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# Hate Crimes

DWIGHT GREENE\*

Today, I will limit my comments, for the most part, to the subject of hate crimes. With respect to that topic, my conclusion is this: if you think about hate crime long and hard, you will find that it is difficult to find a single set of conclusions about the subject, about what we ought to do about the problem, and about how we ought to do it. This is an incredibly complex subject, particularly for those who are involved in the law and who approach this subject in the context of a society with many "isms". We'll talk about a few of those "isms," because racism, I think, is only one of the things going on here.

I separate hate crimes into three paradigms. The first paradigm is the one that most people think of when they consider hate crime: white on black crime. The classic example of this violent crime is lynching. But this paradigm also includes the horrible murder of Vincent Chin in Detroit in 1982.<sup>1</sup> It also includes the killing of Petty Officer Harold Mansfield in Jacksonville, Florida.<sup>2</sup> It includes, most recently, the killing of a young Asian named Lu Yen Phan Nguyen, by Bradley W. Mills.<sup>3</sup> These types of crimes take place all over the country and typically involve white gangs targeting a person of color.

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\* Professor Greene delivered this essay at a Hate Crimes Symposium held at the University of Miami School of Law. Tragically, he was killed a short time later, a victim of a violent crime. The *University of Miami Law Review* is honored to have the privilege of adapting his enlightening presentation for publication.

1. Vincent Chin, a 27 years old Chinese-American man, was fatally beaten on June 19, 1983, in the parking lot of a nightclub outside of Detroit, Michigan. He died on June 23, from wounds received from a baseball bat, just days before he was to be married. His attackers, Ronald Ebens, an autoworker, and his stepson, pleaded guilty to manslaughter and received no jail time. Asian-Americans alleged the beating was racially motivated, but the subsequent federal charges brought against Ebens resulted in an acquittal. See John Holusha, *Two Fined in Detroit Slaying are Indicted by Federal Jury*, N.Y. TIMES, Nov. 3, 1983, at A26; Isabel Wilkerson, *For Asian-Americans, Acquittal in Rights Case Arouses Outrage and Fear*, N.Y. TIMES, May 6, 1987, at A20.

2. Harold J. Mansfield Jr., a 22 years old African-American sailor, was shot dead in a shopping center parking lot outside Jacksonville, Florida. Before the shooting, his white assailant gave a shopping center clerk a card that read: "White People Awaken. Save the White Race." *White Supremacist Wanted in Slaying*, WASH. POST, May 21, 1991, at A8.

3. Luyen Phan Nguyen, a 19 years old Vietnamese immigrant, was beaten to death by a group of white men as he left a party near Fort Lauderdale, Florida. Nguyen's attackers, seven of whom were charged in his death, followed him from the party after he had objected to the use of a racial slur. One defendant, Bradley W. Mills, was convicted of second-degree murder and sentenced to 50 years in prison. *Fifty Year Term in Killing of Vietnamese Immigrant*, N.Y. TIMES, Dec. 10, 1992, at A24.

Within this first paradigm I include at least two subclasses. The first subclass is juvenile, spur-of-the-moment crime. There are three issues connected with this type of crime. First, the young people committing these crimes may have had a history of involvement with racist groups such as the skinheads. These young people, typically white, are youngsters much like this Mr. Bradley Mills, who was a groundskeeper at a country club. He and the victim were not from the same socio-economic class. This raises a second issue in the topic of hate crimes that is not always considered, namely the extent to which race and class factor into these crimes. Third and finally, these youngsters often have America's favorite drug in their systems. That is to say, they are more often drunk rather than high on any other controlled substance. Under this influence, these young people then commit crimes which, though perhaps not totally spontaneous, also cannot be described as planned or premeditated in the classical conspiratorial sense of a Ku Klux Klan crime.

That brings me to the second subclass in my first paradigm of white on black crime: adult-planned conspiracies to violate the rights of someone of color. These are Aryan Nation and Ku Klux Klan kinds of activities, in which grown people, sometimes with law enforcement involvement, orchestrate violence against a specific person, usually a person of color. We can go on with the first paradigm, but I think that what I have given provides at least a sense of it.

The second paradigm is "police-on-outsider" violence. The classic case in this paradigm is police crime against gays and lesbians. I refer to this classic case as one of my police paradigms, but not because I couldn't use the police beating of Rodney King<sup>4</sup> or the recent killing of a man in Detroit by two white police officers.<sup>5</sup> I could use those examples, but I think that the paradigm works best when we instead focus on gays and lesbians as the victims of police crime. After all, the Stonewall movement itself started when gays and lesbians began to resist systematic police harassment.<sup>6</sup> Furthermore, the focus on gay and lesbian vic-

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4. See Jill Walker & Lou Cannon, *Felony Assault Charged in L.A.; Four Police Officers Indicted in Videotaped Beating of Motorist*, WASH. POST, Mar. 16, 1991, at A1. See also Abraham L. Davis, *The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past?*, 10 HARV. BLACKLETTER J. 67 (1993).

5. The similarities to the case of Rodney King were obvious. Malice Wayne Green, a 35 year old African-American male, died of head injuries after being beaten by several police officers while unarmed and sitting behind the wheel of a car. Two white policemen were charged with his murder, while two others, including a black supervisor at the scene, were charged with lesser crimes. At least seven police officers, four emergency medical personnel, and a number of bystanders witnessed the beating. See Donald Woutat, *Detroit Officers Charged in Black Motorist's Death*, L.A. TIMES, Nov. 17, 1992, at A1.

6. The brief uprising which gave rise to the Stonewall movement took place over two nights

tims raises what I consider to be one of the most understated and overlooked issues in connection with the problem of hate crimes: whether the problem is one of inadequate criminal penalties, or whether the problem is that the enforcers of hate crime statutes, both police officers and prosecutors, do not value hate crime victims. That is to say, I suggest, and will discuss more below, that enhancing penalties is probably the wrong solution for hate crimes. The real problem with hate crimes lies more in enforcement mechanisms than it does with the maximum available penalties under current statutes.

Let me draw a few distinctions here. There are a number of different kinds of hate crime statutes. I'll mention just three main categories to provide a sense of the landscape. The first category includes statutes that create new categories of crime. For example, consider the case where someone burns a cross on another's lawn for a racial reason. Some statutes make this kind of action a hate crime. Such a statute was recently the subject of a United States Supreme Court case, *R.A.V. v. St. Paul*,<sup>7</sup> which I'll discuss later in more detail.

The second category of hate crimes statutes encompasses those that enhance the penalty for activities that are already illegal. For example, when someone paints something on another person's house, that action might be considered a simple trespass violation. In many places it might not even be considered a misdemeanor; it may only be considered a violation of the law and not really a crime. This second type of hate crime statute changes that. These statutes provide that where, for example, someone paints a swastika on the side of a religious building, this act of vandalism, previously treated as no more than a traffic violation, is now treated as a serious crime.

The third category of hate crime statutes involves activities already considered criminal: assault, murder and particular kinds of assault, such as a rape. Statutes such as the one here in Florida<sup>8</sup> enhance the penalty for crimes based on the reason the crime was committed. Accordingly, the penalty increases if the crime was committed *because of* the victim's race, religion, ethnicity or ancestry. These are called

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in June, 1969. Police raided the unlicensed Stonewall Inn in New York City's Greenwich Village and attempted to arrest the homosexual clientele in attendance. The ensuing streetfighting between police and citizens marked the first time the gay community struck back against perceived systemic police harassment. See William A. Henry, *Pride and Prejudice: Times Have Changed Twenty Five Years After Stonewall, but Gays Still Have Cause to Fear Bumping up Against the Limits of Tolerance*, TIME, June 27, 1994, at 54; Andrew Kopkind, *After Stonewall: Riot at the Stonewall Bar in New York, New York, June 27, 1969*, THE NATION, July 4, 1994, at 4.

7. 112 S. Ct. 2539 (1992).

8. FLA. STAT. § 775.085 (Supp. 1994).

enhancement statutes and are the type of hate crime statute with which I will be mostly concerned.

The rationale behind these statutes is this: in order to deter hate crime, we need to increase the penalty for already-existing crimes. This is a common legislative response to the problem of hate crimes. Many of these statutes require minimum mandatory sentences, including jail time for first-time offenders. Florida has this kind of statute.<sup>9</sup>

Unfortunately, changing the law does not change the people who enforce it. Recall my second paradigm of "police-on-outsider" violence. Now let's take this paradigm and flesh it out a little. If the local police don't think much of gays and lesbians, and a crime is committed against a gay or lesbian person, commonly called gay-bashing, what will be the police response? Will they consider it a serious crime? The Jeffrey Dahmer case<sup>10</sup> is a classic illustration. Once, this horrible person victimized a young Asian man and when the police were called they found the nude boy bleeding in the street with this man. However, they failed to take any action because they considered it to be a mere homosexual lovers' spat. The situation wasn't taken seriously by the people responsible for law enforcement. My threshold question is this: what effect will doubling the penalty have on the response of the police? I suggest that the effect will likely be marginal at best. We have a knee-jerk response in many areas of the law, but in particular in dealing with hate crimes today. We think that to respond by adding criminal penalties, and toughening up the law, we will be effective. I call this the macho response to crime: making the penalty harder, or worse, or tougher, in order to solve the crime problem. I suggest that penalty enhancement doesn't solve the problem and that better responses are available.

But let me explain my third paradigm, before you think this problem is simple. The third category is black on white crime. In this context, I use the word "Black" in the same sense that the late President Johnson used the term in his last public speech. President Johnson said "Black" means any person who has been discriminated against in America based on the color of their skin. He expressly meant to include Latinos, Asians, Native Americans, and other people.

My first question is: Can a person of color commit a hate crime against someone white? Many hate speech statutes operate one way only; that is to say, historically oppressed groups cannot be victimizers

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9. The Supreme Court of Florida recently upheld the constitutionality of the state's hate crimes statute (FLA. STAT. § 775.085 (Supp. 1994)), finding penalty enhancement appropriate where a criminal act evidences racial bias. *State v. Stalder*, 630 So. 2d 1072, 1077 (Fla. 1994).

10. See Rogers Worthington & Steve Johnson, *Three Cops Suspended; Left Victim with Dahmer*, CHI. TRIB., July 27, 1991, at 1 (reporting on community allegations that police inaction was racially motivated).

under some hate speech provisions. However, I know of no hate crime statute that is written so as to operate one way only.

Why do I raise this category of hate crime as a separate paradigm? Well, this is where the complexity gets very interesting. In New York City, where I am from, we have sometimes been very successful in forming political alliances between people of color, whereas the youth of our city have been very successful in forming multi-racial *criminal* alliances. The media typically projects the image that young male crime in New York is perpetrated by racially segregated groups. However, the reality is more like the Los Angeles riots, where more than fifty percent of the people arrested were Latino.<sup>11</sup> The media falsely presented those riots as a confrontation between blacks and whites. Contrary to what is presented by the press, some of New York's most infamous recent crimes involved alliances between young men of color, often Blacks and Latinos, in a joint criminal venture. For example, the Brian Watkins case<sup>12</sup> involved a young man who visited New York with his family to see the U.S. Open tennis matches. The family was riding the subway when a group of young men, mostly Latino, but some black, attacked them to get money to go dancing. During the robbery, Brian Watkins resisted and was stabbed with a knife and killed. According to some witnesses, during the course of that horrible crime, some of the young people made what could be construed as anti-white comments. The question is: do such statements convert an economically motivated crime into a hate crime? If they do, then I suggest that given both the tendencies of law enforcement mechanisms and the frequency with which young men of color use language loosely, hate crime statutes are going to be used most frequently against black and Latino males, and not against perpetrators of white on black crimes. That is to say, statistically, the most typical hate crime prosecution will involve a crime perpetrated by a person of color, usually male, against someone white.

Those are the three paradigms. But now I digress. If at this point this seems all very interesting and complex, consider now the issue of intragroup crime. Can one black "hate" another black simply because he's black and commit a hate crime against the other? Can a Latino "hate" a black and commit a hate crime against the black person? Or can these crimes only take place between blacks and whites? There is much racial tension in parts of California between some Asians and some Latinos and between some Latinos and some blacks. Can hate

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11. Lynne Duke, *Bitterness Smolders In Wary, Uneasy L.A.*, WASH. POST, Nov. 18, 1992, at A1.

12. See Jane Gross, *Slain Utah Tourist Eulogized as 'a Real-Life Hero,'* N.Y. TIMES, Sept. 9, 1990, § 1, at 42.

crimes take place between groups that are both of color or within the same group? Who defines the group anyway? If the criminal statute requires an attack against someone from a different race, do we then have to define what a "race" is? This is starting to be very interesting, and I suggest, very complex.

Before I go back to the enforcement issue, let me address the constitutional context. Today, there is some doubt about the constitutionality of hate crime statutes. The *R.A.V.* case involved a group of whites, some of them juveniles, who burned a cross on a black family's lawn and were prosecuted under a hate crime statute. The whites involved were from a sociologic group in which racism was common. The case went to the United States Supreme Court and drew an opinion from Justice Scalia which opined on and redefined the world of the First Amendment.<sup>13</sup> However, the opinion is unclear, and it appears that we're going to have to wait to find out whether enhancement statutes like the kind I discussed above are constitutional or not.

In *R.A.V.*, the hate crime statute under which the defendants were prosecuted was the kind that creates a new category of crime. Prior to the statute, the crime for which the defendants were prosecuted did not exist. There were some other underlying crimes, as Justice Scalia made clear,<sup>14</sup> that the defendants could have been prosecuted for terrorism or arson, for example. Although the Court struck down the statute, it suggested that such conduct may be subject to a kind of regulation to which more symbolic behavior is not.

In a concurring opinion, four Justices adopted a traditional overbreadth argument, finding that the main reason the statute was defective is because it outlawed behavior otherwise protected by the First Amendment.<sup>15</sup> For example, if the words expressed by the defendant offended someone, but were not "fighting words" in the traditional sense, they may be barred by the statute but protected by the First Amendment. I think the concurrence is quite solid. My point is that we don't know what the constitutional status of enhancement statutes is after *R.A.V.* The case provides some clues, but we're probably going to have to wait and see whether the Court will uphold a pure enhancement hate crime statute where the underlying crime is already well established.

I think that *R.A.V.* indicated that the statute could have been saved if, as Justice White suggested, instead of just focusing on a particular

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13. *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992).

14. The complained of conduct could have been prosecuted under existing statutes prohibiting terroristic threats, arson, and criminal damage to property. *Id.* at 2541 n.1.

15. "Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment." *Id.* at 2560 (White, J., concurring).

limited group of "fighting words," the statute had added a provision that included "all other fighting words that may constitutionally be subject to this ordinance."<sup>16</sup>

Let me present a couple of the remedies that I think we ought to pursue rather than enhancements. Enhancement statutes may be constitutional, but I do not favor them for some of the reasons I've indicated already. Fighting hate crime isn't as simple as going out and getting a new hate crime statute. Instead, we ought to concentrate on changing the consciousness and nature of the prosecutorial arm of the criminal justice system. One way to do this is to create anti-bias units within police departments. One may ask, "How can that help? It's the same police department." Consider the formation of domestic violence units in more progressive police departments. When police officers' careers depend upon the successful prosecution of the targeted crimes, it changes things. That's why we have the Civil Rights Division in the Justice Department. The same holds true for other prosecutors. You can change their rewards and incentives, and thus their actions on the job.

Furthermore, and just as importantly, we need to change the consciousness of both the front-line police officers, as well as the prosecutors, toward these sorts of crimes. We need to develop guidelines for their discretion. There is also a need to differentiate between economic crimes during the course of which something of a racial or religious nature was uttered, and crimes primarily motivated to affect injury or harm on the victim. Proper training and efforts to raise the level of consciousness with respect to these issues can be attempted. While trying to do this, dialogue with the affected communities is critical.

Finally, it seems to me that we are collectively doing a very bad job at this sort of thing. What do I mean by that? At many universities and high schools throughout the country, issues of race and group-based biases are generally considered too complex and difficult for people to deal with. Accordingly, these issues are usually not addressed appropriately, if at all. Although we may get less immediate satisfaction from trying to address these complex issues than we get from the prosecution of someone who has committed a bad act, we, as a society, need to devote our resources differently. A good example is the society's current focus on punitive measures as the solution to crime, rather than on the problems of racism which are the source of crime. Instead of sending a fifteen year-old black boy to jail for ten years at a cost of fifty thousand dollars a year, we need to figure out how to use that five hundred thousand dollars to change the consciousness of one hundred, two hundred or a thousand people a year.

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16. *Id.* at 2553.