may have different meanings and repercussions in antidiscrimination law, naturalization, asylum law, or affirmative action in comparison with criminal law.

### *(4) Mistaken Classification and Victimization by Association*

Finally, it is important to emphasize that, although textual language needs to be strict and narrow in requiring vulnerability and setting forth protected characteristics, it has been a habitual practice in antidiscrimination and hate crime practice to extend protections in specific cases for mistaken identities and victims associated with members of the protected groups. Hence, if a straight ally participating in an LGBT march is attacked by homophobic perpetrators, the application of hate crime provisions ought to be in place, just as when a tourist from Mexico is taken for Roma in Eastern Europe and attacked by far-right extremists.

### ***Misapprehension No. 3: Applying Hate Crimes for Minority Offenders against Majority Victims***

In this text, it has been argued that states should conceptualize hate crimes as minority protection instruments. The Hungarian cases discussed demonstrate the absurdity of applying hate crime provisions in cases involving violence against members belonging to the majority community. It has been reiterated that, even if the victims were not members of hate groups and a motivation including animosity toward them as members of the majority community could be established, this should not suffice for classification as hate crimes. It has been argued that a second layer of scrutiny pertaining to vulnerability should be required. The reason for this is that the additional protection afforded by criminal law to specific groups is not rooted in the centrality of identities, nor in the immutability of the protected characteristics alone, but rather in that these personality traits are signifiers for historical or structural patterns of marginalization. Let us be reminded again: all offenders, including minority perpetrators (with racist motivations), will need to face some sort of criminal sanctions for the base crime; only the additional special moral and political message included in hate crimes will be absent.

An additional source of distrust for applying hate crime sanctions against members of minority communities pertains to what Lynne Haney (2016) calls penal nationalism, a special form of penal populism, which can equate punitiveness with a national sovereignty and protection along a variety of forms for reimagining community and the lines of social exclusion.

Admittedly, there may be legitimate arguments supporting the inclusion of local minorities (who are members of the majority nationally) within the symbolic recognition of hate crime provisions. However, even if individual vulnerabilities may be present in their case, a collective systematic marginalization in the criminal justice system would not be present, nor the need for additional symbolic recognition, since racist violence against them will be naturally condemned by the majority community.

This is one of the reasons why the exclusion of racist motivation by members of minority communities against members of the majority community cannot amount to discrimination, as such protections should be reserved to provide compensatory, symbolic protections to groups prevented from full participation in public life. (Particularly difficult cases involve attacks against Jews in Israel or blacks in South Africa.) It needs to be underlined that this conceptualization needs

to be made explicit by the legislator, which can then be balanced by authorizing the judiciary to apply more severe individualized sanctioning under ordinary criminal provisions for the base crimes committed with abhorrent motivation by using the artillery of penalty enhancements.

### *Hard Cases*

Legislators and policy makers should, however, be prepared to accept that hate crimes may not be a meaningful concept in certain cases, such as in gang-related interethnic violence wherein the minority and vulnerability dimensions, which actually should trigger the entire concept, cannot be conceptualized or operationalized. In a similar vein, it may simply be futile to apply hate crime provisions for cases like a (clearly racially motivated) assault on an Armenian citizen by an Azerbaijani in Switzerland, where the marginalization and vulnerability of the victim are impossible to discern in their initial meaning.

To sum up, this article advocates a legislative (and judicial) policy that conceptualizes hate crimes as a minority-protection mechanism. Again, it should be underlined that the reason justifying the exclusion of certain groups and criminal behavior from hate crime conceptualization lies in the fact that an analogy for protected characteristics in antidiscrimination law, where the broadest possible list is desirable, is false, as any form of violence against members of groups not recognized as non-hate crime victims will still be sanctioned by ordinary criminal law.

### ***Misapprehension No. 4: Allowing Institutional Discrimination through Systematic Underpolicing of Hate Crimes against Minority Victims***

It needs to be emphasized that the gravity of the misapprehension of applying hate crimes to minority offenders is further accentuated by the rampant failure to properly diagnose and apply hate crime provisions in general. It mostly happens when members of minority and vulnerable groups are the victims, but the perpetrators are not members of minority and vulnerable groups. Given the fact that law enforcement authorities fail to provide a public service set forth by law, this amounts to institutional discrimination. Indeed, one may even argue that the systematic underpolicing of hate crimes amounts to a form of systematic inequality that justifies the very creation of hate crimes. The phenomenon of institutional discrimination is widely documented by domestic and international organizations (Bárd 2017). To go back to the Hungarian case, one example from the Working Group Against Hate Crimes (GYEM) (2013)—a unique NGO coalition established in 2012 to join forces for more effective state responses to hate crimes in Hungary—reviews 24 cases, showing how law enforcement officers systematically fail to protect victims of hate crimes (Dombos et al. 2014). The systemic failures surface in four dimensions: (1) underclassification of hate crimes, (2) failure to undertake law-enforcement action, and (3) failure to take investigative measures.

As regards (1) the underclassification of hate crimes, underclassification refers to the phenomenon that hate and bias motivation is disregarded during the procedure. So, the prosecutor (or the judge) applies the base crime instead of the hate crime provision of the Penal Code. As for (2) the failure to take law-enforcement action, police often fail to take the necessary measures at far-right, extremist assemblies directed against vulnerable groups, even if there is sufficient evidence to suggest that an infringement of law took place. Likewise, failure in investigative measures (3) appears to be a general problem, inasmuch as the investigative authorities fail to question the witnesses, collect the CCTV recordings prior to their deletion, or investigate the motives in order to learn of the social networks and lifestyle of the offenders (e.g., whether they have extremist symbols on their walls or what type of comments they make in public fora).

When it comes to underpolicing hate crimes, Hungarian practice is fairly typical. For example, between October 2015 and January 2017 the European Court of Human Rights found Hungary to be in violation of the European Convention on Human Rights in relation to handling hate crime incidents three times.<sup>11</sup> In each case, Roma victims' fundamental rights were violated due to the omissions of hate crime procedures by law-enforcement authorities.

***Misapprehension No. 5: Conceptualizing Victims Based on Self-Identification and Not by the Perpetrator's (or the Wider Community's) Potential Perception and Classification***

As a corollary to the previous point, hate crimes should not only be minority protection and mere identity-protection instruments: it should also be explicit that, in determining criminal responsibility and culpability, the perception and classification of the perpetrator—and as a prime point of reference the perception of the wider community and society—should matter when determining bias and membership in the protected group.

A similar argument against identity-based hate crime conceptualization is made by Schweppe (2012, 181) who points to the “disabled” label in legislation, where the victims themselves may not in fact view themselves as such but rather as “differently-abled.”

Classification and identification principles have crucial procedural ramifications. First, they impact privacy and data protection. Under European privacy standards, data pertaining to the most commonly protected characteristics—such as race, ethnicity, sexual orientation, and medical condition—are sensitive data, the processing of which either requires anonymization or the written permission of the data subject. This article argues, however, that information pertaining to the perpetrator's perception and classification should not qualify as sensitive or even personal data. Strictly speaking, it does not actually refer to the status of the data subject (the victim). It is a statement or an inference concerning the state of mind of another person (the offender), and this need not meet a stringent protection. When it comes to protecting members of vulnerable communities from discrimination of criminal victimization, their identification is not relevant. What matters is the perpetrator's (accurate or mistaken) classification- and perception-based bias. The victim's identification as a member of a protected group should be relevant insofar as a criminal investigation's initial focus goes. Thus, if a victim claims to be a victim of a hate crime due to their identity, the police should always classify the case as a potential hate crime and follow proper protocol to substantiate the investigation on these grounds.<sup>12</sup> The victim's identity as member of a protected group, however, is neither a necessary nor sufficient criterion for the verification of the crime as a hate crime. Just because a victim identifies as a member of a protected group does not prove the bias motivation of the crime, nor is it a requirement for a hate crime to be recognized as such for the victim to identify with the protected group. The reason for this is twofold. First, criminal sanctioning should include the aforementioned cases of victimization by mistake and association, when the victim is not an actual member of the protected group. Second, there are legislative standards in criminal law establishing objective criteria for membership in the protected groups. Investigative authorities in most cases do not have—and should not have—means to “verify and validate” what it means to be Jewish or gay for an anti-Semitic or homophobic incident and, according to a thick privacy interpretation, are not even authorized to ask the victim about these personality traits. What matters is the perpetrator's perception and bias. When lacking a voluntary declaration as regards the identity of the victim, the only question the police may ask is whether the victim would think that the perpetrator could have chosen them due to a presumed membership in the protected group. When it comes to standards of evidence for bias and the role of subjective versus objective classifications, the investigative authorities need to establish two facts: (1) whether the victim could have been perceived by the perpetrator as member of the protected group—for which the general public's commonly held perception can be established and applied—and (2) whether actual bias toward the group and the victim can be established. This latter is the most difficult part of hate crime investigation, but there is a plethora of national and international guidelines for investigative protocols.

Unfortunately, none of the dozens of guidelines and recommendations by international organizations, which could harmonize legislation, reflect adequately on the complexities of hate crimes outlined above, nor are they effectively cognizant of the dangers of overbroad legislation. Most documents follow a benevolently superficial approach expressed, for example, in “Prosecuting Hate Crimes: A Practical Guide,” published by OSCE-ODHIR (Organization for Security and

Co-operation in Europe Office for Democratic Institutions and Human Rights). As such, the International Association of Prosecutors holds that “hate crimes are criminal acts where the victim is targeted because of her or his group identity [...] Almost any crime contained in a penal code can be a hate crime” (OSCE-ODHIR 2014, 16). The British Association of Chief Police Officers’ tactical guidance follows a similar victim-based definition by describing hate crimes as “any incident perceived by the victim to be motivated by hate or prejudice” (ACPO 2005). (And even the aforementioned Uniform Crime Reporting Program document uses such categorization.)

## Concluding Remarks

This article pointed to the various ways legal policy can be misguided in the labyrinth of identity politics, minority protection, and penal populism. It was argued that states should adopt hate crime legislation, as this now is part of the international standard for good and progressive criminal justice. It was also argued that hate crimes should be conceptualized as a minority-protection mechanism, which should not protect identity but identifiable vulnerability on the group level, and that in the legislative language a thorough enumeration of the protected characteristics is warranted by rule of law requirements. It was specifically argued that hate crimes should not be applicable in interethnic conflicts when members of minority communities are perpetrators and the victims are members of the majority. Moreover, hate crimes may not be applicable in all conflicts when race, ethnicity, or nationality are involved, and the exclusion of certain groups or types of conflicts does not amount to discrimination or the denial of citizenship, as all offenders ought to be sanctioned under generally applicable criminal law. The proliferation of protected characteristics is where identity politics turn into a form of penal populism. It was further argued that victimization should not be conceptualized based on self-identification but on the perpetrator’s—or the wider community’s—potential perception and classification. Finally, the view held by international courts and reports was reiterated, namely, that the systematic underpolicing of hate crimes amounts to institutional discrimination.

**Acknowledgments.** The author would like to thank Piotr Godzisz for a thorough read and a lengthy commentary of the manuscript.

**Disclosure.** Author has nothing to disclose.

**Financial Support.** The research project was partly financed from the SASPRO Programme. The research leading to these results has received funding from the People Programme (Marie Curie Actions) European Union’s Seventh Framework Programme under REA grant agreement No. 609427. The research has been further co-funded by the Slovak Academy of Sciences and by DEMOS (Democratic Efficacy and the Varieties of Populism in Europe) H2020 RIA project, as well as the 129018, 129245 and 134962 Hungarian National Research and Innovation Grants.

## Notes

- 1 See, for example, the activities of the EU Fundamental Rights Agency (FRA). Also, see Directive 2012/29/EU of October 25, 2012, establishing minimum standards on the rights, support, and protection of victims—specifically making references to victims of hate crime—Council of the European Union (2013), Council Conclusions 2013/JHA of December 6, 2013, on combating hate crime in the European Union, and the Council Framework Decision 2008/913/JHA of November 28, 2008, on combating certain forms and expressions of racism and xenophobia by means of criminal law requires Member States.
- 2 On the lack of hate crimes laws in Ireland, consider Carr et al. (2017) and Carmody et al. (2015).
- 3 Miskolci Járásbíróság (repeated I. decision) 22. B. 2418/2011, Miskolci Törvényszék (repeated appellate decision) 3. Bf. 2023/2012.
- 4 Miskolci Törvényszék (trial court) 4. Fk. 1188/2011, Debreceni Ítéltábla (appellate decision) Fkf. I. 498/2013.

- 5 Magyar Köztársaság Legfelsőbb Bíróság Bfv.III.87/2011/5. 2011.
- 6 Kúria Bfv.II.590/2012/18. 2012; Magyar Köztársaság Legfelsőbb Bíróság Bfv.III.87/2011/5. 2011, 5) also see LB-H-BJ-2011-106.
- 7 3/2015 “büntető elvi döntés” on Debreceni Ítéltábla Fkhar. II. 248/2014. See Bfv.II.590/2012/18 and EBD 2015 B.3.
- 8 Application No. 57325/00.
- 9 The notion of ‘vulnerability’ or ‘vulnerable persons’ is also used in legal instruments, including the Regulations and Directives of the Common European Asylum System (CEAS).
- 10 The principle of nonretroactivity, a fundamental component of the rule of law, is expressed in Article 15 of the International Covenant on Civil and Political Rights: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”
- 11 Balázs v. Hungary (Application no. 15529/12), Király and Dömötör v. Hungary (Application no. 10851/13), R.B. v. Hungary (Application no. 64602/12).
- 12 ECRI’s Policy Recommendation No. 11 recommends that law enforcement records racist incidents, which are defined as “any incident which is perceived to be racist by the victim or any other person”.

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