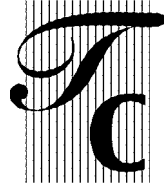


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Editor's Note

For the purpose of this Symposium, James Jacobs wrote a synopsis of his book for *Theoretical Criminology*. This is followed by three commentaries by Barbara Perry, Eugene McLaughlin and Rob White respectively.

Hate Crime: Criminal Law and Identity Politics

Author's summary

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Hate Crime: Criminal Law and Identity Politics has two major theses. First, the new hate crime laws, typically sentence enhancements for some (but not all) criminal offences when a bias motive can be proven, are not necessary for criminal justice purposes. Second, these new hate crime laws, while well motivated, may impose serious negative consequences.

I

The wave of hate crime laws that swept over the country in the 1980s and 1990s cannot be explained as the consequence of either a crime problem or a sentencing problem. There certainly was no hate crime epidemic, despite the attempt by some writers to create exactly that impression. The literature is filled with ridiculous statements about massive increases in hate crimes against one group or another. Yet, the data do not back up the claims. Often a close look at the data that the proponents cite reveals no increase in bias-motivated crime. Indeed, if one took the matter as a serious empirical rather than ideological issue, it would be a daunting challenge to determine which crimes are motivated all, or in part, by prejudice. When the 1990 Federal Hate Crime Statistics Act, which mandated collection of nationwide hate crime statistics, and showed that only a minuscule percentage of all crimes are hate crimes (even under the Act's expansive definition), proponents of hate crime laws denounced the data-gathering exercise as a failure.

I believe that history will show that the USA has experienced a significant diminution in racist, anti-Semitic, and anti-ethnic violence over the 20th century. One need only glance at the blood-curdling history of lynchings of African-Americans that took place in the late 19th and early 20th centuries, and the bombings of Black churches and of synagogues that rocked the south in the 1950s and early 1960s, to confirm that such horrific incidents are now rare. Admittedly, there is no way to know whether there is more anti-gay violence now than there was a generation or two ago; we have no trend data and, of course, many more gay people live openly now so there would be many more identifiable potential victims than a generation or two ago. Likewise, we do not know whether the rate of violence by men against women has increased over the century. (Many hate crime law proponents argue that male on female violence, the largest category of intergroup crime, should not count as bias crime because the offender and victim usually know one another. That is not persuasive to me since much, probably most, male on female violence is motivated in whole or in part by misogynistic values and stereotypes.)

Sentence enhancement for bias crime certainly cannot be effectively defended on the ground that American society does not allow for sufficiently severe sanctions to punish and deter biased offenders. To the contrary, all commentators on the US criminal justice scene recognize that our sentencing laws are draconian, the toughest of any democracy. In addition, our sentences have become even harsher in the past two decades. Indeed, we have so many offenders in prison (approximately two million) and for such long terms that we now probably have the highest rate of imprisonment of any country in history. Perhaps we ought to see the hate crime movement in the context of this drive for more and harsher punishment.

In every state, the maximum punishment for murder is either death or life imprisonment, often without the possibility of parole. The typical statutory maximum punishment for rape well exceeds 20 years, and for aggravated assault at least 10 years. Even unlawful gun possession by a person with a previous felony record can be punished by up to 10 years in prison. Furthermore, none of this takes into account 'three strikes (and two strikes) and you're out' laws, sentence enhancements for use of a weapon, and the capacity to impose consecutive sentences on defendants for episodes of criminal conduct that can be chopped up into multiple offences. None of this reality stops hate crime law proponents from demanding that racist and homophobic murderers be punished as hate crime offenders, 'not just as ordinary murders'. Is it not ironic that in the name of creating a more tolerant society, a number of states have added 'bias motivation' to the list of aggravating circumstances that justify the death penalty?

Some critics of *Hate Crime: Criminal Law and Identity Politics* might concede that murder and rape sentences are already at or near the maximum possible and could not be enhanced, but might argue that it is with respect to lower level offences that sentence enhancements for bias motivation can really have bite. Should we not be punishing hate crime graffiti, vandalism and harassment far more severely? To answer the question, we need to know how seriously these crimes can be punished

under existing sentencing laws. Consider this. In New York State, the maximum punishment for graffiti is a year in jail. Would that not be sufficient to punish the biased offender who defaces a subway, religious institution, or public or private building with a derogatory word for blacks, Hispanics, whites, Jews, Catholics or members of any other group? (By the way, we argue that civil libertarians should be appalled by doubling or tripling the sentence of an offender whose graffiti expresses a socially or politically incorrect opinion.) Should it not raise civil liberty concern that a person who smears a car with ‘Send Jews Back to Israel’ or ‘Down With Popery’ is punished twice as severely as the person who smears the car with ‘Change US Immigration Law’? New York State’s maximum punishment for vandalism is four years’ imprisonment. Is that not punishment enough for the offender who defaces tombstones in a religious cemetery or who trashes the offices of a woman’s rights organization?

What is going on? Why are otherwise ‘liberal’ people who fight for rights and equality wedding themselves to the forces of law and order? It is often said that enhancing the maximum punishment (if that is even possible) for bias offenders ‘sends a message’ about society’s intolerance of prejudice. Of course, the criminal law itself sends a message about society’s intolerance of the conduct that is proscribed in the criminal code. Potential hate crime offenders, if they have been listening at all, will know quite well that America’s government, media, business leaders and educational establishment, among others, deplore racism and other biases. It seems very unlikely that potential hate crime offenders will be impressed with the message that society is even more intolerant of prejudiced crime than an unprejudiced crime.

In truth, to the extent that the hate crime laws send a message, they send a message to the minority and victims groups that welcome such essentially symbolic statements as valuable to their broader agenda. Hate crime laws only make sense if they are somehow a way of mobilizing support for minority or victims groups in the areas of employment, education, housing and so forth. It need hardly be pointed out that members of victimized groups derive no benefit from punishing twice as much as usual a person who victimized one of the group’s members. And, here is another irony: although most violent crime is intra-racial, more intergroup crime is perpetrated by African-Americans on whites than by whites on African-Americans. Thus, if the hate crime enhancement statutes apply in both situations, they might have the perverse effect of punishing more African-American offenders to longer terms, all in the name of promoting greater tolerance.

II

Hate crime laws are put forward as a strategy for moving us toward a more tolerant society. But is that necessarily the case? There are at least some reasons to be cautious.

No matter our politics or ethnic prejudices, most Americans could join together in condemning serious crimes. The advent of the bias crime label

has led to charges about double standards and hypocrisy in the way that some crimes and not others are labelled. Some writers argued that crimes by minority group members should not count as hate crimes at all. Others argued that crimes by men against women should not qualify as hate crimes. Such opinions, of course, provoke sharp, even angry, responses. Emile Durkheim long ago argued that in denouncing crime and the criminal, the society strengthened its social solidarity. Now we are turning crime into something else to fight about. By sorting crimes into two categories, bad and very bad (that is, bias motivated), it would not be surprising to find that the crime problem has become subsumed in the culture wars and identity politics that already stand as the major fault lines in American society.

The new bias crime sentence enhancements are really laws that are meant to be admired, not used very often. But they may further politicize our criminal justice system, especially prosecutorial charging and jury trials. Perhaps prosecutors will be pressured by one victim group or another to charge (or not charge) a particular crime as a hate crime; saying yes or no might prove politically costly. In addition, those hate crime laws that require a jury finding of a bias motivation may well demand more than our jury system is capable of delivering. Most of us probably never think about the necessary preconditions for a successfully functioning jury system. The jurors must be willing and able to put aside their prejudices, ethnic and other loyalties, especially in those (most) jurisdictions that require juror unanimity. Thus, for example, it hardly seems likely that a jury system could operate in Bosnia or Rwanda. Where jurors would put group identity and loyalty ahead of service to the criminal justice system, a jury system would be unworkable.

The last thing that prosecutors want to do, when arguing in front of diverse juries, is to play the race card or any other card that would get jurors thinking about their particularistic loyalties rather than about 'just the facts and nothing but the facts'. If jurors come to see a prosecution as a piece of a larger intergroup conflict (or as motivated by the prosecutor's desire to curry favour with a group), they may see their own duty as standing up for the victim or defendant who is a member of their own group.

It is yet a final irony that the proponents of bias crime laws and prosecutions are counting on longer jail and prison terms to move us toward a more tolerant society, when it is precisely our jails and prisons where racism, homophobia and probably all the other vile prejudices that mar our society are most virulent.

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