



WHAT'S

**GOT TO DO
WITH IT?**

**DO CRIMES
OF BIGOTRY
DESERVE EXTRA
PUNISHMENT?**

BY JACOB SULLUM

On a Saturday night in November 1988, three skinheads, all members of a group called East Side White Pride, were cruising the streets of Portland, Oregon, when they saw three Ethiopian immigrants. Shouting racial epithets, the skinheads leaped from their car, clubbed the Ethiopians with a baseball bat, and kicked them with steel-toed boots. One of their victims, Mulugeta Seraw, died a few hours later.

In July 1989, two white men in Raleigh, North Carolina, murdered Jim Loo, a 24-year-old Chinese-American, attacking him with the butt of a gun and a broken bottle. The men said they did not like "Orientals."

In September 1990, reports *National Journal*, a group of assailants in Kentucky "beat a gay man with a tire iron, locked him in a car trunk with a bunch of snapping turtles and then tried to set the car on fire. He was left with severe brain damage."

When you read about incidents like these, it's easy to understand the appeal of hate-crime laws. In recent years all but four states have adopted such laws, most of which raise the penalties for existing offenses when they are motivated by bigotry. Supporters of hate-crime laws say they do not want to suppress speech or ideas—only a particularly dangerous kind of crime. Opponents argue that such laws punish what people say, think, and believe, in violation of the First Amendment.

The Supreme Court left this debate unresolved last summer, when it addressed the issue of hate-crime laws for the first time. In *RAV v. St. Paul*, the Court unanimously overturned a St. Paul ordinance that banned the display on public or private property of "a symbol, object, appellation, characterization or graffiti" likely to arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."

The case arose after a teenager, Robert Viktora, burned a cross on the lawn of a black family in June 1990. In addition to charging him with assault under state law, the city prosecuted him under the hate-crime ordinance. And because that ordinance banned specific expressive acts—rather than simply raising the penalty for existing crimes—the Supreme Court's decision may or may not apply more broadly to "penalty-enhancement" statutes. Since the ruling, state supreme courts have overturned penalty-enhancement laws in Wisconsin and Ohio but upheld one in Oregon. So hate-crime laws, in their most common form, remain very much the subject of legal, political, and philosophical debate.

Like the prospect of Nazis marching in Skokie, this controversy has divided traditional defenders of the First Amendment. Many members of the American Civil Liberties Union favor penalty enhancement, although they oppose laws such as St. Paul's that criminalize expression alone. The union's national board is split on the issue, and state chapters have adopted conflicting positions.

This ambivalence was evident in the ACLU's mixed reaction to the Supreme Court's decision in *RAV v. St. Paul*. The organization applauded the result but faulted the majority's reasoning, which seemed to question the constitutionality of singling out acts motivated by bigotry.

"Any of the laws being passed by the state legislatures that treat crimes motivated by racial, ethnic, religious, or gender bias in a special way are now going to be vulnerable to constitutional attack because of this decision. That concerns us," ACLU attorney Loren Siegel told *The New York Times*.

But Kevin O'Neill, who wrote the Ohio ACLU chapter's brief against that state's law, has no such qualms. "Our basic concern about hate-crimes legislation in general, and Ohio's ethnic intimidation law in particular, is that it is an effort by government to punish people because of their ideas," he told a wire-service reporter, pointing out that each state ACLU chapter is autonomous.

Susan Gellman, a public defender who challenged Ohio's hate-crime law, notes that both sides of the debate are dedicated to the ideal of tolerance. "The difference is only in the level of focus," she writes in the *UCLA Law Review*. "The proponents of ethnic intimidation laws are focusing on individual intolerance, *i.e.*, bigotry; the critics are focusing on societal intolerance, *i.e.*, repression."

In fact, the penalty-enhancement approach was designed precisely to avoid First Amendment problems. The model statute developed by the Anti-Defamation League of B'nai B'rith, which most states have imitated, raises the seriousness of an offense when it is committed "by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals." The model statute also boosts penalties for "institutional vandalism" and allows hate-crime victims to sue for special, general, and punitive damages.

Twenty-nine states have adopted penalty-enhancement laws since 1980, when Maryland became the first. The effect of such laws can be dramatic. In a case that led the Wisconsin Supreme Court to overturn that state's hate-crime law last summer, Todd Mitchell was convicted of aggravated battery after leading a group of blacks in a racist attack on a white teenager. Wisconsin's penalty-enhancement statute increased the maximum sentence for the crime from two to seven years, and Mitchell got four.

Legislatures passed these laws largely in response to lobbying by the ADL, which presented its first model bill in 1981. Lawmakers were also influenced by statistics suggesting that hate crimes were on the rise, coupled with publicity surrounding particularly egregious incidents. Both kinds of information are cause for concern, but they have limitations, and the conjunction of the two can be especially misleading.

The ADL's annual audit of anti-Semitic incidents, begun in 1979, is probably the best-known nationwide indicator of hate crimes. Its numbers show a steady increase every year from 1986 (906) through 1991 (1,879). But since the ADL's audit is based on reports to its chapters throughout the country, these numbers are affected by changes in reporting behavior. The more people hear about hate crimes—including publicity about the audit itself—the more likely they are to report such incidents to the ADL or the police. This sets up a feedback loop in which one year's numbers push up the next year's.

And hate-crime numbers can go up when police departments change their classification methods. After passage of the

federal Hate Crime Statistics Act of 1990, for example, the New York Police Department broadened its definition of hate crime to meet federal reporting requirements. Originally, the department defined a hate crime as an offense in which bias is the prevailing motive; now it counts as a hate crime any act in which bias is *part* of the motive. So it's not clear to what extent hate-crime figures reflect an actual rise in incidents.

Plus, a single random event can skew the numbers, falsely suggesting an alarming nationwide rise. For example, the ADL counted twice as many anti-Semitic assaults in 1991 as it did in 1990. But all but a handful of the additional attacks were associated with unrest in Crown Heights, Brooklyn, following a car accident in which a Hasidic Jew killed a black boy. If that accident hadn't happened, the number of assaults would have been roughly the same.

Perhaps more disturbing than the raw numbers are stories about particular crimes, such as the skinhead attack in Portland or the gay bashing in Kentucky. On an emotional level, at least, cases of vicious beatings and senseless murders seem to bolster the argument for penalty enhancement. But their very brutality would merit additional punishment under ordinary criminal law, regardless of the reasons for the attacks.

And as horrifying as such crimes are, it's important to remember that they are very unusual. For example, of the 1,879 anti-Semitic incidents catalogued by the ADL in 1991, only 60 were physical attacks. The vast majority involved threats, harassment, or vandalism; many of the incidents were slurs or vague threats that would not even qualify as crimes.

It's also worth remembering how infrequent hate crimes are relative to other offenses. In 1990, the same year the ADL counted 30 anti-Semitic assaults, the Federal Bureau of Investigation counted nearly 1 million arrests for assault nationwide. Jews represent about 2.4 percent of the population, and let's assume they suffer a proportionate number of assaults. That means that for every assault motivated by anti-Semitism, Jews experienced roughly 800 assaults for other reasons (assuming that every assault led to an arrest).

By creating a distinction based on motive, hate-crime laws are bound to punish people based on their speech, since that is usually the only evidence of bigoted motivation. As the Wisconsin Supreme Court observed: "There are numerous instances where the statute can be applied to convert a misdemeanor to a felony merely because of the spoken word. For

example, if A strikes B in the face he commits a criminal battery. However, should A add a word such as 'nigger,' 'honkey,' 'jew,' 'mick,' 'kraut,' 'spic,' or 'queer,' the crime becomes a felony, and A will be punished not for his conduct alone—a misdemeanor—but for using the spoken word."

Supporters of hate-crime laws recognize this concern. Joe Roy, chief investigator for Klanwatch, an organization that monitors hate groups, emphasizes that an epithet is not sufficient evidence of a hate crime. "Each particular situation has to be scrutinized by the investigating officers," he says. "There is a danger where somebody calls somebody a name, and the victim hollers, 'Hate crime!'"

The FBI's *Hate Crime Data Collection Guidelines* describe hypothetical cases to help police identify the real thing. For example, a purse snatching in which the thief knocks his Jewish

victim to the ground and calls her a "kike" would not be reported as a hate crime. On the other hand, police should report a hate crime after investigating a case of synagogue vandalism in which the perpetrators destroyed religious objects and painted a swastika and the slogan "Death to the Jews!" on the walls, but did not steal anything.

Real-life cases are often more complicated. Dirk Roggeveen, a former U.S. Justice Department prosecutor who handled hate-crime cases, recalls a teenager whom the department considered charging under a federal law that forbids interfering with housing rights on the basis of race, religion, or national origin. The teenager had burned a cross in the driveway of a black family's home. But it turned out that he had a long-running feud with a member of the family, stemming from an incident in art class. (She had some disparaging things to say about one of his paintings.) Since then, they had been playing increasingly cruel practical jokes on each other, some of them involving racial elements.

"He burned a cross because he figured that would be the thing that would piss her off the most," Roggeveen says. But the department concluded that the boy had not intended to drive the family from the neighborhood; nor had he targeted the girl because she was black.

With such careful distinctions to be made, there's always the danger that less conscientious prosecutors might abuse their discretion. In any case that involves a slur or an element of bigotry, prosecutors can choose to bring hate-crime charges, automatically boosting the penalty that the defendant might face.

In 1991, for example, a police officer responded to a domestic disturbance at the home of Michael Hamm in Punta Gorda, Florida. "As I tried to make contact with Mr. Hamm," the

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officer later reported, "he became verbally aggressive towards me and stated, 'I'll shoot you, white cracker.'" Hamm was charged not only with simple assault but also with violating Florida's hate-crime law, which boosted the maximum penalty he could receive from one year to three years. The charge was eventually dropped, but the case illustrates how police officers and prosecutors might use hate-crime laws to impose extra punishment on people who have offended them in some way—for example, by talking back to a cop.

Gellman, the Ohio public defender, warns that penalty-enhancement statutes are apt to result in arbitrary and discriminatory enforcement. She suggests they might even be used against political protesters, especially members of minority groups. "That's not what the legislatures have in mind when they enact these things," she says, "but I could see it being applied in a case like that."

Steven Freeman, the ADL's legal director, says the possibility does not worry him much. "Prosecutors still bear the burden of proving that the crime is bias-motivated," he says, "and I don't think that's so easy to do. It's not enough to say that this person is bigoted, and this person committed a crime." But Freeman is talking about the burden of proof in a trial, and most cases don't make it that far. Hate-crime laws can give prosecutors added leverage in plea bargaining, whether or not the charges would stand up in court.

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The strongest argument for punishing hate crimes more severely than other crimes is that they do more harm, in the same way that armed robbery causes more harm than shoplifting and thus merits a greater penalty. "We can show that there's a greater harm to the individual, that other members of the target group who learn about [a hate crime] are intimidated by it, and that each one of these acts exacerbates the intergroup and racial tensions that are tearing this country apart," says Robert Purvis, administrative director of the National Institute Against Prejudice and Violence. "All of those things together spell out a very compelling state interest in targeting this particular kind of crime."

To back up his claim of greater individual harm, Purvis cites a nationwide telephone survey that his group conducted in 1989 using a random sample of more than 2,000 subjects. The study found that respondents who had been victims of violence motivated by prejudice were significantly more likely to report negative psychological reactions—including anger, greater nervousness, increased alcohol or drug use, and fear of sleeping alone—than were other victims of violence. But these feelings vary from case to case, individual to individual, and prosecu-

tors, not victims, determine the charges in individual cases, making special hate-crime penalties a crude instrument for balancing punishment with harm.

In fact, the ADL's model hate-crime statute boosts the penalty range even when the perpetrator mistakenly thought his victim belonged to a certain group. In its 1991 status report on hate-crime statutes, the ADL describes a case in which a California family suffered through a two-year campaign of terrorism. A man wrote anti-Semitic graffiti on their home, sent them threatening letters, and burned small crosses in their yard. Later he attempted to burn their home down and fired shots through the kitchen window. He was prosecuted under California's religious-terrorism statute, among other laws. Yet it turns out the family was Catholic. Surely they suffered because of his crimes, but did they suffer more because he thought they were Jewish?

Hate crimes do tend to generate fear and discomfort among other members of the targeted group. When thugs attack a gay couple in Greenwich Village because they see them holding hands, for example, homosexuals feel especially threatened. But the degree of fear depends on the amount of publicity. Especially in the less dramatic cases that represent the vast majority of hate crimes—threats, graffiti, minor vandalism—the incidents may pass unnoticed by people who are not directly acquainted with the victims. Yet hate-crime laws enhance

the penalties even for offenses that do not attract attention.

Nor is it clear that the concentrated fear caused by some hate crimes is worse than the more widespread fear engendered by ordinary crimes. "Why is it more terrorizing or socially destabilizing to stab someone because he is Jewish, for instance, than to stab someone for his sneakers?" writes Jonathan Rauch in *The New Republic*. "The former signals that Jews are in danger; the latter signals that everyone is in danger."

And the social effects of hate crimes are unpredictable. Such a crime may indeed increase ethnic tensions, but it may also bring a community together. Early one morning in November 1991, for example, 52 mezuzahs were stolen from the doorposts of dormitory rooms at Barnard College. "In a positive outgrowth of the incident," the ADL reports in its annual audit, "many non-Jewish students at Barnard expressed solidarity with the victims of the vandalism." And last March, after vandals broke into the office of a Moslem professor at the University of Southern California and spray-painted anti-Iranian slogans on the walls, a coalition that included Jews, blacks, and Japanese-Americans condemned the crime.

In any case, the acts that lead to the worst intergroup

tensions and violence need not be hate crimes. Ordinary street crime aggravates racial tensions, making middle-class whites fearful of young black men, who in turn resent the suspicion. And a community's response to an incident often hinges on public perceptions of motivation, which may be mistaken or unverifiable. In the Rodney King case, for example, the cops clearly did not beat him merely because of his race, since his two black companions were unharmed. Although many people suspected that King was beaten more severely than he would have had he been white, we will probably never know for sure. Yet that perception, coupled with the impression that the police officers would not have been acquitted had King been white, was enough to set off the L.A. riots.

Ultimately, hate crime laws are a way to teach people that bigotry is bad. That's why they concentrate less on specific harms to victims—which judges, after all, can consider in sentencing—and more on perpetrators' beliefs. The purpose of penalty enhancement, says the ADL's Freeman, is "to send a message that society is not going to tolerate crimes motivated by bigotry, that they're reprehensible."

Deanna Duby, deputy legal director of People for the American Way, says "the rationale behind hate-crime statutes generally has been the desire to make a statement that society sees any kind of crime based on hatred directed at a specific group of people to be particularly abhorrent." The court is saying that the criminal is wrong to be a bigot. But this is no different in principle from giving extra jail time to a member of Earth First! who sabotages a bulldozer because it is wrong to be an environmentalist.

The main principle underlying the First Amendment—that people should not be punished for their beliefs—is also a basic principle of justice in liberal societies. Our legal system distinguishes between acts and ideas. In the case of hate crimes, act and idea seem intertwined, so we tend to lose sight of the distinction.

But suppose the gay man beaten by bigots in Kentucky was instead a cancer researcher beaten just as brutally by animal-rights activists. Many of the same people who would demand extra punishment for the bigots would object to imposing extra punishment on the animal-rights activists. Yet the principle is the same.

One argument for special laws is that hate crimes otherwise might be treated less seriously than ordinary crimes, precisely because most people do not feel threatened by them or because the public is unsympathetic to their victims. Certainly this was

the case for most of recorded history; consider the situation of Jews in medieval Europe or blacks in the old South. When the government was not actively persecuting them, it was turning a blind eye as others did. Hate-crime laws might be seen as a way of making up for that history, just as affirmative action is billed as an attempt to compensate for a history of government-enforced discrimination. (Although these laws officially protect everyone, the vast majority of hate crimes involve members of minority groups.)

But the promise of a liberal democracy is that members of minority groups will be protected from aggression, just like everyone else. If someone wrongs a Jew or a black, he

will be punished just as severely as if he had wronged a Christian or a white—and his motivation, whether bigotry, greed, or simple viciousness, won't matter in either case. You correct unequal protection by making it equal, not by reversing it.

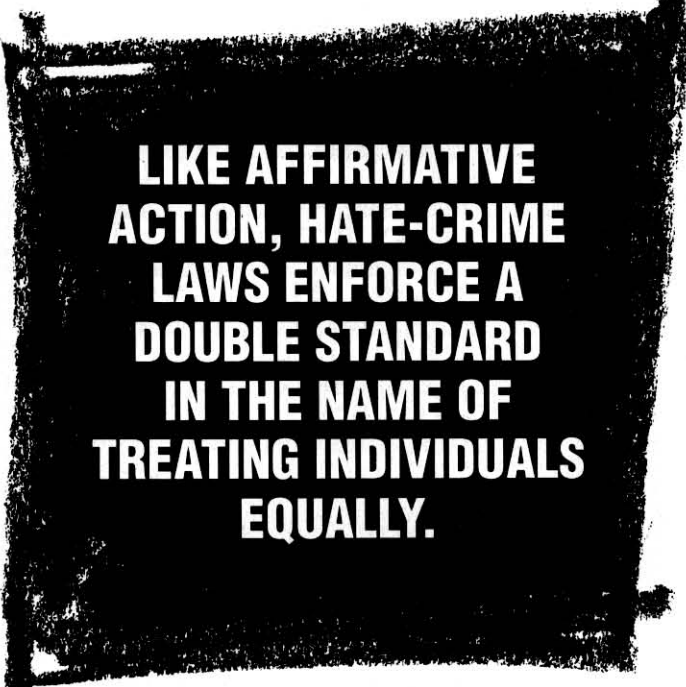
By punishing opinions, hate-crime laws institutionalize the very bigotry they seek to prevent: They treat some individuals as second-class citizens simply because of the ideas they hold. And they treat some targets, such as Catholic churches, as more important than others, such as abortion clinics (leading, of course, to the charge that vandalizing an abortion clinic is a hate crime

against women). Like affirmative action, hate-crime laws enforce a double standard in the name of treating individuals equally.

It's hard to generate much sympathy for bigots. Perhaps for this reason, the arguments against hate-crime laws have focused on how they might hurt decent, tolerant, law-abiding people like you and me: the chilling effect, the slippery slope, and so on. While these arguments have merit, they leave the impression that hate-crime laws might be all right if we could avoid such side effects.

People find it hard to accept that penalty enhancement itself is unjust, because deep down they sense that a crime *is* worse when it's motivated by bigotry. This feeling is a healthy sign, because it shows that those who express it have rejected intolerance. We hate the crime more because of the idea it represents. It is right that we should, but it is wrong for the law to adopt the same attitude. ■

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