

Hate Crime: A Review Essay

Frederick W. Lawrence, Punishing Hate: Bias Crimes Under American Law, Harvard University Press, Cambridge (1999)

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James B. Jacobs and Kimberly Potter, Hate Crimes: Criminal Law & Identity Politics, Oxford University Press, New York (1999),

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It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair...

Charles Dickens – A Tale of Two Cities

Two books. Two very different perspectives. In one, the spectre of hate crime looms as a very large, and very real, menace to American society. In the other, the problem is one of exaggeration, hyperbole and unintended consequences flowing from well-intentioned attempts to deal with bigotry and prejudice.

Each book is motivated by a concern to minimise harmful behaviour. Each is basically anti-racist in political orientation. Each book wishes to define and dissect the nature and extent of hate crime. Each book proposes certain courses of action to deal with racism and violence.

In the end, however, one book argues that the criminal law is a key tool in the struggle against 'bias' crime. By contrast, the other views the criminal law as a crude mechanism of social control which has the potential, through the misuse of authority and power, to sow the seeds of dissent – to, in fact, fan the flames of inter-group conflict.

Frederick Lawrence asserts that a society dedicated to equality must treat bias crimes differently from other crimes, and must enhance the punishment of such crimes. 'Bias' crimes are defined as those in which the motivation for criminal activity is driven by bigotry on the basis of race, ethnicity, religion, national origin, sexual orientation and, in certain instances, gender. In legal terms, two models of bias crime statutes are distinguished. The 'racial animus' model requires that the defendant has acted out of hatred for the victim's racial group or the victim for being a member of that group. The 'discriminatory selection' model requires that the defendant has selected their victim because of the victim's membership in a particular group. The common thread in these definitions is the 'state of mind' of the bias criminal.

Jacobs and Potter, on the other hand, argue that it is extremely difficult to define a species of crime based upon prejudice or bigotry. The concept is a social construct, one that varies greatly in meaning depending upon whether a broad or a restrictive definition is used. They argue that hate crime is inherently ambiguous conceptually, and that it is terribly hard to demonstrate empirically – given that, in most cases, it is

not possible to determine an offender's motivation. Choices invariably have to be made as to how to define the precise meaning of 'prejudice', and how to understand the nature of the causal link between the offender's prejudice and criminal conduct.

For Lawrence, the extent of bias crime is essentially dependent upon a combination of objective quantification (e.g. crime reports, violence perpetrated by 'militias'), and changing perceptions (e.g. what was once seen as a 'prank' is now seen as bias-motivated vandalism). Perception and problem are inextricably related. Importantly, it is argued that the harm of a bias crime exceeds that of a similar crime lacking bias motivation. It is seen to reverberate throughout the broader target communities and society-at-large, as well as affecting immediate victims. Bias crimes are seen to involve direct and identifiable harms to specific local communities.

From another vantage-point, however, the size of the hate crime problem is entirely dependent upon how the definition is manipulated. This is certainly the view of Jacobs and Potter. Thus, for example, they argue that 'If criminal conduct must be completely or pre-dominantly caused by prejudice in order to be termed hate crime, there will be few hate crimes. If prejudice need only *in part* to have motivated the crime, hate crime will be plentiful' (p 28). They critique the notion that there is a hate crime epidemic. In doing so, they note the lack of reliable, uniform data on hate crime. They say that, comparatively speaking, there is less prejudice-motivated violence against minority groups today than in many other periods of American history.

Jacobs and Potter also question the justifications for hate crime laws, especially those which assume greater culpability of hate crime offenders, more severe emotional harm to hate crime victims, more severe impact on the community, greater potential to trigger retaliation and inter-group conflict, and greater need for deterrence. Many such assumptions need to be substantiated empirically, they argue. Other assumptions require a rethink of the moral calculus, including taking into account instances where blameworthiness is at least partly mitigated by how prejudices are learned in the first place.

A distinction can be made between 'bias crimes' and 'racist speech'. For instance, Lawrence argues that free expression ought to protect the right to express offensive views, but not the right to behave criminally. If 'speech' is not linked somehow to a parallel crime (e.g. trespass, assault, making of threats), then, however offensive, it should not be criminalised. He later goes on to present a model for bias crime statutes, one which focuses on the racial motivation of the actor. According to Lawrence, 'If bias crimes are not punished more harshly than parallel crimes, the message expressed by the criminal justice system is that racial harmony and equality are not among the highest values held by [American] society' (p 8). The criminal law, as an expression of social values, thus has a central place in dealing with bias crimes.

What gets criminalised and how this occurs is an important issue that nevertheless warrants close consideration. For Jacobs and Potter, the proliferation of hate crime laws in the USA demonstrates the impact of 'identity politics' on criminal law. That is, the new legislation demonstrates the success of various advocacy groups that work on behalf of racial, religious, and ethnic groups, gays and lesbians, and women, in getting symbolic legislation passed which, ultimately, affirms their worth and identity. But, herein, perhaps, lies one of the dangers of such legislation. For Jacobs and Potter argue that all too often this gives politicians an easy way out. Denouncing the problem

becomes, in effect, a substitute for addressing the problem. Rather than energy and commitment going to institution building in the area of community relations, the law is seen as a 'quick fix', with no real discernible positive impact. Indeed, they argue the reverse may be the case.

Hate crime laws thus could well have negative socio-political consequences. For example, Jacobs and Potter argue that sentence enhancements for low-level hate crimes (e.g. vandalism, graffiti) constitute an undermining of freedom of speech and essentially punishes the offender for their beliefs and opinions. It is also seen as disproportionate punishment.

More generally, such laws are criticised in that they might have the effect of making worse existing social divisions, rather than contributing to social solidarity. The problem is that: 'Breaking down generic criminal law into new crimes and punishment hierarchies depending on the prejudices of the offenders and the demographic identities of victims may exacerbate rather than ameliorate social schisms and conflicts' (p 144). The politics involved in hate crime laws is hence seen to reinforce identity politics, and thereby, to further divide American society. In so far as this is the case, Jacobs and Potter argue that many of the recent hate crime laws should be repealed. Criminal laws are not the answer; rather, they argue that community relations units within police services, minority recruitment programs, and better accountability of justice officials are better ways to proceed.

These are important books, and each contains compelling and insightful evidence regarding the place and role of criminal law in dealing with hate crime. The authors are united by a desire to positively and constructively grapple with important issues such as definition of the crime, justification for punishment, appropriateness of social response, ideals of social harmony and freedom of speech. Each views the response of the state to bias or hate crimes as a complex political process. None is under any illusion that the problem of hate crimes will be solved simply or easily. In their own ways, each book also supports the idea of a multi-pronged approach to the issues. However, significant analytical and political differences lead to very different conclusions regarding preferred sites and forms of intervention.

The 'debate' represented in these two books raises a number of significant issues for those engaged in analysis of, and social action around, hate or bias crimes. For example, it highlights the ways in which crime is socially constructed, although this is not necessarily a major problem as such – after all, it is intrinsic to the realities of law making and law reform. The adoption of expansive or restrictive definitions of hate crime (as with 'environmental crime', preventable workplace homicide, etc) are not symptomatic of analytical ambiguity so much as indicative of the political struggles and consciousness-raising which accompanies any debate over how 'social harm' is to be construed.

That certain social problems are (apparently) inflated for the purposes of particular lobby groups (i.e. distorting of data, research and public pronouncements in order to mobilise opinion in certain directions) does need to be recognised. But care has to be taken regarding how to interpret the social processes whereby particular problems become 'public' issues. For instance, there is a danger that critique of the way in which lobbying occurs may inadvertently reproduce the ideology that 'special interest groups' are manipulative and conniving, and that they are out to capture the political agenda for their own very selective ends. This is a favourite argument of the Right, and one which,

along with the phrase 'politically correct', is actively used to de-legitimize the voices and genuine concerns of the less powerful in society.

To argue that hate laws are socially divisive is likewise problematic, if taken as a blanket statement. While there is no doubt that conflicts do occur over the introduction and implementation of hate laws (witness the debates over racial vilification legislation in Australia), these reflect real material differences in social location and social mobilisation. Social solidarity is not constructed in a vacuum; it is unrealistic as a social objective to the extent that it ignores the profound injustices and inequalities of the larger society. The experienced realities of hate and bias crimes in the daily lives of people of colour, gay men and lesbians, and so on, have to be acknowledged. Accordingly, it is essential to analyse the conditions under which 'identity politics' have emerged, and to situate discussion of particular groups within the context of wider social processes – such as slavery, colonialism, immigration policies and ideologies, and heterosexism. It is these that have fundamentally shaped the past and present lived realities of divided societies, and which simultaneously generate momentum toward law reform, and resistance to this.

It is also necessary to examine closely the material basis for hate crime. For instance, we need to appreciate how the dislocations and economic hardships associated with 'globalisation' are associated with a re-shaping of ideological and political relations in countries such as the United States and Australia. The emergence of the racist Far Right in the form of populist mass parties (as recently evidenced in Austria, and the One Nation phenomenon in Australia), in the guise of small, militant (and sometimes, armed) white supremacist groups, and as manifest in major retreats politically in areas such as immigrant entry and settlement policy and indigenous issues, are tied to the unequal distributive effects of economic re-structuring. The 'new racism' is directly linked to shifts in the wider political economy.

The fracturing of many communities economically provides a ground upon which many different types of political struggle are taking place, across the rightwing-leftwing spectrum. In this context, the notion of 'social solidarity' is best conceptualised as something that must be built politically, and through the development of strategic alliances. In the light of social fragmentation and ideological flux it is imperative that clear lines of demarcation be drawn – that 'bottom lines' be established regarding human rights, personal safety and communal well-being. This is necessarily a partisan process. It will inevitably be accompanied by conflict. But social justice demands nothing less than major challenges to and transformations in the established order.

Dealing with the problem of hate crime requires careful appraisal of existing data collection methods, and a critical appraisal of the varying definitions that may be applied. It also means taking a cautious approach to hate crime legislation, and of subjecting such laws to continuous scrutiny.

The criminal law, amongst other forms of law, is by its very nature an important symbolic and practical site of struggle against bigotry and bias. Yes, there will always be ambiguities and anomalies in the application of anti-discrimination legislation. Yes, there will be unintended consequences, including those which negatively impact on minority people themselves. Yes, there will be overt ideological conflict accompanying law reform. Yes, there are major complications and technical difficulties in trying to draft and implement model anti-bias statutes.

In the end, however, the main thing to be learned from the debates over the use and appropriateness of the criminal law in dealing with hate crime is that the choices we make ought to be fundamentally dictated by strategic objectives. That is, action should be guided by consideration of which measures, at any point in time, will best raise consciousness of the issues in the most productive way, and which will best serve to defend and extend the rights, legitimacy and safety of people subjected to hate crime. We should be under no illusion that law reform is necessarily the sole answer, or that a proliferation of new laws or adoption of new model legislation will actually solve the problem. The precise role of the law in dealing with hate or bias crime will always be partial, and its effects will always be contingent upon what is occurring politically in other areas of social life. Taking action on hate crime invariably requires a multiplicity of approaches, across a range of institutional domains.

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