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All Skulls Are Created Equal

Do Hate Crime Laws Violate the First Amendment?

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> *"If the skulls of all Americans are equally valuable (i.e., if this is a democracy), why not give everyone [the same sentence] for cracking any cranium at all?"*
> John Leo, "The Politics of Hate"[1]

Abstract:

Since the 1980s, state legislatures and the federal government have passed laws that target what have come to be known as "hate" or "bias" crimes. Most hate crime laws do not punish previously legal conduct. Instead, they enhance the penalties on acts that are already deemed criminal. The constitutionality of these laws has been questioned by scholars who believe they violate the First Amendment. Several state courts have grappled with the issues raised by these statutes, and the U.S. Supreme Court has issued two seemingly contradictory rulings on the subject, in the cases of *R.A.V. v. St. Paul* and *Wisconsin v. Mitchell*. In this article, Constantino Díaz-Durán argues that hate crime legislation undermines rights guaranteed by the Constitution by directly targeting people's thoughts, and by having a chilling effect on speech.

Introduction:

Imagine a woman killing her children. One by one, drowning them in the bathtub. Infanticide is a shocking crime, not only because it goes against our most basic conceptions of human nature, but also because the murderer often claims to have done it out of love. We refuse to accept this kind of love, however, and quickly declare a murderous mother to be mentally ill. She may not go to prison, but she cannot escape the psychiatric ward. Either way, she meets justice.

Love is not an excuse for committing a crime. Suppose a priest goes on a shooting spree in his church. Would we expect a judge to show leniency if he claimed to have acted out of love—say, to usher his parishioners into heaven? Would we believe him? What kind of proof would we require in order to reduce his sentence based on this allegedly laudable motive? Which kinds of love would legislatures recognize as legitimately warranting sentence mitigation?

These questions are, of course, almost impossible to answer. Legislatures have no right to tell us what to love or what not to hate. Courts cannot take it upon themselves to determine whether we are sincere or not when we say we do not hate someone. What they can do, and are called to do, is punish all criminal offenders—mindful of the limits decreed by law.

In spite of the difficulties it presents, the government has attempted to punish certain kinds of hatred which it considers particularly heinous. The constitutionality of these laws has been questioned by scholars who believe they violate the First Amendment. Penalty enhancement statutes, they claim, undermine rights guaranteed by the Constitution by directly targeting people's thoughts, and by having a chilling effect on speech.

Crime and Prejudice:

Since the 1980s, state legislatures and the federal government have passed laws concerning "hate" or "bias" crimes. Defining these terms poses several problems. According to New York University law professors James Jacobs and Kimberly Potter, "hate crime is not really about hate, but about bias or prejudice… Statutory definitions of hate crime differ somewhat from state to state, but essentially hate crime refers to criminal conduct motivated by prejudice."[2]

"Prejudice" is a broad and complex term. Taken at face value, it has become a sort of dirty word. Calling someone prejudiced is akin to calling them intolerant, bigoted or narrow-minded. Properly understood, however, prejudice seems to be an almost inescapable human trait. Whether they are conscious of it or not, most people possess several kinds of prejudice. Certain prejudices are good, many are considered harmless, and some are seen as wicked. It is, clearly, the latter which are targeted by hate crime statutes. These laws seek to punish criminals more severely when they act with the intention of harming not just their victim, but also the "group" to which the victim is perceived to belong.

This effort has come as a byproduct of the trend towards a political climate where "individuals relate to one another as members of competing groups based upon characteristics like race, gender, religion, and sexual orientation."[3] This trend, known as "identity politics," seeks to exalt the victimization of particular groups, thereby granting them grounds to demand special rights and protections. By enacting hate crime laws, politicians pander to these groups' lobbying efforts and send a message of moral righteousness.

Problems emerge because not everyone agrees on which groups deserve to be singled out for special protection. While most agree that racism and misogyny are deplorable, for example, not everyone is willing to place homophobia in the same category. The most common prejudices prohibited in state statutes are those based on the victim's race, color, religion, and national origin. Thirty-two states add sexual orientation to that list, with the District of Columbia going as far as to include notions as vague as "personal appearance," "family responsibility," and "matriculation."[4]

Most hate crime laws do not punish previously legal conduct. Instead, they enhance the penalties on acts that are already deemed criminal. Statutes vary from state to state, but most follow a similar pattern. The Montana sentence enhancement statute, for example, provides that

> a person who has been found guilty of any offense … that was committed because of the victim's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities … in addition to the punishment provided for commission of the offense, may be sentenced to a term of imprisonment of not less than two years or more than 10 years.[5]

Other states have adopted laws based on a model statute produced by the Anti Defamation League, which redefines previously criminal conduct as a new crime, or as an aggravated form of an existing crime. These statutes provide for new offenses of "intimidation" and "institutional vandalism."[6] But whether a state chooses to implement a sentence-enhancement statute, or to create a new substantive offense, the result is the same. In either case, the criminal offender will receive a harsher punishment for acting upon his alleged prejudice.

Hate Speech:

The debate over the constitutionality of hate crime laws is closely related to the concept of "hate speech." There is no widely accepted legal definition of this term, but it could be characterized as speech deemed offensive by a class of persons who share a common identity. The first laws seeking to proscribe this type of speech were aimed at what was called "group libel."

The United States Supreme Court upheld the constitutionality of group libel laws in 1952, in the case of *Beauharnais v. Illinois*. Joseph Beauharnais, president of the White Circle League of America, had

been distributing racist leaflets in the streets of Chicago "in protest against negro aggressions and infiltrations into all white neighborhoods."[7] The literature went on to state that "if persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite [it], then the aggressions … rapes, robberies, knives, guns and marijuana of the negro, surely will."[8] Beauharnais was convicted and fined $200 under an Illinois statute which provided that

> It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . .[9]

In a 5–4 decision, the Supreme Court found a group libel exception to the First Amendment. Writing for the majority, Justice Felix Frankfurter based this decision on the grounds that "criminal libel has been defined, limited and constitutionally recognized time out of mind," and "if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group."[10]

The controversial ruling in *Beauharnais* was all but abandoned by the Supreme Court, however, and it seems to be Justice Hugo Black's dissenting opinion which carried the day: "I think the First Amendment, with the Fourteenth, 'absolutely' forbids such laws without any 'ifs' or 'buts' or 'whereases.'" Jacobs and Porter assert that twelve years later, in *New York Times v. Sullivan,* the court "effectively sapped the *Beauharnais* group libel rationale of its vitality, by requiring that an individual bringing a libel suit prove the libelous statement was directed at the individual, personally, and not simply at a group to which the individual belongs."[11]

With group libel laws, and other attempts to directly restrict speech, falling out of favor, would-be censors were forced to look for other ways to outlaw bigotry. Drawing a distinction between "speech," or "thought," and "conduct motivated by prejudice," they have sought to circumvent the limitations erected by the First Amendment.

The constitutionality of these laws has been contested in several states. The U.S. Supreme Court has issued two rulings on the subject. In *R.A.V. v. St. Paul,* the court struck down an ordinance that made it illegal to display a symbol which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[12] In *Wisconsin v. Mitchell,* the court upheld a sentence-enhancement statute by distinguishing between laws that punish expression per se, and laws that punish expression that is linked to criminal conduct. These seemingly contradictory opinions came within a year of each other, and have done little to clear the murky waters of hate crime jurisprudence. This is illustrated by the Ohio Supreme Court decisions in the case of *State v. Wyant*, which involved a sentence-enhancement statute similar to Wisconsin's. Following the *R.A.V.* decision, the state court struck down the statute as unconstitutional under the First Amendment. Less than two years later, however, it was forced to reverse that decision, in light of *Mitchell.*

R.A.V. v. St Paul and Fighting Words:

In order to understand the U.S. Supreme Court's decision in *R.A.V. v. St. Paul,* it is necessary to review the "fighting words" doctrine. The term was first used in a Supreme Court decision by Justice Frank Murphy in the 1942 case of *Chaplinsky v. New Hampshire,* in which the court affirmed the conviction of a man charged under a statute stating that

> No person shall address any offensive, derisive, or annoying word to any other person who is lawfully in any street or any other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his

> presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.[13]

The Court construed the statute to extend only to words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Further elaborating that "The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker."[14] The court has continued to uphold the fighting words doctrine, but its commitment to it appears to be mostly lip-service. Indeed, in *Cohen v. California,* the court went as far as to say that it is often true that "one man's vulgarity is another's lyric." Adding that the "verbal tumult, discord, and even offensive utterance"—which often appear to be the immediate consequence of free expression—are "within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve."[15]

R.A.V. deals with the case of a white juvenile who, along with other teenagers, burned a "crudely made cross"[16] on the lawn of a black family's home. This conduct could have been punished under a number of different statutes. However, the city chose to prosecute R.A.V. under a St. Paul ordinance providing that

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, 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.[17]

The Minnesota Supreme Court upheld the charges, narrowing the construction of the ordinance to apply only to fighting words in the spirit of *Chaplinsky.* The U.S. Supreme Court reversed the ruling in a unanimous decision. Writing the majority opinion, Justice Antonin Scalia acknowledged the State's right to proscribe fighting words. However, he found the statute to be unconstitutional because it prohibited only *certain kinds* of fighting words, based on the government's hostility towards the content expressed by those words. Drawing an analogy between fighting words and "a noisy sound truck," he explains that "both can be used to convey an idea, but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."[18] In other words, while the statute made it a misdemeanor to use fighting words against a person based on their "race, color, creed, religion or gender," it remained legal to use them against someone in connection with, for example, their ethnicity, national origin, or sexual orientation. This singling-out of prejudices deemed offensive by the state is unconstitutional.

Criminalization of Motive in Wisconsin v. Mitchell

The main objection to the constitutionality of hate crime laws is that "generic criminal laws already punish injurious conduct; so recriminalization or sentence enhancement for the same injurious conduct when motivated by prejudice amounts to extra punishment for values, beliefs, and opinions that the government deems abhorrent."[19] The Wisconsin Supreme Court advanced this view in their decision in the case of Todd Mitchell, a 19 year-old African American convicted of aggravated battery on a white teenage boy because of the victim's race.

A group of African American teenagers had gathered outside an apartment complex in Kenosha, Wis. They were discussing a scene from the movie "Mississippi Burning," in which a black boy is viciously attacked by a white man. A short time later, George Reddick, a fourteen year old white boy, approached the apartment complex. At this point, Mitchell said "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell counted to three and pointed the crowd towards Reddick. They attacked him, knocking him down and beating him into a coma.

A jury found Mitchell guilty of aggravated battery, which carried a maximum sentence of two years. But because the jury also found him guilty of selecting his victim because of his race, the potential maximum sentence was increased to seven years. Mitchell was sentenced by the court to four years in prison. The Wisconsin hate crime penalty enhancer provision goes into effect whenever the defendant "intentionally selects the person against whom the crime … is committed … because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."[20]

The Wisconsin Supreme Court ruled, in no uncertain terms, that "The hate crimes statute violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought and violates the First Amendment indirectly by chilling free speech."[21] In the court's opinion, the statute is facially invalid because it "is directed solely at the subjective motivation of the actor—his or her prejudice." And "punishment of one's thought, however repugnant the thought, is unconstitutional." They also found the statute to be unconstitutionally overbroad because it chills speech by allowing the use of the defendant's speech, both current and past, as circumstantial evidence to prove the intentional selection.

Less than a year after the *R.A.V.* decision, it seemed almost certain that the U.S. Supreme Court would affirm the holdings of the Wisconsin court. Instead, a unanimous Supreme Court reversed the state court's ruling, arguing that the cases are different because whereas the St. Paul ordinance was expressly directed at expression, the statute in this case is aimed at conduct unprotected by the First Amendment.

Chief Justice Rehnquist, writing for the court, rejected the argument that prejudice-based sentence enhancement statutes unconstitutionally punish a person's thoughts. Sentencing judges, he argues, have traditionally taken motive into account when determining what sentence to give a convicted defendant,

> And the fact that the Wisconsin Legislature has decided, as a general matter, that bias-motivated offenses warrant greater maximum penalties across the board does not alter the result here. For the primary responsibility for fixing criminal penalties lies with the legislature.[22]

The court also found no merit in Mitchell's overbreadth claim, stating that "the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property… is simply too speculative a hypothesis." Furthermore, the court ruled, the First Amendment does not prohibit the use of speech as evidence of a defendant's motive or intent.

Ethnic Intimidation in Ohio (State v. Wyant):

In the wake of *R.A.V.,* and the Wisconsin Supreme Court's ruling on *Mitchell,* a unanimous Ohio Supreme Court struck down that state's ethnic intimidation statute presenting a compelling case against the constitutionality of laws in which "the enhanced penalty results solely from the actor's reason for acting, or his motive."[23] This case was later reversed, in response to the U.S. Supreme Court's decision on *Mitchell,* but its thorough analysis of the criminalization of motive is well worth looking at.

David Wyant, his wife, and a group of relatives were being loud and obnoxious at their rented campsite at Alum Creek State Park. Their neighbors, Jerry White and Patricia McGowan, complained to park officials, who asked the Wyant party to tone it down. White and McGowan were both black. The Wyants and company were all white. Fifteen or twenty minutes after the park officials left, the Wyants turned their radio back on and Mr. Wyant was heard to say: "We didn't have this problem until those niggers moved in next to us," "I ought to shoot that black motherfucker," and "I ought to kick his black ass."[24] Wyant was indicted and convicted of one count of ethnic intimidation, predicated on aggravated menacing, and sentenced to one and a half years' imprisonment.[25]

The ethnic intimidation statute under which Wyant was convicted provides for enhanced criminal penalties when a person is found guilty of committing certain predicate offenses "by reason of the race, color, religion, or national origin of another person or group of persons." The predicate offenses on which conviction of ethic intimidation depends are aggravated menacing, criminal damaging or endangering,

criminal mischief, and certain types of telephone harassment. "Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."[26]

Writing for the court, Justice Herbert Brown points out that "the predicate offenses to ethnic intimidation are already punishable acts under other statutes. Thus, the enhanced penalty must be for something more than the elements that constitute the predicate offense." In order to trigger a conviction of ethnic intimidation, and the correspondingly enhanced penalty, then, the actor needs only to have acted "by reason of" the victim's protected status.

According to Justice Brown, motive is not really an element of the crime. It might be used, procedurally, as evidence of guilt—or in the case of good motives, to plea for leniency. But it is not motive what is punished when judges take into account penalty-enhancing criteria. It is, he believes, other thought-related concepts—such as intent and purpose—what is used as elements of crimes or in order to enhance penalties:

> There is a significant difference between *why* a person commits a crime and whether a person has *intentionally done* the acts which are made criminal. Motive is the reasons and beliefs that lead a person to act or refrain from acting. The same crime can be committed for any of a number of different motives. Enhancing a penalty because of motive therefore punishes the person's thought, rather than the person's act or criminal intent.[27]

Motive is different from criminal intent in that "intent" refers to the actor's state of mind at the time of the act. "Intent" is determined, for example, by answering the question "Did A *intend* to kill B when A's car hit B's, or was it an accident?" The search for "motive," on the other hand, presupposes an affirmative answer to that question: "*Why* did A *want* to kill B?"

Motive is also easily distinguished from a "purpose to commit an additional criminal act," which is what is commonly seen in criminal statutes as the basis to enhance penalties or create a separate, more serious crime:

> For example, burglary is a trespass "with a purpose" to commit a theft offense or felony. Purpose in this context is not the same as motive. What is being punished is the act of trespass, plus the additional act of theft, or the intent to commit theft. Upon trespassing, A's intent is to commit theft, but the motive may be to pay debts, to buy drugs, or to annoy the owner of the property. The object of the purpose is itself a crime. Thus the penalty is not enhanced solely to punish the thought or motive.[28]

This is clearly the case with murder for pecuniary gain, which Chief Justice Rehnquist mentioned in *Mitchell* as an example of a motive-based penalty enhancing circumstance. What is being punished in these cases is not the murderer's motive. It is his or her intent to commit an additional criminal act, namely theft. Unfortunately, it seems that the Chief Justice was blind to this distinction. Along these lines is another common example of an "aggravating circumstance" which in some states may increase the penalty for murder to death: acting for the purpose of escaping another offense. If a suspect kills his arresting officer in order to avoid going to jail, his sentence may be enhanced, but not because of his motive (preferring life next to his family than behind bars, for example). Rather, it is his intent to resist arrest (itself an offense) what is punished.

Committing murder for hire is another example of an aggravating circumstance. Again, though, what is punished here is not the person's having a mercenary motive. "Hiring is a transaction. The greater punishment is for the additional act of hiring or being hired to kill. The motive for the crime (such as jealousy, greed or vengeance) is not punished."[29]

Justice Brown acknowledges the fact that the government has the right to decide that acts against certain individuals are more serious criminal acts than others. For that reason, killing a peace officer or a government official, may carry a harsher penalty than killing an ordinary citizen. Under that light, he argues,

> the legislature could decide that blacks are more valuable than whites, and enhance the punishment when a black is the victim of a criminal act. Such a statute would pass First Amendment analysis because the motive or the thought which precipitated the attack would not be punished. However … such a statute would not survive analysis under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[30]

Another common defense of hate crime laws is that they are analogous to federal and state antidiscrimination laws. Says Rehnquist: "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge."[31] According to Justice Brown, however, while these laws do prohibit acts committed with a discriminatory motive, they are analytically different from penalty-enhancing hate crime laws. He points out two theories by which a case can be made for employment discrimination laws, the "disparate impact" and the "disparate treatment" analyses. Motive is almost wholly irrelevant under the former because it deals with practices that, while neutral at face value, have a harsher effect on a particular group of people. Discriminatory motive is necessary to prove a case under the latter analysis, but this proof can be inferred from the difference in treatment. In either case, "it is discriminatory treatment that is the object of punishment, not the bigoted attitude per se. … Bigoted motive by itself is not punished, nor does proof of motive enhance the penalty when a discriminatory act is being punished."[32]

Conclusion:

The U.S. Supreme Court is yet to establish a comprehensive and consistent hate crime jurisprudence. In spite of efforts to reconcile the decision in *Wisconsin v. Mitchell* with that of *R.A.V. v. St. Paul,* the court has failed to convince critics who see serious violations of the First Amendment in statutes such as the one upheld in *Mitchell.*

The court's main argument that motive has been traditionally used by sentencing judges falls apart once the necessary distinctions between "motive," "intent," and "purpose" are made. Motive, properly understood, had not been criminalized prior to *Mitchell*. Freedom of thought is enshrined in our constitution. No matter how offensive or despicable some—or even most—members of society may find certain thoughts, this freedom is one of the premier rights of every individual. In the oft-cited words of Supreme Court Justice Oliver Wendell Holmes, "If there is any principle in the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate."[33]

The use of federal and state antidiscrimination laws as a justification for the constitutionality of hate crime statutes is disingenuous. While both kinds of laws seek to fight against bigotry and intolerance, they are rooted in different traditions and are different in nature. Antidiscrimination laws emerged from the civil rights movement of the 1960s, which sought to eliminate artificial barriers created to oppress a specific racial group. The main goal of this movement was to achieve equality by eliminating unfair privileges denied to the minority. Hate crime laws, on the other hand, have stemmed from the trend towards identity politics which grew strong in the 1980s. Contrary to the civil rights movement, identity politics seek to create new privileges and special protections for some chosen social groups.

Hate crime laws do not protect an individual from being targeted for a crime because of his race or sexual orientation. These laws distort justice by introducing a magnified element of vengeance at the moment of sentencing. Politicians use them to send a message of validation to members of certain groups, while ignoring the legal quagmires that these statutes create. In the end, the noble goal of spreading tolerance is undermined by the violence that these laws do to our nation's constitutional framework.

Endnotes

[1] Leo, John, "The Politics of Hate," U. S. News & World Report, Oct. 9. 1989, p. 24.

[2] Jacobs and Potter, "Hate Crimes: Criminal Law & Identity Politics." Oxford University Press, 1998, p. 11

[3] Jacobs and Potter, p. 5.

[4] Ibid., p. 43. For a full chart, and updated information regarding states which include sexual orientation as one of the protected prejudices, see data compiled by the Anti-Defamation League's Washington Office, at
http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf

[5] Mont. Code Ann. § 45-5-222. Cited in Jacobs and Potter, p. 29.

[6] ADL, Hate Crime Statutes: A 1991 Status Report, p. 4. Cited in Jacobs and Potter, p. 33.

[7] *Beauharnais v. Illinois.* 1952. 343 U.S. 250. Appendix to Opinion of Mr. Justice Black.

[8] Ibid.

[9] *Beauharnais v. Illinois.*

[10] Ibid.

[11] Jacobs and Potter, p. 116.

[12] *R.A.V. v. City of St. Paul*. 1992. 505 U.S. 377

[13] *Chaplinsky v. New Hampshire.* 1942. 315 U.S. 568.

[14] Ibid.

[15] *Cohen v. California.* 1971. 403 U.S. 15

[16] *R.A.V. v. City of St. Paul* at p. 379

[17] Ibid., at p. 380

[18] Ibid., at p. 386

[19] Jacobs and Potter, p. 121

[20] *Wisconsin v. Mitchell.* 1993. 508 U.S. 476

[21] *State v. Mitchell.* 1992. 169 Wis.2d 153, p. 811

[22] *Wisconsin v. Mitchell.*

[23] Ibid., p. 571

[24] *State v. Wyant I.* 1992. 64 Ohio St.3d 566, p. 567

[25] Ibid.

[26] Ibid., p. 570

[27] Ibid., p. 571. Emphasis added.

[28] Ibid., p. 573.

[29] Ibid., p. 574

[30] Ibid., p. 575

[31] *Wisconsin v. Mitchell.*

[32] *State v. Wyant I,* p. 575

[33] *United States v. Schwimmer,* 1929. 279 U.S. 644 (Holmes, J. dissenting), pp. 654-55