Responding to Bias Crimes in America

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We are here to discuss what has been going around America: episodes of bigotry. Some of them are raw, crude, ugly, violent, taking on criminal proportions, constituting criminal acts against law-abiding citizens, solely because of who they are—what color they are, what religion they are, what ethnicity they are, what sexual orientation they are. For those reasons alone, some Americans have been targeted for criminal attacks.

The Anti-Defamation League started a little over ten years ago with model hate crimes statutes. Unlike the St. Paul ordinance, our model hate crimes statutes begin with existing underlying criminal offenses—only crimes, not thoughts, not expressions, not publications, not beliefs—crimes, and only crimes. When the state proves not only that an underlying or predicate criminal offense has been committed, but that the crime has been committed because of the race, religion, national origin, or sexual orientation of another person or another group of persons, then our model code calls for enhanced criminal penalties.

Why do that? More than ten years ago, we were hearing from victims of hate motivated crimes, crimes that sometimes involved inordinately small amounts of property damage. After all, the repair of a spray painting of a swastika on a garage door costs only the amount of paint necessary to whitewash the spot where the swastika existed. Sometimes they also involved very small injuries to persons, but no medical bills. People often were treated and released or didn’t require treatment at all. For these reasons, offenses that were categorized as minor by virtue of the damage were getting very minor attention from law enforcement and from government generally. But we were hearing from the victims that they weren’t minor at all. They were not pranks; they were not funny.

The model codes have now taken the form of criminal statutes, which are either based on the model codes or are func-
tionally similar to them, in a total of thirty-one states, Minnesota included. When we learned of the prosecution in *R.A.V.*, our organization filed an *amicus* brief, principally prepared, I should note, by the respected Minneapolis firm of Leonard, Street and Deinard, specifically Alan Saeks, Mark Weitz, and their colleagues. This brief takes the position that, first, you are an African-American family moving into a white neighborhood targeted for bias-motivated criminal attack, the Anti-Defamation League has an interest in standing with you. Second, even though the St. Paul ordinance is one that we do not like—had it been shown to us before its passage, we would have encouraged very substantial modifications in it—it had been narrowly construed by the Minnesota Supreme Court to apply only to fighting words. Given those constraints, we believed that the prosecution could proceed based upon the St. Paul ordinance.

But the third and perhaps most important reason for our participation is that we have so much at stake. So many states have criminal statutes based on our model codes that we did not want the Supreme Court speaking in this area without having heard from us. The Anti-Defamation League, with thirty regional offices, monitors and on an annual basis publishes an Audit of Anti-Semitic Incidents. Not all of them are crimes, but many are. For 1991, for instance, our thirteenth year of issuing that Audit, we noted a thirteen-year high in the number of incidents of anti-Semitism in America, incidents directed against Jews only for the reason that they are Jewish.

A couple of examples: First, graffiti near my home, sort of a crude Jewish symbol and some kind of a reference to Jews as gangsters. “G-A-N-S-T-E-R-S,” showing that in my neighborhood, we confront dual problems of anti-Semitism and illiteracy. Second, in a neighboring state, a young woman went out to pick up her mail and found, in addition to the day’s mail the carcass of a beheaded fox. Its blood had been used to draw a swastika on her garage door—her second discovery as she turned around to walk back into her home.

From the sublime to the ridiculous to the preposterous and to the savage and everywhere in between, acts are committed against people by reason of who they are. And today, we’re confronted with the question of what should be done about those acts. We must treat these acts seriously. We favor the adoption of criminal laws taking existing criminal offenses,
such as assault, battery, criminal damage to property—things that everyone agrees are crimes—and when those crimes are proven to have been motivated by reason of the race, religion, national origin, sexual orientation of other persons or groups of persons, those crimes ought to be punished more seriously.

The federal government has now adopted the Hate Crime Statistics Act\(^1\) so that the Attorney General will record and publish data from every state about the incidence of bias crimes. Up to now, if you ask about the number of bias crimes in America, everyone will tell you they don't know. The FBI doesn't know; the Anti-Defamation League doesn't know; the NAACP doesn't know. We have to begin to know so that we can devote the kinds of resources—law enforcement resources and other community resources—to what is obviously a growing, disturbing problem in criminal law.

We don't think the problem will ultimately be best addressed by ordinances that speak, as the St. Paul ordinance does, about arousing anger, alarm, or resentment. We do think it should have a criminal law basis. When it does, we think that it better equips law enforcement in our communities to fight against the danger, the corrosive impact, of bias-motivated crimes.

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So much has happened since our panel discussion on April 24, 1992. In June, the United States Supreme Court declared St. Paul's hate crimes ordinance unconstitutional.\(^2\) While all nine justices agreed with that result, the Court divided sharply over the supporting reasoning. Justice Scalia's majority opinion articulated what many believed was a new concept: a notion of "content discrimination" within the First Amendment. To prohibit all fighting words might well be permissible; to prohibit only bigoted or racist fighting words was unconstitutional.\(^3\)

After the \textit{R.A.V.} decision, state courts considering penalty-enhancement hate crimes statutes based upon or similar to Anti-Defamation League model codes began to rule on the constitutionality of those statutes.\(^4\) Plainly, there was no con-

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\item \textit{Id.} at 2547-50.
\item \textit{See Dobbins v. State}, 605 So. 2d 922 (Fla. Dist. Ct. App. 1992) (holding en-
sensus about the reach and significance of the United States Supreme Court’s holding in \textit{R.A.V.}

Finally, on December 14, 1992, the Supreme Court announced that it would hear the Wisconsin case, \textit{State v. Mitchell}. The Court in essence confirmed that its decision in \textit{R.A.V.} would not and could not be the last word on the constitutionality of hate crimes statutes. The Wisconsin statute, based on the ADL model codes, enhanced penalties for certain crimes when a criminal “intentionally selects” a victim “because of the race, religion, color, disability, sexual orientation, national origin or ancestry” of that victim.\footnote{\texttt{Wis. Stat. § 939.645(1)(b) (1989).}} The Wisconsin case presents facts that are also of interest. The defendant, Todd Mitchell, is black. He was convicted for his role in directing the serious beating of a white teenager who, following the attack, was in a coma for nearly four days. Trial evidence indicated he was beaten simply because he was white, and Mitchell’s sentence was accordingly enhanced. So much for the argument that hate crimes statutes are nothing but a codification of “political correctness” in which African-Americans, Jews, gays and lesbians, Asians, and other minorities are favored while whites are disfavored.

We look forward optimistically to the Supreme Court’s penalty enhancement decision—expected this spring—on the constitutionality of hate crimes statutes.


\footnote{\texttt{Wis. Stat. § 939.645(1)(b) (1989).}}