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Hate Crime Laws: Cure or Placebo?

by Daniel M. Levy

Is there something fundamentally different about XXX carved into the hood of a car improperly using a handicapped space and KKK carved into the same car because the driver was African American? Is each merely a crime of property destruction, or is one something more? If the answer is that there is a difference, is the difference one that should be recognized by public policy? Can the actions be treated differently legislatively? Does greater punishment for the Klansman affect free speech rights by penalizing the message delivered using Ks rather than Xs?

This article will not attempt to present an exhaustive discussion on the merits of using legislation as a tool to fight "hate crime." Nor is it my goal to persuade people that I have all the answers, or that my ultimate opinions on the subject are the only correct ones. Rather, I will endeavor to present the background necessary for informed discussion to occur and the framework in which I think it needs to take place. It is my hope that this article will help bring the discussion about the need for such legislation into proper focus. Informed debate on the issues presented needs to take place, but we also need to resist the temptation to allow the media to choose the field, or special interests to set the rules, for this contest of ideas.

THE "HATE CRIME" PROBLEM

Let’s start with the term "hate crime."

"Isn’t all crime hate crime?" the critics ask.

Surely not. If one’s next door neighbor throws loud parties that don’t end before three in the morning, the neighbor is apt to become the subject of hate. If that hate manifests itself in the form of a brick launched through a window, is that a hate crime? While it may be a crime motivated by hate, this brick through the window is not the type of incident at which so-called "hate crime" statutes are targeted.

The fault lies not within the language of the statute, but with the title. "Hate crime" is not simply about hate. Hate is an intense and passionate emotion, often aimed at a specific individual. The conduct that statutes known as "hate crime laws" seek to deter and/or punish, on the other hand, may be cold and calculating. Such crimes may be based on resentment or the need to blame one’s own problems on someone else.

The crimes targeted may not all involve "hate," but they do all have a common element: motive. What today is commonly referred to as "hate crime" is better understood, and more accurately defined, as bias-motivated crime. The crimes are not different because they involve an element of hate, indeed much crime does; the crimes are different because they are motivated by bias aimed at a distinctive group of which the victim is merely a representative.

Unfortunately, the use of the term "hate crime" has led to much confusion and wasted debate on the question, "Isn't all crime hate crime?" Still, its use persists. It persists not based upon reasoned thought on the issues presented, but rather because the term "hate crime" sells more soda pop. The local and national news media are in the ratings business, and "hate crime" is more exciting than "bias-motivated crime." As a headline, there is no need to poll the target community to determine which terminology will sell more papers. "Bias-crime committed locally, news at 11:00," is apt to be seen by many potential viewers as permission to go to bed early.

Allowing the discussion to be shaped by media coverage has resulted in additional distraction from the real issues in another way as well. The need to cover only stories that sell results in attention being paid only to the most horrendous of crimes. News coverage, especially on the national level, tends to be about bias-motivated crimes like that in Jasper, Texas, where James Byrd was dragged to his death behind a pickup truck, his dismembered body parts strewn the length of the crime scene. While establishing that the motive for this crime was that Mr. Byrd was African American accurately categorizes the crime as bias-motivated, it does not provide a compelling reason for the passage of enhanced sentencing legislation. Such a murder is penalized with either a life or a death sentence in any jurisdiction.

The already available sentencing options in these high profile cases thus begs the question, "What purpose could possibly be served by enacting a new statutory offense, or by increasing the maximum sentencing options for existing crimes?" While high penalty felony cases may be the ones that will always garner media coverage and national attention, they are precisely the wrong cases by which to examine the need for special bias-crime legislation. We should not be asking whether there is a substantive difference between a murder like that of James Byrd, who was selected based upon the color of his skin, and one where all the facts are the same but the victim is selected for having cheated the defendant in a business deal. There is no such thing as a "lesser" murder. We need to look at the question in the context of "lesser" crimes. We need to go back to the question of whether there is a substantive difference between the three Xs scratched into the hood of a car because of how it was parked, and three Ks scratched in the hood of a car because of who parked it.

Certainly, there is.

Bias-motivated crime, in fact, significantly differs from crime committed with other motivation in a number of ways. As pointed out by Frederick M. Lawrence in his book *Punishing Hate, Bias Crimes under American Law*,[1] most violent crime may be divided into two broad categories. First, there are crimes committed without any specific animus for the victims, who are interchangeable. This would include such crimes as armed robbery, where a clerk is threatened only because he or she happens to be the clerk on duty. Also included are home invasions where the perpetrator may never know who the victim was, and random acts of violence, such as drive-by shootings. The second category consists of crimes that are specifically motivated by the identity of the victim. This encompasses crimes of passion, revenge, or the like, where no other person could be substituted for the intended victim.

Bias-motivated crime fits into neither described category. The victim is neither random nor specific. Victims are not selected because of *what they do* or because of *who they are*. Victims are selected because of *what they are*. As such, the impact of bias-motivated crime is different than that of other crime.

A crime motivated by bias is likely to have a greater negative effect on its victim. When a member of a group is victimized for that reason alone, it will almost certainly trigger feelings not only related to

the immediate incident, but also related to the entire history of prejudice and/or violence against that group. It is certain to cause the victim to withdraw from, and be suspicious of, the larger community. A community that reaches out to the victim and condemns the offense committed can lessen this alienating effect. A prosecution that recognizes this can be a significant step in the right direction. Bias-motivated crime also has a greater detrimental effect on the communities involved than other crime. The smaller community that shares the victim's identity will correctly recognize that the group, as a whole, was the target of the crime. Like the specific victim, this community is likely to relive previous wrongs and to feel alienated from the community at large. If not addressed, this effect will "balkanize" people in ways that will harm society as a whole.

Another area on which there is much debate, yet on which debate only serves to divert discussion from the questions to which the answers make a real difference, is whether the incidence of bias-motivated crime is on the rise. FBI numbers show that there were 4,755 bias-motivated crimes reported in 1991, of which 12 were murders.[2] In 1995, the FBI reported bias-motivated crimes at 7,947, with 20 being murders.[3] While this is a dramatic increase in reported cases, there remains the very real question of unreported cases. Further, the number of agencies contributing data on bias-motivated crimes rose during the same period, resulting in a decrease in the average number of incidents per reporting agency.[4]

Does this mean that the number of bias-motivated crimes committed is on the upswing—or that it is on a downward slide? In either case, how quickly is it moving? According to Jack McDevitt, co-director of the Center for Criminal Justice Policy Research, College of Criminal Justice, Northeastern University, "The bottom line is that we don't know. It looks as if the best data we have is incomplete."[5] As such, this debate over the existence and/or direction of a trend continues, and it continues to distract discussion from the more important issues relating to how to address the problem.

Knowing whether the incidence of bias-motivated crime is increasing or decreasing is not necessary for a discussion of whether the problem effectively can, or should, be addressed legislatively. For this discussion, it doesn't matter how many unreported cases there were, nor whether the number was up or down in a particular year. What is important, and what is undeniable, is that the numbers represent a very real problem. Even were it to represent every incident, nearly 8,000 bias-motivated crimes and 20 murders cannot be described any other way.

Furthermore, as will be discussed later, one of the stated purposes for passing bias-motivated crime legislation is to address the perceptions of the community. As such, it may be argued that, all statistics aside, in this case perception is reality. Whether based upon statistical fact or media hype, it cannot be disputed that society perceives the current incidence of bias-motivated crime to constitute a serious problem.

THE SOLUTION?

Those who advocate penalty enhancement as a way of combating bias-motivated crime assert that it is an appropriate tool for several reasons. First, as is the case in any criminal statute, it is hoped that the potential punishment will act as a deterrent to anyone who may be contemplating its commission. The greater the penalty, it is hoped, the greater the deterrent effect. Also traditionally considered as a part of sentence determination is the level of harm caused by the offense. As was discussed previously, the harm caused by bias-motivated crime is greater than that caused by a similar crime without the bias-motivation. The increased harm to both the victim and the community is certainly a factor that can, and, they argue, should, result in increased statutory penalty provisions.

Bias-motivated crime is often intended to "send a message." It is a message that can divide the community if allowed to go unanswered. Advocates for specific bias- motivated crime statutes and enhanced penalties argue that they are an appropriate way for a community to answer messages of hate and division. It is a community's way of emphasizing its belief that the behavior is wrong and expressing that it will not be tolerated.

As a result, nearly every state in the nation now has some legislation that addresses bias-motivated crime, and over 40 of these are criminal penalty enhancement laws.[6] A number of states have statutes that increase the penalty for existing crimes. An example is Wisconsin, which provides that "the penalties for the underlying crime are increased" in instances where the victim is selected based upon the perpetrator's bias against a group of which the victim is perceived to be a member.[7] Other states, including Michigan, create separate statutory offenses for instances motivated by bias. For example, in Washington, "A person is guilty of malicious harassment if he or she maliciously and intentionally" commits certain acts based upon a specified bias.[8] For purposes of this discussion, the distinction is not important. In either case, conduct that would otherwise be criminal is subject to greater penalty based on its bias-motivation.

The primary challenge to penalty enhancement legislation has always been that it penalizes speech and thereby violates the First Amendment of the Constitution.[9] The Supreme Court has, however, determined that when drafted correctly, the statutes are constitutional. Three U.S. Supreme Court cases serve as landmarks for anyone seeking to navigate the criteria used to examine the constitutionality of statutes that seek to address the problem of bias-motivated crime with criminal sanctions. Two of these cases have been decided; the third is presently before the Court.

R.A.V. v City of St. Paul[10] involved a white male juvenile who was charged with being one of several individuals who took part in burning a cross on the lawn of an African-American couple who had recently moved into the neighborhood. The ordinance challenged in *R.A.V.* stated:

> *Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastikas, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.*[11]

The court in *R.A.V.* was unanimous in finding that the ordinance must be struck down, but differed as to the reason. Four Justices found the ordinance to be void as overbroad. They began by agreeing with the majority in finding that "fighting words" could be prohibited without violating the First Amendment. They held, however, that the statutory language presented went further and also criminalized expressions that, though offensive, did not meet the definition of "fighting words" and were, therefor, constitutionally protected. As they found the legislation prohibited both protected and unprotected speech, these Justices stated that they would have found the statute to be impermissibly overbroad.

Justice Scalia authored the opinion signed by the remaining five Justices. The majority rejected the idea that the St. Paul ordinance was too broad. They found the statute not to prohibit any constitutionally protected expression, but to forbid only the use of a limited number of methods of expression that might be used. The majority went on to state that while possible to proscribe certain expressive conduct, St. Paul could only prohibit such conduct if the ban was drawn to prohibit the

offending conduct without reference to the message. As the ordinance in *R.A.V.* expressly prohibited only expressions of certain viewpoints, it failed this neutral content requirement.

Wisconsin v Mitchell[12] followed on the heels of *R.A.V.* and either clarified or confused the question depending on your viewpoint. Again, the case involved a juvenile, however in this instance Mitchell was African American. He was convicted, following trial as an adult, for his part in an incident in which a white boy was randomly selected and beaten unconscious based on his color. The beating resulted in severe physical injury to the victim. Mitchell was an instigator of the incident, but was not shown to have taken any part in the actual beating. Although Wisconsin provided a maximum sentence of two years for aggravated battery, Mitchell faced a seven-year maximum and was sentenced to serve four years. The sentence enhancement was based upon a Wisconsin statute that increased the penalties for the "underlying" crime whenever the perpetrator:

> *[s]elects the person against whom the crime...is committed or selects the property which is damaged or otherwise affected...because of race, religion, color, disability, sexual orientation, national origin, or ancestry of that person or the owner or occupant of that property.*[13]

Chief Justice Rehnquist wrote the opinion in Mitchell on behalf of a unanimous Court. Although the Mitchell Court distinguished the state law from the city ordinance in *R.A.V.* on a number of bases, two themes predominated the opinion. The first is that the Court found the language in the St. Paul ordinance to be targeted based upon the distinction between proper and improper points of view, whereas the Wisconsin statute was targeted at illegal conduct.

This distinction between punishing the "speech" and punishing the "conduct" works to create a legal difference between the two statutes, but has only limited value when applied to real world facts. Calling the prohibited act conduct rather than the expression of a viewpoint does avoid directly confronting the offending act as a form of speech. Still, what difference is there between the sentence Mitchell received and the one he would otherwise have received that is not due to the offensive nature of the view expressed? The speech/conduct distinction becomes even more cloudy when one recalls that Mitchell's only *conduct* was his *verbal* instigation of the beating, and that the speech in *R.A.V.* consisted of the physical acts of trespass and arson.

The second theme in *Mitchell* is that Wisconsin's law did not create a new crime, but only sought to provide a different sentencing scheme for conduct that was already criminal. In this regard, the Chief Justice notes that motive has always been a legitimate consideration in the sentencing process. A court may impose a lesser sentence for a theft because the court sympathizes with the defendant's being motivated by hunger, and later impose a greater sentence because it disapproves of the second defendant's having stolen only to increase the size of a CD collection. Also a permissible sentencing consideration, states the Mitchell opinion, is the extent of harm that results from the conduct being punished. The imposition of greater sentences can be a proper recognition of a greater harm to victims, other parties, or even society at large.

Again, this is a legal distinction that can be used to separate the two types of legislative schemes, but the distinction seems to fail to address the ultimate question. If the only difference between a two-year maximum sentence and a seven-year maximum sentence is that the latter is bias-motivated, can it really be claimed that it is not the motive (expression of one's hateful opinions) that is being punished? In spite of these difficulties, *R.A.V.* and *Mitchell* remain the two cases by which any bias-motivated crime legislation must be assessed.

Still, the statutory schemes permitted by these cases did not go far enough for some states. New Jersey's legislature, for example, chose to take the reasoning of *Mitchell* at face value. Like the states already discussed, it provided enhanced sentencing (including enhanced maximum sentences) for crimes that were bias-motivated. However, New Jersey reasoned that if the enhancement was a matter of sentencing, it need never be presented to a jury. New Jersey thus permits a judge to determine, by a preponderance of the evidence, that a crime was bias-motivated. This judicial determination is made *after* the jury has determined, beyond a reasonable doubt, only that the underlying offense was committed, or after a plea is entered during which the defendant admits *only* to the underlying offense. Because this is a sentencing enhancement provision, the result is that the statutory maximum (in addition to any minimum) penalty faced by a defendant changes after the conviction has been entered.

This statute gave rise to *Apprendi v New Jersey*,[14] the third case referred to earlier as landmark. Though the case is still pending before the U.S. Supreme Court (cert. was granted in November 1999[15]), it is referred to as landmark because the issue to be resolved is of such great import. Can the sentencing judge increase the maximum penalty faced by an already convicted defendant?

Apprendi pled guilty to two counts of possession of a weapon with unlawful purpose,[16] admitting to having fired a number of rifle shots into the home of Michael and Mattie Fowlkes and their three children.[17] The Fowlkes family were Apprendi's only African-American neighbors, and he admitted to wanting to frighten them into moving. New Jersey provides that a defendant convicted of the crime of possession of a weapon with unlawful purpose is subject to a sentencing range of 5-10 years.

After the court accepted Apprendi's plea,[18] the prosecution moved to double the sentencing range to 10-20 years pursuant to the New Jersey enhancement statute.[19] The statute provides for such enhancement where the defendant "acted with a purpose to intimidate...because of race, color, gender, handicap, religion, sexual orientation, or ethnicity." The trial court held a hearing and determined, by a preponderance of the evidence, that Apprendi had, in fact, acted with such a purpose and enhanced his sentence accordingly.[20]

New Jersey's Appellate Division and its Supreme Court upheld the trial court's decision, as well as the procedure by which it was reached. They held that the existence of a defendant's bias-motivation is not an element of the crime but that it is merely a sentencing factor. The issue for the U.S. Supreme Court may be summarized as whether the selection of a victim, based solely upon the desire to make a statement about the type of person the victim was, is more akin to motive or an intent. As a rule, motive (jealousy, greed) is not an element of a crime that must be proven to a jury. Intent (to murder, to deliver), on the other hand, is.

MICHIGAN

Michigan's "Ethnic Intimidation" statute currently provides that "A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin..." commits a crime against that person or that person's property.[21] It is a two-year felony.[22] The statute also provides that a victim may bring a civil suit against a perpetrator "regardless of the existence or outcome of any criminal prosecution." A prevailing victim stands to recover the greater of $2,000 or three times actual damages, plus attorney fees and costs.[23]

Thus, Michigan's present statute complies with the requirements of both Mitchell and *R.A.V.* Further, the decision in *Apprendi* will have no impact on the Michigan statute as it is currently written. However, if in *Apprendi* the Supreme Court holds that it is permissible to remove the question of motive from the jury's purview, it can be anticipated that efforts to do so in Michigan would commence immediately.

As originally drafted and proposed, Michigan's statute included "sexual orientation" as one of the proscribed motivations. This provision was, however, dropped in a legislative compromise to secure the passage of the remainder of the bill.[24] Attempts to amend the statute in order to reinstate sexual orientation began almost immediately and are currently an annual event in the Michigan Legislature. More recently, attempts to amend the Act have sought to make the sentence consecutive to any other sentence arising from the same criminal conduct, as well as to change the title of the act to the more accurately descriptive "Felonious Intimidation" Act.[25]

AUTHOR'S PERSPECTIVE

It would seem as true now as when Blackstone first noted, "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness."[26] The presence of the word happiness in this quote is striking. The courts persist in attempting to create a legal distinction between speech and conduct so as to claim that restrictions on bias-motivate crimes do not affect First Amendment free speech rights. Common sense tells us that if what the First Amendment protects is expression, these distinctions are without meaning. Surely punishing the Klansman who carves the KKK in the car hood more severely than the vandal who carves the XXX is, at least in part, punishing expression.

The reality is that there are few, if any, absolute rights that can be exercised without any consideration for how others may be harmed. Before there was a First Amendment, before there was a Constitution, this country was founded upon the "unalienable rights" to "life, liberty and the pursuit of happiness."[27] If we recognize that bias-crime legislation does, in fact, present some restriction of expression, it quickly becomes evident that this restriction is far outweighed by the harm the bias-motivated crime intentionally seeks to cause. It is harm, not just in the physical sense in which the specific victim is caused to suffer, but harm that is specifically directed at the very ideals the Constitution seeks to protect.

The First Amendment is a shield that protects the right of the individual to be who they are, and to not have to hide those very traits and opinions that make us individuals. The First Amendment is not a sword to be swung by those who seek to attack these fundamental rights. Bias-motivated crimes should be prosecuted more severely than other similar crimes, precisely because they are a direct attack on the fundamental principles upon which our system of justice, our Constitution, and our nation are founded.

As strongly as I believe the above, it is not here urged that the principle be extended to the extent contemplated in *Apprendi*. Motive and intent overlap too much to maintain that either can be the cause for increasing the maximum penalty to which a defendant is exposed without recognizing that an element has been added to the underlying offense. Apprendi is really being sentenced for firearms violations with intent to scare the Fowlkes family into moving.

The logical extension of *Apprendi* would be to permit the prosecution to prove only felonious assault to a jury beyond a reasonable doubt. Then, after the jury is discharged, a judge would decide, based

only upon a preponderance standard, whether the crime committed was indeed merely a Felonious Assault (two-year maximum penalty in Michigan).[28] The judge alone would also have the option of determining that the offense committed was Assault to do Great Bodily Harm Less Than Murder (10-year maximum),[29] or was Assault with intent to Rob while not armed (15-year maximum).[30] Perhaps the judge would find the crime was an Assault with intent to Murder[31] or to Rob while Armed[32] (life maximums). Would even New Jersey argue this radical change to be permissible?

I also believe there is no consistent reason to exclude crimes motivated by the perpetrator's perception of the victim's sexual orientation from legislation intended to combat bias-crime. There are two reasons touted by those who oppose including this bias in such statutes; neither is persuasive. First, it is contended that legislatively saying that it is a crime to physically assault a person based solely upon their sexual orientation is somehow expressing legislative approval of the orientation itself. As one who advocates the legal rights of even hate groups founded upon the very biases contemplated by these statutes, I reject this argument in whole. My advocating the right of a neo-Nazi group to set up a website cannot be seen by reasonable people to indicate that I support the group's hate for my family and myself.

The other justification proffered for excluding sexual-orientation bias is that sexual orientation is a choice that can be changed, and that the statutes must protect only against bias based upon unalterable characteristics like race. One need not address the science on whether sexual orientation is indeed a choice to see the fallacy in this contention. One only need look to the inclusion of crimes motivated by religious bias. The contention that sexual orientation should be excluded because it may involve a choice intentionally ignores plain facts in order to justify maintaining the comparatively more popular bias. It is, however, precisely those biases that are most widely held, for which the need for protection is greatest.

CONCLUSION

Bias-crime legislation is clearly not the antidote to the poison of hate. It can, however, go a long way to reassuring the victim of such crime (and their community as a whole) that the society in which they reside condemns, rather than condones, the use of criminal activity as a form of expression. We cannot legislate a change in individual attitudes, but we do define our societal priorities and attitudes by the legislation we choose to enact. Bias-crime statutes can be a significant tool in this regard.

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Endnotes*:*

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[1] Harvard University Press, 1999, at page 9.

[2] "A Policymaker's Guide to Hate Crimes" Monograph, United States Department of Justice, Bureau of Justice Assistance, p 8, March 1997.

[3] *Id.*

[4] *Id.* at 7.

[5] *Id.*

[6] Hate Crimes: ADL Blueprint for Action, Anti-Defamation League, 1997, p 4.

[7] Wis Stat Ann 939.645.

[8] Wash Rev Code Ann 9A.36.080.

[9] "Congress shall make no laws...abridging the freedom of speech...."

[10] 505 US 377; 112 S Ct 2538 (1992).

[11] St. Paul Legislative Code § 292.02 (1990).

[12] 508 US 476; 113 S Ct 2194 (1993).

[13] Wis Stat Ann 939.645 (1991).

[14] 159 NJ 7, 731 A2d 485 (1999).

[15] ___ US ___; 120 S Ct 535 (1999).

[16] NJ Code of Criminal Justice (NJCCJ) § 2C:39-4.

[17] Apprendi also pled to a single count of possession of a prohibited weapon, but the lesser, concurrent, penalty for that offense renders it irrelevant to this discussion.

[18] It should be noted that the parties agreed that the prosecution would move for the enhanced sentencing and that the defendant would oppose it both factually and legally.

[19] NJCCJ § 2C:44-3e.

[20] Apprendi received 12 years of incarceration with a four-year period of parole ineligibility on the first firearm count and lesser, concurrent, sentences on the remaining two counts.

[21] MCL 750.147b; MSA 28.344(2).

[22] *Id.* at § 2.

[23] *Id.* at § 3.

[24] Senate Fiscal Agency, "First Analysis of HB 4113 (Substitute S-2), (1987-1988).

[25] See, i.e., HB 1442 (1999-2000).

[26] Wisconsin v Mitchell, supra at 488, (quoting Blackstone, 4 W Blackstone, Commentaries 16).

[27] Declaration of Independence of the United States of America.

[28] MCL 750.82.

[29]MCL 750.84.

[30] MCL 750.88.

[31] MCL 750.83.

[32] MCL 750.89.