Cultures in Conflict: Does Regulation of Hate Crime Comfort with the Constitution?

1. INTRODUCTION

In light of the recent developments in Europe, from Sarajevo to Solingen, crime motivated by historic prejudices and by the tensions arising from the new multiculturalism has received a great deal of attention. The United States, a multicultural nation from birth and itself no stranger to prejudice, has attempted in various ways to combat bias-motivated crime. Familiarity with these efforts might prove to be of value to Europeans faced with similar problems.

In the last decade, statistics kept in the United States by civil rights, religious, gay and lesbian, and racial and ethnic advocacy groups have indicated an increase in bias-motivated crimes (referred to in this article by the popular term 'hate crime'). Response to this phenomenon has taken several different forms: the government has begun collecting data on hate crime, colleges and universities have implemented anti-discrimination policies, and states and localities have enacted criminal provisions aimed at reducing this type of violence. Both the hate crime statutes and the university policies raise constitutional issues and have been challenged in court, with some cases appealed all the way up to the United States Supreme Court. Discussion of these issues is the heart of this essay. The statutes mandating the keeping of statistics of course present no constitutional concerns, but they demonstrate how difficult it is to define and identify bias-motivated violence even in the absence of constitutional considerations.

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3. According to Professor Jacobs, American crime statistics are notoriously unreliable, and the hate crime accounting done by private groups suffers from even more potential reliability problems than do traditional crime statistics. Jacobs suggests, but does not claim, that this 'crime wave' may in fact be partially explained by a greater willingness to report certain crimes as bias-related than in the past. J. Jacobs, 'The Emergence and Implications of American Hate Crime Jurisprudence', 22 Israel Yearbook on Human Rights (1992) p. 39 at p. 43.

4. Clearly, a major goal of hate crime statutes is the deterrence of potential offenders from committing hate crimes, but deterrence is not their only function: as well as expressing the moral conviction that criminals with certain kinds of hate motives deserve more severe punishment than other criminals, hate crime statutes also serve the symbolic function of conveying to the public the state's abhorrence of bigotry.
2. HATE CRIMES STATISTICS ACT

In 1990 the federal government passed the Hate Crimes Statistics Act requiring the collection of data on and the publishing of an annual report about hate crime.5 Other than providing a general definition of hate crime — 'crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity' — Congress left the implementation of the Act up to the United States Attorney General.6 The Attorney General assigned the project to the Federal Bureau of Investigation (FBI), and the FBI passed responsibility for the assignment to its Uniform Crime Reports (UCR) Section.7 The UCR developed and distributed Hate Crime Data Collecting Guidelines8 (Guidelines) as well as a Training Guide for Hate Crime Data Collection9 (Training Guide) to city, county, and state law enforcement agencies.

The purpose of the UCR materials is to explain to the law enforcement officers directly responsible for collecting data what a hate crime is and how to recognize one. The Guidelines provide a somewhat more refined definition of hate crime than does the Act itself: a hate crime is '(a) criminal offence committed against a person or property, which is motivated, in whole or in part, by the offender's bias against a race, religion, ethnic/national origin group, or sexual orientation group.'10 Recognizing the difficulty of identifying motive, a subjective quality in the mind of the offender, the Training Guide prescribes a two-step decision-making process designed to help local law enforcement officers carry out their duties: the officer responding to a potential bias crime is responsible for the preliminary classification of the incident (the crime is to be classified as a suspected bias incident if there is 'any indication that the offender was motivated by bias');11 the final decision regarding classification rests with a reviewing officer.12

The Training Guide provides both the responding and reviewing officers with lists of factors to consider in making their decisions. Neither list provides criteria on the basis of which identification of hate crimes can easily be made. Here I shall reproduce only the list developed for the responding officer:

1. Is the motivation of the alleged offender known?
2. Was the incident known to have been motivated by racial, religious, ethnic, or sexual orientation bias?
3. Does the victim perceive the action of the offender to have been motivated by bias?
4. Is there no clear other motivation for the incident?
5. Were any racial, religious, ethnic, or sexual orientation bias remarks made by the offender?

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