

# A Mainstream Look at Hate Crime Law

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In 1981, in response to what it claimed was a rise in the frequency of anti-Semitic incidents in America, the Anti-Defamation League of B'nai Brith (ADL) drafted a model “ethnic intimidation” statute and—in alliance with the Southern Poverty Law Center (SPLC), the National Institute Against Prejudice and Violence, and the National Gay and Lesbian Task Force—began lobbying for its passage. The most important and revolutionary aspect of the proposed legislation was an enhancement of penalties for persons who violated other criminal laws whenever such violations were motivated by the victim’s race, color, religion, national origin, or sexual orientation: a misdemeanor might be upgraded to a felony, for example, or a prison sentence substantially lengthened.

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## HATE CRIMES

**Causes, Controls, and Controversies, 4<sup>th</sup> Edition**

by Phyllis B. Gerstenfeld

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The ADL’s model legislation also created a civil cause of action whereby victims of such crimes could sue their attackers, as well as providing for the collection of data regarding such crimes and specialized training for police officers. Oregon and Washington were among the first states to pass such legislation.

The ADL has made some changes to its model legislation over the years, adding gender to their list of protected categories and switching the name from “ethnic intimidation” to “Bias Motivated Crimes.” The term “hate crime” persists in popular use.

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Today, 45 states, the District of Columbia, and the federal government have all enacted some form of hate crime legislation, some of it drafted without reference to the ADL’s model. All such laws include at least race, religion, and ethnicity (or national origin) in their lists of protected categories, 32 include physical disability, 31 include gender or sexual orientation, 17 include transgender and gender identity, 16 include age, and 6 include political affiliation. In 2016, Louisiana became the first state to include crimes against public safety personnel (“blue lives matter”).

I approached the present volume skeptically, expecting it to prove an example of advocacy research, i.e., an effort to promote more and broader hate crime laws under color of neutrally studying them. I was pleasantly surprised to discover that Gerstenfeld fairly presents the concerns raised by opponents of such laws, as well as acknowledging the difficulty of the constitutional issues they raise.

## DIFFICULTIES IN ENFORCING LAWS AGAINST MOTIVES

Judges have always been able to consider motivation during sentencing, but hate crimes laws are the first criminal laws in which the murky area of motivation constitutes part of the offense itself. The author very sensibly writes:

We frequently tend to be inaccurate in interpreting our own motives. Psychological literature is full of examples. Even the causes of simple acts can be unclear. Why did I eat that candy bar this afternoon? Was I hungry? Bored? Addicted to chocolate? Influenced by hormones? Compensating for some emotional distress? If I cannot identify the motive behind such an uncomplicated act as a mid-day snack, how can we expect people to determine the motives of other people in such complex behaviors as criminal offense—and to do so, as the law demands, beyond a reasonable doubt?

Moreover, the uniform enforcement of hate crime laws has proven extraordinarily difficult to achieve. Many incidents never get reported to police, in part because certain protected categories (e.g., blacks and homosexuals) tend not to trust the police. Once an incident is reported, it may be something of a toss-up whether it gets reported as a hate crime. Many police officers dislike the extra paper work involved, and may be unlikely to write up anything less stereotypical than hooded Klansmen burning a cross in a black family's front yard as a hate crime.

Yet the book also provides some amusing examples of overzealous enforcement. One officer filed a hate crime report after responding to a domestic dispute because he got the impression that the husband and wife hated one another. Another case involved a golf cart driven recklessly across a golf course: the complainant mentioned that the incident occurred on the eve of Rosh Hashanah, and that something similar had happened on the same day two years before. This was enough for the police to write it up as an anti-Jewish hate crime. And there is plenty of room between the two extremes of underenforcement and overenforcement; Gerstenfeld acknowledges that "ambiguous situations may be more the rule than the exception when it comes to identifying bias crimes."

Most states have no hate crime training requirement for police at all, and some training materials have been found not to reflect the law accurately. Once police report such a crime, the matter is turned over to a prosecutor, who must decide whether to try to obtain a hate crime penalty enhancement; this introduces another level of subjectivity.

The upshot is a yawning gap between the number of bias incidents revealed in victim surveys and the number of prosecutions, let alone convictions. "When a potentially high rate of inaccurate convictions combines with serious reporting difficulties among both victims and police officers," acknowledges Gerstenfeld, "it calls into question the wisdom and utility of hate crime laws."

## CONSTITUTIONAL ISSUES

When a hate crime case does come to trial, three types of evidence are commonly presented to prove that the incident was motivated by bias against a group the victim belongs to: 1) the absence of any other apparent motive, 2) the uttering of slurs around the time of the crime, and 3) membership in so-called hate groups.

The second and third types of evidence raise serious constitutional issues. It is perfectly legal to utter slurs or belong to groups of which others may disapprove (the term *hate group* remains legally undefined). But Americans may be hesitant to exercise rights which might be used against them in a future hate crime pros-

ecution. Some state courts have struck down hate crimes statutes as unconstitutional for this reason.

Furthermore, many people may be tempted to utter slurs during the heat of a physical altercation even if they do not have any strong negative bias against the group in question, just as they might make use of any handy object as a weapon. And even the Grand Dragon of the Ku Klux Klan need not be motivated by bias in *every* altercation he may have with a non-white.

For these reasons, Gerstenfeld herself writes that she is "firmly on the fence" regarding the constitutionality of hate crimes legislation. She mentions that the ACLU has suffered internal divisions over the issue, and that scholars and even judges have expressed their own ambivalence.

## WHY HATE CRIMES LAWS?

So why do we have hate crime laws? The author distinguishes three kinds of arguments commonly put forward in their favor: arguments based on *retribution*, *deterrence*, and *symbolic effects*.

Retributive arguments assert that bias-motivated crimes call for harsher penalties because they are objectively more harmful than similar crimes in the absence of such motivation. It is sometimes argued, e.g., that victims of hate crimes suffer greater psychological trauma, including

profound sadness; lack of trust in people; withdrawal; excessive fear of personal and family safety; sleep problems; headaches; physical weakness; increased use of alcohol and drugs; excessive anger; and suicidal feelings.

"The problem with these assertions," as the author points out, "is that they are difficult to support empirically." Both B'nai Brith Canada and the National Institute Against Prejudice and Violence have produced studies to prove that hate crime victims suffer more, but the author remarks that neither study was "methodologically strong"; no control groups were used, for example. Justified or not, the claim of increased psychological trauma was accepted by Chief Justice William Rehnquist in deciding *Wisconsin v. Mitchell* (1993).

Others argue that hate crimes have a wider impact than other crimes, affecting all members of the target group. Supporting studies have been produced for this thesis as well, but are questionable due to their small sample size and uncertain representativeness.

It has also been argued that hate crimes may be more likely than other crimes to spark retaliation and further conflict. This argument was also accepted by Chief Justice Rehnquist, but has, as Gerstenfeld puts it, "extremely little empirical support."

Hate crime legislation has also been supported on

the grounds of its possible deterrent effects, but here as well the author admits that “very little research has carefully considered the possible deterrent effects of hate crimes laws.”

The most frequently made argument in favor of hate crimes legislation is probably that such laws “serve a symbolic or denunciatory purpose.” This is what people mean when they speak of hate crimes laws or convictions as “sending a message”—they allow legislators, judges, and juries to show that they are on the side of the angels, to “make a public statement” in favor of tolerance, equality, and so on. Unlike the arguments based on retaliation and deterrence, this argument is not empirically testable at all, which may be one reason for its popularity. One might also question whether “sending messages” is a proper function of legislation or judicial proceedings, or even compatible with their primary aim of seeing that justice is done.

It has been said that a society is defined by what it overprotects. The extreme concern for religious orthodoxy in sixteenth-century Spain, e.g., reveals what was most important to the society of that time and place. The proliferation of hate crimes laws is similarly revealing about the state of present-day America. Being a racially pluralist society, and increasingly inclined even to *define* itself as such, America has become weirdly preoccupied with the repression of group conflict. An influential segment of public opinion seems determined to go on importing ever more exotic groups to force us all to tolerate, under threat of ever more draconian punishments.

### VICTIMS CATEGORIES

Another thorny issue raised by hate crime legislation is deciding which categories should and should not be protected. It is inevitable that once such laws are on the books, new groups will begin demanding inclusion. Iowa and New York now have ten protected categories. Eventually there is likely to be backlash from members of the “old” categories, resulting in Balkanization rather than increased tolerance. (The ADL has already denounced the “blue lives matter” movement to extend hate crime protection to policemen, for example.) There may not be any objective principle for deciding individual cases, and so protection is likely to end up going to whichever groups are best organized and funded: as the late Joe Sobran once remarked, it takes a lot of clout to be a victim.

The author also concedes that hate crime legislation may

inspire resentment of minorities... similar to the way in which children often dislike the “teacher’s pet.” Members of the general public, who are usually uninformed about the realities of how the laws work, may feel that

certain groups are getting special treatment.

This is perfectly correct, and one wonders whether more accurate knowledge would do anything to dispel the impression.

### A TECHNOCRATIC MINDSET

It is to the credit of the author’s objectivity that she provides so much material on which a reader so inclined might build a case *against* hate crime legislation. But she seems to retain a great deal of faith that such laws can eventually be made to work. The plea that “more research is needed” about this or that aspect of hate crimes runs through her book like a recurring refrain. If rigorous studies were actually carried out on every subject she suggests, dozens—perhaps hundreds—might prove necessary. It would require several years and an enormous budget.

Presumably, once all this were done, a panel of qualified experts would study the results and design a legislative and administrative response to hate crimes that would resolve all the ambiguities, overcome all barriers to objective reporting and prosecution, and efficiently administer the proper response to every “bias incident” in the United States—and eventually, perhaps, the world. Technocratic *hubris* has rarely gone so far.

She also speculates on possible technocratic responses to hate crimes, such as “counseling and education” for perpetrators. So far, Massachusetts is the only state to have attempted something along these lines; their hate crimes law includes the following: “A person convicted under the provisions of this section shall complete a diversity awareness program.” But how could anyone unaware of diversity commit a hate crime in the first place?

### TYPES OF HATE CRIMES

In her third chapter, Gerstenfeld offers a typology of hate crimes. The commonest kind, accounting for two-thirds of the total, she designates “thrill-seeking” crimes. These are most often committed by young men in small groups; often, they “do not have a particularly strong animosity for their victims.” Such perpetrators frequently travel to neighborhoods where they are unknown to commit their crimes, and may even admit to police that they were merely “bored” and looking for excitement. Others may be trying to prove their “toughness” to their peers. The author remarks that the frequency of crimes thus motivated suggests “prevention programs aimed at simply reducing bigotry may not be as effective as hoped.”

The second kind of hate crime she designates “reactive.” These are committed in response to a stimulus, such as a seeing black person in a white neighborhood or an interracial or homosexual couple. The per-

petrator does not usually leave his own neighborhood. “Reactive” crimes account for about one quarter of hate crimes.

A third kind, or possibly a subset of reactive hate crimes, are “retaliatory crimes.” A famous example occurred during New York City’s Crown Heights riots of 1991: after two black children were struck by a car driven by a Hasidic Jew, a group of local blacks murdered Yankel Rosenbaum, a young Yeshiva student, in retaliation. Retaliatory crimes make up about eight percent of hate crimes.

The last and least common kind of hate crime is what the author calls “mission crimes,” in which the perpetrator sets out to harm or kill members of a group of which he disapproves. Examples include the murder of nine black churchgoers in Charleston, South Carolina, by Dylan Roof in 2015, and the Pulse gay nightclub massacre perpetrated in Orlando, Florida, by the Muslim Omar Mateen in 2016. These are the crimes that best match what people are likely to think of as hate crimes, and must have played an important role in inspiring hate crime legislation. Yet in practice, they are the rarest type. Their infrequency may not be sufficiently appreciated because such crimes always receive wide publicity when they occur. One wonders whether it makes sense to punish the garden variety thrill-seeking punks who commit two-thirds of “bias-motivated crimes” with laws based on a mental model of “mission” hate crimes.

## PREJUDICE

One of the weakest sections of Gerstenfeld’s study is devoted to “the psychology of prejudice,” in the sense of bias against outgroups. She follows the conventional liberal notion that, in Oscar Hammerstein’s words, “you’ve got to be carefully taught” prejudice, since it appears to be absent in newborns. She mentions that a preference for one’s own group has been observed to begin at around age seven.

But this reasoning is fallacious. Children are not born sexually mature either, but it does not follow that they must be “taught” how to reach puberty: they are born biologically preprogrammed to do so in their teens. There is abundant evidence for kin preference in the lower animals and even in certain plants. Much of this material is usefully summarized in Chapter 4 of Jared Taylor’s *White Identity*. (These remarks concern “racial prejudice”; I leave bias against homosexuals and other protected categories for another occasion.)

Gerstenfeld seems to have at least caught wind of some of this research, since she acknowledges at one point that “from a sociobiological view, it is sensible that humans should fear strangers and favor people who are most like themselves.” But this is an off-hand remark in a different section of the book; her thematic

discussion of prejudice follows the liberal nurturist line unswervingly.

There is also an odd subjectivism to her whole discussion of the “psychology of prejudice.” She speaks of perpetrators targeting ethnic groups whom they *perceive as* taking away their economic or political power. In the particular cases she cites, she writes of English hooligans who *felt as if* Muslims were taking over their territory, or *felt* that foreigners had been unfairly prioritized in the allocation of scarce local resources.

To me it would seem important to ask whether such feelings and perceptions were correct or not, but the author appears to have no interest in this. A quick look confirms that Muslims *have* in fact been taking over British urban neighborhoods in recent years. (Admittedly, the displeased locals might have behaved more rationally by going after Tony Blair instead of the Pakistani grocer on the corner.)

Consider Gerstenfeld’s definition of *prejudice*: “an aversive or hostile attitude toward a person who belongs to a group, simply because he belongs to that group, and is therefore presumed to have the objectionable qualities ascribed to that group.” She quietly ignores the question of whether certain groups might actually tend to have objectionable qualities. A white American who avoids black neighborhoods out of concern for personal safety, e.g., might be described as having an aversive (if not necessarily hostile) attitude to blacks; he might, therefore, qualify as *prejudiced* under her definition, even if his aversion was based on accurate knowledge of FBI crime statistics.

Yet the definition of prejudice in terms of aversion to groups is no older, I believe, than Gunnar Myrdal’s 1944 book *An American Dilemma*. According to the word’s root sense of *preconceived or rationally unwarranted belief*, an expectation of heightened danger in black neighborhoods is no prejudice, but statistically well-warranted. Indeed, it is belief in racial equality that appears to be a widespread *prejudice* in this original sense of the word.

But do not expect any awareness of such distinctions in Gerstenfeld’s book.

## A BIAS AGAINST WHITES?

The author provides no thematic discussion of white people and hate crimes, limiting herself to criticizing unnamed “white supremacists” for denying that hate crimes laws protect whites, and for portraying crimes committed against whites as the “real” hate crimes which the government and news media ignore.

It is true that whites are not excluded from formal protection by hate crimes laws. Yet the book cites only one actual example of an anti-white hate crime: four black Wisconsin teenagers had just seen the movie

*Mississippi Burning*, a notorious anti-white hatefest which critics across the political spectrum considered factually challenged. Todd Mitchell, 19, said to the others: “Do you all feel hyped up to move on some white people?” Shortly afterward, a 14-year-old white boy named Gregory Riddick walked by. Mitchell said, “You want to fuck somebody up? There goes a white boy; go get him,” pointing at Riddick. The group beat him severely enough to leave him in a coma for four days, with possible permanent brain damage. Aggravated battery carries a maximum penalty of two years in Wisconsin, but Mitchell received a hate crime enhancement to four years.

I think it fair to say that this is an extreme case, almost analogous to the KKK burning a cross on a black family’s lawn. But as Gerstenfeld elsewhere admits, ambiguous cases are the rule rather than the exception where hate crimes laws are concerned. Might there be a tendency to ascribe black-on-white crimes to motives such as robbery, downplaying the possibility of a racial factor?

The author acknowledges that “hate crimes committed by whites against non-whites were the most likely to result in an arrest... perhaps because they best fit the officers’ conceptions of what hate crime involves.” We should also remember that hate crimes laws began as a project of the ADL, and that the SPLC was a key ally in lobbying for passage. Looking at the materials put out by these organizations, no one can miss the implication that heterosexual white men are the “haters” likeliest to commit bias crimes, while non-whites are their likeliest victims. Given the ambiguity of motive in so many criminal cases, such an assumption may become a self-fulfilling prophecy, leading police to give greater consideration to possible “bias” whenever a suspect is white.

The author notes that “almost all the research on hate crimes has focused on European and English-speaking countries, mostly ignoring the significant problems faced by nations in Asia, Africa, and Latin America.” Surely, this is because European and English-speaking countries are where white majorities are found.

Hate crime hoaxes have become quite common, especially on college campuses, and are usually designed to make “white racists” appear to be the responsible party. Yet the whole subject of hoaxes is never once alluded to in Gerstenfeld’s book.

In 2014, according to FBI statistics, whites accounted for 52 percent of hate crime offenders, although making up 63.7 percent of the U.S. population. So even with what is likely to be biased enforcement against them, they are still somewhat underrepresented. Blacks have actually proven the most overrepresented group among perpetrators, but Gerstenfeld can think of only two possible reasons for this: “economic depriva-

tion” and “anger over racism.” Some of the worst inter-ethnic violence in recent years has occurred in turf wars between blacks and Latinos in Southern California.

So disappointed have advocates of hate crime legislation been by these results that some have openly called for non-whites to be exempted from prosecution! As the author points out, such a proposal would be unlikely to survive a Fourteenth Amendment challenge. But who knows what may happen when whites are reduced to a minority, and non-whites trained in “critical legal studies” take over the bench.

The author acknowledges that “most hate crime offenders do not belong to organized extremist groups,” but this does not prevent her from devoting an entire chapter to “organized hate.” She reports that “white supremacist” groups are the commonest kind of hate group:

White supremacists believe the power that is rightfully theirs, by virtue of their superior race, is being stolen by others.... [A]t least one of their primary goals is to advance their own interests at the expense of those they oppose.

This presumably contrasts with the behavior of an anti-hate group such as the ADL, which has no interest in power, and carefully considers all the possible consequences of their actions for white Christians before doing anything that might benefit Jews.

The author provides a helpful list of groups devoted to combating hate: included are organizations representing Jewish-, Arab-, Asian-, and Mexican-Americans, as well as American Indians. All are apparently working to protect the public from white supremacists, with no special regard for their own interests. Whites, on the other hand, appear to form *only* hate groups, being entirely absent from the anti-hate list.

Another marker of hate groups, according to Gerstenfeld, is that they “believe they have the right to define what constitutes an American, and residency in their country can be permitted only on their terms.” Once again, the implication appears to be that anti-hate groups—among which the author includes the National Council of La Raza and the Mexican American Legal Defense and Educational Fund—have no interest in influencing American immigration and citizenship policy.

What could possibly account for this strange disparity between arrogant, selfish, power-hungry, hate-filled whites and all these other disinterested and altruistic groups? Is there some moral depravity peculiar to European-descended people that has not affected the rest of the world? We can only conclude, in Gerstenfeld’s own manner, that this is an area which “requires further research.” ■