Hate Crime

- Crimes motivated by bigotry usually arise not out of the pathological rantings and ravings of a few deviant types in organized hate groups, but out of the very mainstream of society.
  - Jack Levin and Jack McDevitt, Hate Crimes: The Rising Tide of Bigotry and Bloodshed

Hate Crime

- What is a “Hate Crime”?
  - It is not simply a crime in which the offender hates the victim
  - To be classified a “hate crime”, the act does not need to be motivated by hatred at all
  - In actuality, “hate” crimes are really about bias and prejudice
Hate Crime (cont.)

• How much hate crime is there?
  - Depends on how hate crime is conceptualized and defined
    - What is the definition of “prejudice”?
    - What is the nature and degree of the causal link between the offender’s prejudice and criminal conduct?
  - Bottom line - We can make the hate crime problem as big or as small as we want by manipulating the definition

Hate Crime (cont.)

• Simplest definition:
  - A criminal act which is motivated, at least in part, by the group affiliation of the victim
  - Definition may be correct, but not always precise
  - Are the following acts hate crimes?
    - OK City bombing
    - 9/11 attacks
    - The Holocaust
    - Israeli/Palestinian conflict
    - Catholic & Protestant violence in Northern Ireland

Hate Crime (cont.)

• Sometimes difficult to distinguish between criminal and non-criminal acts of bias
  - White supremacist prints a magazine urging white people to unite and form a revolution to evict all non-whites from the country
  - Hate crime or free speech?
Prior to the enactment of hate crime laws, there were several ways in which the legal system dealt with acts motivated by bias:

- **Civil Rights Act (1871)**
  - Permits the federal government to prosecute people who have deprived others of their civil rights, either in concert with others (18 U.S.C. § 241), or in their capacity as government employees (18 U.S.C. § 242).
  - Sometimes used to punish people in situations unrelated to race.
  - Rodney King trials.

Another law (42 U.S.C. § 1983) allows a person to sue a state or local government employee in federal court when that employee interferes with his/her constitutional or civil rights.

18 U.S.C. § 245 – Federally Protected Activities:
- Criminalizes interfering with another person’s enjoyment of certain activities or benefits when the interference is due to the person’s race, color, religion, or national origin.
- Protected activities such as:
  - Attending school
  - Being employed
  - Traveling
  - Eating in restaurants
- Meant to protect those in the civil rights movement.
- Rarely used.
Limitations of Federal Statutes

- They are federal laws
  - Federal jurisdiction is limited, legally and practically
    - From a legal standpoint, under the US Constitution, the federal govt. may criminalize primarily those acts that affect interstate commerce
  - *Heart of Atlanta v. US* (1964) and *Katzenbach v. McClung* (1964)
    - Activities of restaurants and hotels could be federally regulated
  - The federal govt.'s power to prohibit bias-motivated crime is questionable

Limitations of Federal Statutes (cont.)

- These laws were enacted under specific circumstances and with the purpose of addressing specific problems
  - Activities of the Klan during reconstruction
  - The language of the laws does not cover many potential bias-related crimes
    - § 241 does not cover crimes by individual actors
    - § 242 and 1983 apply only to acts committed by govt. employees or agents
    - § 245 protects only certain acts on the part of victims and does not cover sexual orientation, age, disability, or gender

Limitations of Federal Statutes (cont.)

- Even if the federal govt. could use the laws in the Civil Rights Act, would it?
  - Due to issues concerning federalism and limited resources, the federal govt. usually plays a minor role in the prosecution of crimes
    - Most crimes are prosecuted by the states
    - Federal prosecutions concentrate on only a few types of offenses
      - 52% of federal prosecutions are drug or immigration-related
Limitations of Federal Statutes (cont.)

- If the federal govt. does not have the power, resources, or the inclination to address bias-related crimes, then it is up to the states
- Without specific hate crime laws, there are two potential ways in which these offenders can be prosecuted

1) Prosecute them via laws prohibiting very specific acts. E.g. –
   - Laws prohibiting masks in public places
   - Laws against desecrating cemeteries or places of worship
   - Special circumstances in death penalty cases
   - Problem – These laws only encompass only a small percentage of bias-motivated crimes
     - Of the 7,789 hate crimes reported to the FBI in 2009, only 216 (<3%) occurred at houses of worship and only 8 were homicides

2) Prosecute people who commit bias-motivated crimes for the underlying crime. E.g. –
   - Cross-burning: Arson
   - Defacing a synagogue: Vandalism
   - Gay-bashing: Assault and battery
   - Problem – Beginning in the late 1970s, some people and advocacy groups began to argue that this was not sufficient
Hate Crime

- Should there be such a thing as a “hate crime”?

Hate Crime

- Arguments for hate crimes usually fall into one of the following three categories:
  1) Retributive – Hate crime laws should exist because these offenses deserve worse punishments
  2) Deterrence – Hate crime laws are a good idea because it will discourage people from committing these types of offenses
  3) Symbolic Effects – Hate crime laws serve a symbolic or denunciatory purpose

Arguments for Having Hate Crime Laws:
Hate Crimes are Different from Ordinary Crimes

1) Victims suffer more psychological trauma
   - Researchers report that victims of hate crimes suffer from:
     - Low self-esteem and depression
     - Profound sadness and withdrawal
     - Lack of trust in people
     - Excessive fear of personal and family safety
     - Sleep problems/headaches/physical weakness
     - Increased use of alcohol and drugs
     - Excessive anger
     - Suicidal feelings
Arguments for Having Hate Crime Laws: Hate Crimes are Different from Ordinary Crimes (cont.)

- Problem: Difficult to support empirically
  - Do victims of hate crimes experience more trauma than victims of “ordinary crime”?
    - “It should come as no surprise that hate crime victims report psychological and emotional effects. All victims do.” – Jacobs and Potter, 1998
  - Only a few studies have attempted to assess the emotional state of hate crime victims
  - Most studies had methodological problems

Arguments for Having Hate Crime Laws: Hate Crimes are Different from Ordinary Crimes (cont.)

- The question of whether hate crimes are more psychologically harmful is complicated by a number of factors, none of which have been studied
  - The most we can conclude is that under some circumstances, hate crimes might be more traumatic than other crimes

Arguments for Having Hate Crime Laws: Hate Crimes are Different from Ordinary Crimes (cont.)

2) Hate crime victims may suffer more physical trauma

  - Like the assertion that hate crime victims suffer more psychological trauma, there is little to no empirical evidence to support this claim
  - This claim is based on an unpublished study by Jack McDevitt
  - He found that among crimes reported to the Boston police, the proportion of attacks against the person were higher among hate crimes than among crimes in general
Arguments for Having Hate Crime Laws:
Hate Crimes are Different from Ordinary Crimes (cont.)
- More recent studies concur
  - From 1997-1999, 60% of the hate crimes reported to the FBI were violent crimes (Strom, 2001) whereas in 1999, only about 26% of all crimes were violent (Rennison, 2000)
- Problem: Hate crimes are severely underreported, which skews study results
- Even if hate crime numbers were reported accurately, how can anyone tell which crimes are more heinous?

Arguments for Having Hate Crime Laws:
Hate Crimes May Have a Wider Impact
- Hate crimes, it is asserted, have a wider impact than do ordinary crimes
- Others argue that the ripple effect from hate crimes is far from unique
  - “Many crimes, whatever their motivation, have repercussions beyond the immediate victim and his or her family and friends.” (Jacobs and Potter)

Arguments for Having Hate Crime Laws:
Hate Crimes May Spark Retaliation and Conflict
- Hate crimes deserve greater punishment because they tend to spark retaliation and further intergroup conflict
- This argument also has little empirical support
Arguments for Having Hate Crime Laws: Hate Crimes May Spark Retaliation and Conflict (cont.)

- Weisburd and B. Levin (1994) report that in the month after an infamous race-related murder of a black man in Howard Beach, New York in 1986, police recorded twice as many hate crimes as the previous month.
- However, it is possible that:
  - the number of bias-related incidents themselves did not increase, but that people were more likely to report them following a well-publicized incident, or;
  - that police were more sensitive to the issues involved, thus were more likely to interpret and record a crime as bias-motivated.

Arguments for Having Hate Crime Laws: Hate Crimes May Spark Retaliation and Conflict (cont.)

- Only one experiment has studied the potential retaliatory responses to a hate crime in a controlled manner.
  - Conclusion – Participants were no more likely to seek revenge for hate crimes than for ordinary crimes.
- The effects of hate crimes on communities may be more insidious.
  - Hate crimes attack community cohesion and the social order in general, and can lead to distrust, fear & anxiety.
  - Hard to measure; so far, no one has tried.

Arguments for Having Hate Crime Laws: Deterrence

- Hate crime legislation will discourage people from committing these harmful offenses.
- Although this argument seems to make sense, it suffers from a number of potentially faulty assumptions.
Arguments for Having Hate Crime Laws: Deterrence (cont.)

1) That the potential offenders will be aware of hate crime laws
   • Does the average person understand how they work?
   • Does the average person realize that most hate crime laws lead to enhanced sentences?
   • Does the average person know what constitutes a hate crime?

Arguments for Having Hate Crime Laws: Deterrence (cont.)

2) That hate crime offenders believe there is a reasonable likelihood of being caught and prosecuted
   • People are well aware of the penalties for speeding, yet still speed
   • A 2001 California Dept. of Justice study showed that a person who committed a hate crime had a 1 in 10 chance of being convicted
   • Add to this the assumption that a potential offender is not already deterred by the potential of being punished for the underlying crime, but would be by the addition of a punishment for a hate crime

Arguments for Having Hate Crime Laws: Deterrence (cont.)

3) That the risks of engaging in hate crime outweigh the benefits
   • However, the benefits can be substantial
     • Acceptance and admiration from their peers
     • Boost to their self-esteem
     • Excitement
     • Release of pent-up frustration
   • These benefits would probably not be outweighed by the relatively small risk of being arrested
Arguments for Having Hate Crime Laws: Symbolic Effects

- That hate crime laws serve a symbolic or denunciatory purpose (Denunciatory theory)
  - They express strong social condemnation of bias crimes, which tend to be symbolic themselves
  - The condemnation of hate crimes implies a general affirmation of the societal groups targeted by hate crimes and their rightful place in society
  - They reinforce the community’s commitment to equality among all citizens
  - This is the most commonly used argument for hate crime laws

Arguments for Having Hate Crime Laws: Symbolic Effects (cont.)

- Do hate crime laws have the impact that symbolic effect advocates claim?
  - Possibly, if prosecutions are frequent and well-publicized
- Do these laws contribute to the long-term reduction in prejudice?
  - Possibly, but it is difficult, if not impossible to quantify empirically

Arguments for Having Hate Crime Laws: Symbolic Effects (cont.)

- Corollaries
  - Failing to prosecute hate crimes might send a message that society approves of such behavior
  - What are the symbolic effects if such laws protect some groups but not others?
Arguments for Having Hate Crime Laws: Symbolic Effects (cont.)

- Of the three arguments for hate crime laws, the symbolic effects argument seems to be the strongest
- By the 1980s advocacy groups and some legislators were using all three arguments that hate crimes legislation was needed

The Birth of Hate Crimes

- 1977 – Skokie, IL
- Anti-Defamation League (ADL) began tracking anti-Semitic incidents across the US between 1978 and 1981
  - Number of reported incidents increased from 49 to 974
  - Concerned about the apparent rising trend, the ADL drafted a model ethnic intimidation statute and began lobbying states to pass it

The Birth of Hate Crimes (cont.)

- Model statute contained four provisions
  1) Aimed primarily at people who targeted cemeteries/community centers/places of worship
     - Some states already had a similar statute
  2) The second was more revolutionary
     - A person could be found guilty of “intimidation” if he/she violated some existing criminal law, and if he/she committed the crime because of the victim’s group (or perceived group)
     - Expanded upon existing civil rights laws
     - Acted as a penalty enhancer
The Birth of Hate Crimes (cont.)

3) Created a civil cause of action so that victims of institutional vandalism and bias crimes may sue their attackers
4) Provides for the collection of law enforcement data on bias crimes and for specialized training of police officers

Hate Crime Laws Today - State

- ADL efforts very successful
  - Drafted model statute in 1981
  - By 1994, 34 states and the District of Columbia had some kind of penalty-enhancement law
- Some states used the ADL model
- Other wrote their own
- Some were pure penalty enhancers for bias-related crime
- Other states created a separate substantive offense

Hate Crime Laws Today – State (cont.)

- Statutes vary from state to state
  - Some only include certain offenses
  - Some include language that the victim must have been chosen “because of” or “by reason of” his or her group
  - Others only require that the crime “evidence” or “demonstrate” prejudice, or that prejudice was “manifest”
Hate Crime Laws Today – State (cont.)

- States also differ substantially as to which groups are protected by the statute
  - All statutes include at least race, religion, and ethnicity (or national origin)
  - Only 23 cover sexual orientation
  - 21 include gender
  - 23 include mental or physical disability
  - 4 include political affiliation
  - 4 include age

Hate Crime Laws Today – State (cont.)

- Some states also have additional, related laws
  - Most states (40) prohibit institutional vandalism
  - 24 states have statutes regarding collection of hate crime data
  - 10 states have laws relating to specialized training for law enforcement personnel
  - 28 states authorize civil actions
  - CA, IL, LA, MA, MN, and WA have all five types
  - WY has no hate crime provisions

Hate Crime Laws - Mass. Hate Crime Legislation

- MA. Annotated Laws Chapter 265: Section 39
  - Covers:
    - Bias-motivated violence and intimidation, and institutional vandalism
    - Race, color, religion, national origin, sexual orientation, or disability
    - Does not cover gender
    - Allows for data collection
    - Training for law enforcement officers (LEOs)
Hate Crime Laws - Mass. Hate Crime Legislation (cont.)

- MA. Annotated Laws Chapter 265: Section 39
  - Allows for increased penalties
    - Maximum $5,000 fine and/or 2 ½ years imprisonment
    - Bodily injury increases penalties to $10,000 fine and 5 years imprisonment
    - Armed with a firearm increases penalty to 10 years imprisonment max, not less than 2 1/2
    - Restitution to the victim up to 3 times the amount of the property damage
  - Requires offenders to complete designated diversity awareness program

Hate Crime Laws - NH Hate Crime Legislation

- RSA 651:6, I(f)
  - Allows for increased penalties if crime was substantially motivated “because of hostility toward the victim’s religion, race, creed, sexual orientation, national origin, or sex.”
  - Covers:
    - Bias-motivated violence and intimidation
    - Does not cover institutional vandalism
    - Allows for civil action
    - Does cover gender
    - No offender education programs/LEO training
    - No data collection
    - No personal civil recourse

Hate Crime Laws - Federal

- 1990 - First federal hate crime laws were enacted
  - Hate Crimes Statistics Act (HCSA)
  - Required US DOJ to collect data on hate crimes from local law enforcement agencies and publish the results
- 1994 – Congress passed the Hate Crimes Sentencing Enhancement Act
  - Ordered the US Sentencing Commission to revise sentencing requirements
  - Increased penalties by three levels
Hate Crime Laws – Federal (cont.)

- 1994 – Congress passed Violence Against Women Act (VAWA)
  - Allowed victims of gender-based crimes to sue their attackers for compensatory damages
- 1997 – Church Arson Prevention Act
  - Allowed federal prosecution
  - Increased penalties for damaging places of worship

Hate Crime Laws – Federal (cont.)

- 2009 – Congress passed the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act (Matthew Shepard Act)
    - Now includes crimes motivated by the victim’s actual or perceived gender, sexual orientation, gender identity, or disability

Hate Crime Laws – Federal: Matthew Shepard Act (cont.)

- The Act also:
  - Removes the prerequisite that the victim be engaging in a federally-protected activity
  - Gives federal authorities greater ability to engage in hate crimes investigations that local authorities choose not to pursue
  - Provides $5 million per year in funding for fiscal years 2010-2012 to help state and local agencies pay for investigating and prosecuting hate crimes
  - Requires the FBI to track stats on hate crimes against transgender people
Hate Speech

- Can someone be punished for putting a swastika on their property or if they call someone a disparaging name?
- Hate speech is generally defined as words or symbols that are derogatory or offensive on the basis of race, religion, sexual orientation, etc.
- The difference between hate crime and hate speech is that the former requires some underlying criminal act; the latter does not
- In the case of hate speech, it is the speech itself that is punished

Hate Speech (cont.)

- Some have argued that hate speech is dangerous and harmful
  - Has the same effect as hate crimes
  - Because of this, many college campuses created codes prohibiting certain kinds of speech
  - Some have claimed that this violates the First Amendment (Freedom of Speech)
  - Others have claimed that this interferes with academic freedom and the exchange of ideas

Hate Speech (cont.)

- Some municipalities have enacted hate speech restrictions prohibiting offensive symbols or displays in public places
- Some courts have struck down hate speech restrictions, both municipal and campus
  - *R.A.V. v. City of St. Paul*
- At the same time, courts have upheld hate crime laws
- Hate crimes can be punished; hate speech cannot
These differences can be confusing. The easiest way to distinguish them is to ask the following question:
- Has the perpetrator violated any other criminal law?
- Often the difference is simply between conduct and expression.
- However, hate crime and hate speech can be difficult to distinguish in two situations:
  1) Verbal acts
  2) Symbolic expression

A verbal act occurs when the words themselves constitute some element of the crime:
- Criminal threatening or terroristic threats
- Harassment
Symbolic expression occurs when a person does not say a word, yet still expresses a thought or an idea:
- Burning a flag or wearing an armband (protected speech)
- Burning a draft card or nude dancing (unprotected conduct)