

The New Wave of American Hate Crime Legislation

Since 1980 there has been a steady movement among American states to criminalize, recriminalize, and increase punishments for intentionally injurious conduct motivated by certain types of prejudice and hate. Most of this targeted conduct is already covered by "generic" crime categories, but the new hate crime genre splinters those categories to create a new family of specialized crimes.

The new hate crime legislation needs to be distinguished from an older genre of federal and state criminal law dating back to Reconstruction. Those laws were aimed explicitly against the Ku Klux Klan and other private paramilitary organizations conspiring to violate the rights of black people. In contrast, the current wave of hate crime legislation has not primarily been motivated by *organized* hate groups, but by unorganized acts of individuals or groups of individuals. In other words, the new legislation is not directed at systematic persecution, but at ordinary crimes motivated by certain odious biases.

What accounts for the proliferation of hate crime laws? To what extent are these laws consistent with traditional criminal law principles, to what extent do they represent a departure or innovation? Given that most crimes are motivated by objectionable attitudes and values, what is the justification for singling out certain attitudes and values for special treatment? I will not attempt to answer to these questions definitively, only to suggest that they are more difficult than they might first appear.

What Accounts for the New Wave of Hate Crime Legislation?

The long-term impetus for the 1980s hate crime legislation undoubtedly is the American civil rights movement that, since World War II, pressed forward the interests and aspirations of one group after another — blacks, women, prison inmates, the physically and mentally handicapped, and, most recently, gays and lesbians and undocumented aliens. As the civil rights movement has gained strength and legitimacy, minority groups have become increasingly committed to and skilled in asserting group rights. Not surprisingly, more individuals have come to see themselves (or at least present themselves) as members of disadvantaged or victimized minority groups. American society has experienced a proliferation of group consciousness, and American politics has become increasingly dominated by explicit competition and conflict among groups. Thus, Arthur M. Schlesinger,

Jr., has recently spoken of "the disuniting of America."

The perception that hate crime is increasing has also contributed to the new wave of legislation. The advocates of the new genre of hate crime legislation insist that the United States is experiencing a rising tide of religious, racial, ethnic and homophobic violence. But the existence of such a crime wave has not been clearly established. American crime statistics are notoriously unreliable. In recent decades, we have seen claims about crime waves deflated by systematic study, like the near hysteria over missing and kidnapped children, and the wildly exaggerated claims about increases in crime resulting from "addiction" to various psychoactive drugs.

I do not mean to suggest that the crime statistics provided by civil rights and advocacy groups are consciously inflated or necessarily inaccurate, only that the perception of a crime wave may owe as much to increasing sensitivity as increasing violence. What appears to be a "crime wave" may be explained in part by a greater willingness to regard and report certain crimes as bias-related, and by a better system for collecting and recording information about these offenses. The current wave of hate crime legislation may thus be a response to a *growing intolerance* of discrimination, negative stereotyping and hate mongering, rather than, or as well as, to increases in the frequency and virulence of racial, religious, and homophobic violence.

Interpreting Hate Crime Laws that Recriminalize or Increase Punishment for Already-Criminal Behavior

Hate crime legislation is comprised of a family of laws that includes reporting statutes, civil rights laws, new substantive crimes, and sentencing laws. I will focus on laws that prohibit already-criminal behavior motivated by racism, homophobia, and other biases, and laws that raise penalties for present criminal offenses motivated by those biases. These laws raise two critical issues: (1) which bigotries are covered, and (2) how much wrongful motivation must be proven?

(1) Which Bigotries Are Covered?

All hate crimes cover offenses motivated by racial, religious, and ethnic prejudices. Several state hate crime statutes and pending bills include prejudice based upon sexual orientation. Some states also cover crimes motivated by bias based upon gender, age, and mental and physical handicap.

The debate over including these additional prejudices and victim groups raises tough questions for criminal jurisprudence. One major issue is whether offenses motivated by gender prejudice should be classified as hate-crimes; to do so would place a good percentage of crimes committed by men against women under the hate crime umbrella, including rape and much child sexual abuse. If all crimes motivated in part by attributes that the victim shared with other people were included, few crimes would be excluded. Another question is whether crimes by members of the (racial, ethnic, gender, or religious) minority against majority group members or against other minorities should count as hate crimes? At present, all state hate-crime laws do include such offenses, but several law-review authors have argued that hate-crime laws should be limited to crimes perpetrated by white males against members of minority groups.

Determining what constitutes an offense based upon ethnicity or national origin may also present some difficult and awkward problems in a complex multi-ethnic society. For example, are "Hispanics" a single group or should an assault by a native born Nicaraguan against a native born Puerto Rican be cognizable as a hate crime? What about crimes between blacks born or descended from Haitians and those born or descended from Jamaicans? Such questions could be endlessly multiplied.

(2) *How Much Wrongful Motivation?*

Hate crime laws apply special punishment to crimes committed "because of," "motivated by" or "on account of" certain kinds of prejudices. They require a causal connection between a certain motivation and a certain criminal behavior. But how strong must that connection be? Could a defendant successfully defend himself by claiming that while he was prejudiced against the victim on account of race, he would have committed the crime anyway because he needed the money? Should the hate crime laws be interpreted to cover situations in which prejudiced motivation played *any* role in the defendant's choice of victim, especially in cases where other factors are likely to have been operative — greed, jealousy, personal dislike, sexual obsession, or just run-of-the-mill anti-social impulses? Every crime flows from a complex mix of motives that may be impossible to disentangle. Probably for this reason, Anglo-American criminal law has largely ignored motivation. In developing a jurisprudence of hate crime, we may have to look elsewhere for guidance on wrongful motivation, perhaps to Title VII (though I doubt that twenty years of civil-rights litigation have successfully resolved all the thorny questions of defining and proving motivation).

Clearly, we must determine what biases hate laws cover, and how much motivation they require, in terms of the rationale(s) for hate crime legislation. The law will select different biases if its purpose is to protect historically victimized groups than if its purpose is to prevent

social unrest, and it may demand stronger motivation or evidence of motivation for one purpose than for the other.

What Justifies the New Wave of Hate Crime Legislation?

A. The Wider Impact of Hate Crimes on The Victimized Group

One rationale for the new hate crime laws is that they provide a more severe sanction for a type of crime which has repercussions beyond the immediate victim. Hate crimes, it has been argued, put many members of the victim's group in fear of being victimized by the group to which the aggressor belongs and thereby undermine social stability. But this rationale is not entirely persuasive. Almost all crimes, especially street crimes, have repercussions beyond the immediate victim. For example, in American cities the fear of random street violence is intense. Nightly media accounts of crimes in the subways, parks and streets feed enormous apprehensions about the safety of the environment and are a prime cause of flight from cities to suburbs.

Moreover, if the justification for hate crime laws depends on the uniquely severe social and psychological repercussions of such crimes, there is a need for empirical verification. The vast majority of American street crime involves offenders and victims who belong to the same racial and ethnic groups. In inter-racial cases, the aggressor is more likely to be a member of a racial minority and the victim to be white than the reverse. It is not obvious, especially in urban areas where racial minorities are the demographic majority or near majority, that white on black crimes are more socially destabilizing than black on white crimes, or that either is more destabilizing than the intra-racial violence that challenges the survival of many inner-city neighborhoods.

If enhanced penalties can be justified by the wider group impacts of street crimes, the case for sentence enhancement is probably strongest for males attacking females, young people attacking the elderly, and heterosexuals attacking gays and lesbians. In these types of assault, it is plausible to claim that the systematic victimization of one group by another leaves the members of the victimized group extraordinarily vulnerable and insecure.

B. The Conflict-Generating Potential of Hate Crimes

A slight variation on the above argument is that what makes hate crimes more serious than other offenses in the same generic crime category is the threat of retaliation and wider societal conflict. In the American context, inter-ethnic and inter-racial assaults have much greater potential for retaliation and inter-group conflict than other categories of inter-group aggression. For example, street assaults and rapes have not led to random retaliation by women against men; neither gay bashing nor anti-semitic vandalism and violence have led to wide scale random retaliations by gays and lesbians or Jews. Thus, justifying hate crime legislation by the threat of widespread

retaliation might yield an unexpected and undesirable result. The only kinds of victimization that would be defined as hate crimes would be those in which members of the victimized group were especially likely to retaliate. The victimization of groups whose members were too weak or law-abiding to retaliate would not be covered.

C. Disproportionately Severe Impact on the Individual

Another rationale for punishing hate crimes more seriously than other crimes is that they have a more severe emotional and psychological impact on victims than other crimes in the same generic offense category. This argument is based upon empirical claims which, although plausible, have not yet been demonstrated. Indeed, one just-completed study of hate crime in New York City appears to have found no significant differences in the injuries sustained by hate crime victims and a matched sample of ordinary crime victims.

Even were we to accept the claim that hate crimes inflict greater suffering, distress, and injury than non-hate crimes, some distinctions would be necessary. For the most serious crimes (obviously including murder), it does not seem likely that the aggressor's bias motive would add much, if any, additional harm to the victim. When

the enormity of the crime is great, the marginal harm caused by the offender's prejudice against the victim's group would seem small. For less serious crimes, the significance of the prejudice might be greater. A person might see being knocked to the street by a gang of rowdy youth as less serious than being knocked to the ground by a gang of youth chanting epithets about his race, ethnicity, religion or sexual preference.

The social and personal impact rationales for hate crime legislation are all harm-oriented, and as such are not concerned with the greater culpability of bigoted motivation except insofar as it increases the risk of harm. Under these rationales, even a trace of bigotry would suffice for hate crime liability if it threatened the feared harm.

A distinct set of rationales would emphasize the offender's greater *mens rea* in acting on his biases. For these rationales, of course, the extent to which the actor's criminal conduct was motivated by those bigotries would be important. Proving strong motivation would not only be difficult, but threatening to First Amendment values. Could a prosecutor bring in evidence of the defendant's membership in a group perceived as having a racist program, or his racist reading material?



Detering Hate Crimes

It is also possible to justify enhanced penalties for hate crimes based on a claim that they are harder to deter by existing penalties than ordinary crimes of the same sort, or that they can be more effectively deterred than ordinary crimes by enhanced penalties. These are both claims of marginal deterrence: since the conduct that hate crime laws aim to suppress is already criminal, the question is how many additional crimes will be deterred by threatening potential offenders with an aggravated version of the generic offense or with higher penalties. (Even if some marginal effect could be produced by a draconian penalty, however, it is not clear that penalty should be imposed.) I know of no evidence to support either of these claims.

Marginal deterrence may also be achieved by increasing the risk of apprehension. Thus, it could be argued that the new hate crime laws are needed to change law enforcement priorities, so that certain inter-group crimes will get more law-enforcement attention than run-of-the-mill crimes. This would be a very strong rationale if such crimes had historically received less law-enforcement attention than ordinary crimes in the same categories.

The Importance of Symbolic Denunciation

Much of the movement toward passage of new hate crime legislation is not driven by the belief that more criminal law will lead to less crime, but by the belief that the criminal law is the appropriate vehicle for "making a statement" about the special evil of certain conduct. Message sending is not the same as deterrence. Its goal is to express the abhorrence of certain bigotries in the strong and unambiguous language of the criminal law. This educative use of criminal law is familiar in American jurisprudence, and it has a legitimate role to play in our legal system. But it must be used sparingly, lest it raise expectations it cannot meet, provoke a spiraling escalation of criminal laws and penalties and yield counter-productive results. We need to be mindful of the chaos created by the continuous proliferation and escalation of criminal laws and punishments in the area of illicit drugs. Despite mountains of laws, hundreds of thousands of arrests, and overflowing criminal courts, jails, and prisons, we have failed to suppress the use and abuse of illegal psychoactive drugs. Perhaps we send mixed messages about drugs, because of our ambivalence about their use and criminalization. But even the most unequivocal messages may have little effect on entrenched habits, and we may legitimately wonder whether the

criminal law can be any more successful in suppressing the kind of abhorrent prejudices that blight American society.

Moreover, one must consider the possibility that hate crime legislation might contribute to the deterioration of America's strained race and ethnic relations. In New York City, some journalists have charged that the media and the police are more sensitive to hate crimes with black and Hispanic victims than to crimes in which blacks and Hispanics are perpetrators. If such a perception became widely shared, hate crime laws could end up exacerbating rather than reducing inter-group animosity.

Finally, we should not ignore the progress that has been made in reducing group hatred and prejudice without relying on criminal law. Norms about offensive speech and behavior have changed dramatically over the last several decades, to the point where some observers complain about the suppression of "politically incorrect" opinions by the prevailing liberal orthodoxy.

Over the last decade the United States has experienced the largest immigration in its history. To a remarkable extent, these populations have settled into American society without facing organized or even disorganized resistance and hostility. The current reactions to new immigrants is far more civilized and hospitable than the treatment of immigrants early in the century. This change has occurred without the large-scale employment of criminal law.

Concluding Reflections

The "bottom line" question is whether our goal is for police and prosecutors to enforce the criminal laws in the most "group-blind" way possible, ignoring the race, gender, ethnicity and sexual orientation, etc., of offenders and victims, or whether we want to prioritize cases on the basis of the group membership of offenders and victims. We need to carefully consider whether it is wise policy to emphasize the racial, gender, sexual, and religious components of as many crimes as possible.

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