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Hate Crimes - Should They Carry Enhanced Penalties At Issue

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Hate Crimes

Should they carry enhanced penalties?

By their own admission, those two staunch defenders of the First Amendment—Nadine Strossen, president of the American Civil Liberties Union, and *Village Voice* columnist Nat Hentoff—rarely disagree on the need for free speech.

Except, perhaps, in the case of *Wisconsin v. Mitchell*, now pending before the U.S. Supreme Court. *Mitchell* asks whether enhanced penalties for hate crimes are constitutional.

The ACLU contends that they are, because the gravamen of Mitchell's crime was action rather than speech. Mitchell said, "There's goes a white boy. Let's get him," before he and some companions attacked a 14-year-old boy.

Nat Hentoff sees it differently. He believes that the age, race, ethnicity, gender or sexual preference of a victim ought not make a difference in how criminals are punished.

Yes: Discriminatory Crimes

BY NADINE STROSSEN

To further our constitutional values of equality, the government may impose harsher punishments upon crimes whose victims are selected on the basis of racial and other invidious discrimination.

Opponents of laws authorizing such enhanced penalties have misleadingly claimed that they create "hate-speech crimes," and therefore violate the First Amendment. But these laws target acts that are more accurately described as "discriminatory crimes," and thus may be punished consistent with the First Amendment, so long as the laws are narrowly drawn and carefully applied.

If Wisconsin's discriminatory crime statute—which is currently before the Supreme Court in the *Mitchell* case—punished discriminatory ideas or expressions, the American Civil Liberties Union would oppose that statute. The ACLU has consistently opposed all laws that punish "hate speech" and successfully challenged the University of Wisconsin's hate-speech code on First Amendment grounds. However, Wisconsin did not punish Todd Mitchell for his discriminatory beliefs but for acting on those beliefs by participating in a vicious, near-fatal racist attack on a 14-year-old boy.

This fundamental distinction between protected thought and punishable conduct is central to both free speech jurisprudence and anti-discrimination laws. For example, landlords may believe in racial segregation, but they may not act on this belief by refusing to rent to prospective tenants of a certain race.

Anti-discrimination laws long have prohibited discriminatory acts that would not otherwise be illegal—for example, refusing to hire someone—because of society's consensus that such discriminatory acts cause special harms, not only to the immediate victim but also to the racial or other societal group to which the victim belongs, and to our heterogeneous society more generally. Why, then, shouldn't the law treat discriminatory criminal acts more severely than other criminal acts?

Promoting Equality Values

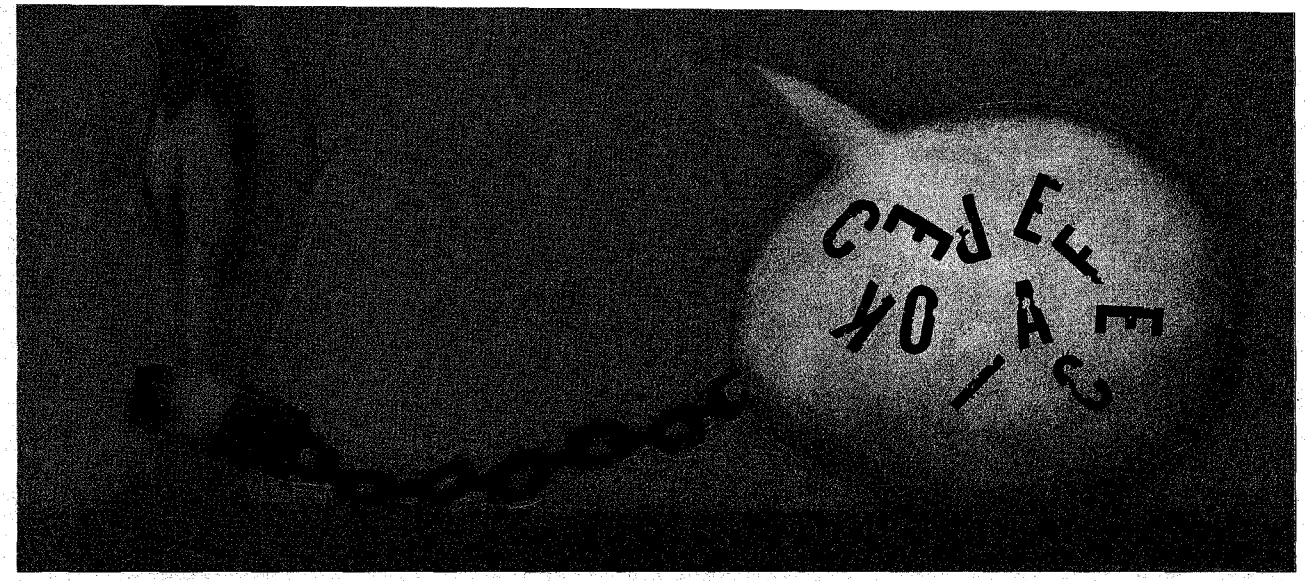
Unlike those who urge that all discriminatory crime laws are unconstitutional, the ACLU's position is that, if narrowly drafted and carefully enforced, such laws can avoid First Amendment pitfalls while promoting constitutionally protected equality values. Thus, the ACLU maintains that a defendant's words are only relevant if the government carries the heavy burden of proving beyond a reasonable doubt that they are directly related to the underlying crime and probative of his discriminatory intent.

Without this tight nexus, the defendant's thoughts, associations and expressions remain constitutionally protected and inadmissible. Accordingly, the ACLU has opposed certain discriminatory crime laws in some contexts. It has opposed Florida's law providing for an enhanced penalty if the crime "evidences prejudice," because this law on its face punishes defendant's abstract thought without demanding a clear, specific connection between the prejudiced thought and a particular crime.

In the *Mitchell* case, there was a sufficiently direct nexus between Mitchell's racially inciting statements and the brutal attacks they provoked to treat the statements as probative of his discriminatory intent. Addressing a group of other black men, Mitchell said, "Do you all feel hyped up to move on some white people?" When the victim approached a short time later, Mitchell said to the group, "You all want to f--- somebody up? There goes a white boy; go get him." He then indicated that the group should surround the victim. Immediately thereafter, group members ran toward the boy, surrounded him, and repeatedly kicked and punched him into unconsciousness.

Expression may constitute circumstantial evidence of discriminatory intent under discriminatory crime laws, as it does under other anti-discrimination laws. But the First Amendment does not bar the use of words to prove criminal intent or other elements of a crime. An accused kidnapper cannot raise a First Amendment objection to the introduction of a ransom note into evidence. Nor can a defendant who has made repeated, harassing telephone calls claim immunity from prosecution because his instruments of harassment were words.

The First Amendment protects the right to be a racist, to join racist organizations, to express racist beliefs—but not the right to engage in racist attacks. This critical distinction may be difficult to draw in particular situations. But to pretend it doesn't exist disserves constitutional values of both free speech and equality. ■



No: Equality Among Victims

BY NAT HENTOFF

Todd Mitchell, a black convicted of aggravated battery in Wisconsin, was sentenced to two years in prison. But because the victim was white, Mitchell, under the state's "hate crimes" law, received an additional sentence of two years. (He could have been put away for three more years for having said, "There goes a white boy; go get him.")

"Does this make sense?" asks an editorial in the *Washington Post.*

"Wouldn't it have been just as outrageous if the assailants had beaten a black boy? Why should one victim be more precious than the other in the eyes of the law?"

Yet, as *State of Wisconsin v. Todd Mitchell* neared April oral arguments in the Supreme Court, the American Civil Liberties Union was supporting the state of Wisconsin. Whatever happened to its support of equal protection under the law?

Those also insisting on the constitutionality of extra punishment for speech-related crimes claim that thereby a message will be sent to blacks, women, gays, lesbians, etc., that bias crimes must be punished more harshly because, as Wisconsin Attorney General James Boyle says, they are "much more harmful to the community."

But what message is sent to all the others in the community who are attacked for no reason other than the criminal's lust for money?

Are the injuries they suffer—however painful physically and psychologically—of less importance to the community under equal protection of the law?

Then there is the actual wording of Wisconsin's enhanced-penalty statute. Due for extra prison time is whoever "intentionally" selects the victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."

What about age? (We are in the middle of a cost-benefit generational war.) What about political orientation? In short, what about *R.A.V. v. City of St. Paul* and the selection of only certain groups to trigger the extra years behind bars because of what they said while committing the crime?

And what about "intentionally?" Is all black-on-white crime or male-on-female crime due to bias?

Bringing in the Thought Police

And in countering the defense against such charges, what is to prevent the prosecutor from finding out what books and magazines the defendant reads, what sort of language he uses at the local bar, and what his co-workers say about what they know of his prejudices.

Those, like the ACLU, who are urging the Supreme Court to add to sentences because of bias are telling it to be sure to foreclose such abusive privacy-bending investigations.

The Supreme Court, however, is under no obligation to take their prayers seriously. And if this statute is—as the ACLU admits in its amicus brief—"easily susceptible to prosecutorial abuse," why is a civil liberties organization asserting its constitutionality? Because the ACLU does not want to appear soft on racism, sexism, etc.

In many of the briefs trying to justify the legitimacy of creating this thought crime, the argument is made that unless the Supreme Court overrules Wisconsin's Supreme Court in this case, state and federal anti-discrimination laws will be at peril.

Yet, as the Supreme Court of Ohio, striking down a similar statute, noted in *State v. Wynant*: "Laws against discrimination in employment, housing and education do prohibit acts committed with a discriminatory motive," but "it is the act of discrimination that is targeted, not the motive."

In disparate impact cases, moreover, no discriminatory motive is necessary. And under a disparate treatment analysis, "proof of discriminatory motive can be inferred from differences in treatment. ... Bigoted motive by itself is not punished, nor does proof of motive enhance the penalty when a discriminatory act is being punished."

In this case before the Supreme Court, the act is being justly punished, but the speech purportedly accompanying the act is also being punished. At least three state affiliates of the ACLU—Ohio, Florida and Vermont—have refused to join the national ACLU's attack on the First Amendment. They agree with what ACLU president Nadine Strossen said in April 1992 in a St. Paul symposium on hate speech and *R.A.V.*:

"Overly broad hate-speech law gives the government a very powerful tool that can be—and historically, consistently has been—used against the very minority groups that it is intended to protect." But that was last year. ■

ILLUSTRATION BY TIM TEEBKEN