Remarks Concerning Prosecution of Bias-Related Crimes

Charles J. Hynes*
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Abstract

Prosecuting bias-related crimes is a very difficult task.
For example, in the summer of 1992, the Russian parliament attempted to control the critical press by trying to establish an oversight committee. However, once the fear is eliminated, the hope is still there.

Russia is now in the process of drafting a new Constitution. One part of the draft, which deals with rights and liberties of citizens, is worded in such a way that it takes the shape of a bill of rights in a civilized democracy. It places the highest value on liberties and natural and inalienable rights of human beings. It commands that "the enumeration in the Constitution and the laws of certain rights and freedoms shall not be used to displace other rights and freedoms retained by an individual." It proclaims popular sovereignty, and its Preamble starts with the words "We, the People ..."

When I see these moves to ensure constitutionalism, I become optimistic. There is a Latin maxim Per Aspera ad Astra—Through Difficulties, Through Thorns to the Stars. In Russia we are now moving painfully through a political thorn-bush. However, we are not just scratching ourselves; we finally see the stars. I firmly believe that Russia shall reach the once unreachable, her stars of Liberty and Justice for All.

I. INTRODUCTION .......................................................... 1213

II. PROSECUTION OF BIAS RELATED CRIMES
    IN NEW YORK ...................................................... 1214
    A. Howard Beach Case ........................................... 1214
    B. Bensonhurst Case ........................................... 1215
    C. Crown Heights Case ......................................... 1215

III. ANTI-BIAS STATUTES ............................................... 1216
    B. State v. Mitchell ............................................. 1219
    C. People v. Miccio ............................................. 1220

IV. CLOSING REMARKS .................................................. 1220

Prosecuting bias-related crimes is a very difficult task. Racial attitudes ingrained in our Nation's children and adolescents are not easily purged. There is a public mood that we have gone far enough in enforcing equal justice. But racial attitudes and the public mood, no matter how strident, are not excuses for a prosecutor's failure to vigorously promote and protect the rights of all citizens. When a person lies on the ground, beaten or murdered or is placed in fear or jeopardy simply because of the color of his or her skin, religion, ethnic heritage, or sexual orientation, everyone has suffered critical injury.

During the past six years, I have served as the chief prosecutor in three of the most notorious bias-related cases in this Country's recent history. In each of these cases, "Howard Beach," "Bensonhurst," and "Crown Heights," the irrational hatred we call "bias" caused a young man to lose his life and

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brought consequently critical damage to our society.

II. PROSECUTION OF BIAS RELATED CRIMES IN NEW YORK

A. Howard Beach Case

The "Howard Beach Case" began during the early morning hours of December 20, 1986, when three young African-American men whose car had broken down near the Howard Beach section of Queens County, New York City, were chased by a gang of young white men wielding sticks and bats and screaming racial epithets. One of the African-Americans was pursued until he was forced onto a six-lane highway where he was struck by a car and killed. A second was severely beaten. A third was able to escape without injury.

Public apprehension in the black community about the fairness of the investigation and prosecution led to my appointment by the Governor of New York as a Special Prosecutor to replace the then District Attorney of Queens County. As Special Prosecutor, I immediately formed a team of experienced investigative, trial, and appellate attorneys and veteran detectives. This team, was able to learn what had occurred on December 20, 1986 and, eventually, I was able to gain the confidence of the victims of the case. We quickly established a legal theory for the prosecution and proceeded to present the case to the Grand Jury. I was able to persuade one of the gang members to cooperate in exchange for the opportunity to plead to a lesser charge. These were essential components in developing homicide cases against those responsible for the acts of mayhem committed during the Christmas-Chanukah season of 1986 in that there were anonymous, quiet village called Howard Beach. When the "Howard Beach Case" concluded, nine of the twelve defendants had been convicted by juries or had plead guilty. Three of those defendants, convicted of manslaughter and assault, remain incarcerated.

B. Bensonhurst Case

On August 23, 1989, Yusef Hawkins and three friends, all African-Americans, came to the mostly white Bensonhurst section of Brooklyn to look at an automobile which had been advertised for sale. A group of white youths apparently believed that the African-Americans were present to attend a birthday party of a young white woman who lived in the neighborhood. They angrily surrounded Hawkins and shouted racial epithets. One of the white youths pulled out a pistol, fired at Hawkins, and killed him.

One of those in the gang, John Vento, in exchange for full immunity, agreed to cooperate in the prosecution of the case. His testimony in the grand jury was instrumental to the indictment of six defendants for murder, manslaughter, riot, assault, unlawful imprisonment, menacing, and criminal possession of a weapon. A seventh defendant was indicted for riot and criminal possession of a weapon.

But sometime in December, 1989, Vento disappeared. On January 2, 1990, my second day as the Kings County (Brooklyn) District Attorney and the prosecutor responsible for the case, I learned of his disappearance. Vento was captured in March, 1990, but he refused to cooperate. Having breached his agreement, he was indicted by a Brooklyn Grand Jury. Ultimately, he was convicted of riot, unlawful imprisonment and menacing, but acquitted of murder, manslaughter, and discrimination. More importantly, however, without Vento's testimony at the trial of the other defendants, the prosecution was legally unable to prove the acting-in-concert charge required to convict of murder anyone but the actual shooter.

C. Crown Heights Case

On August 19, 1991, another well-publicized case in Brooklyn shook the belief of some in the ability of criminal justice system to prosecute a crime ignited by bias. In the racially mixed Crown Heights neighborhood of Brooklyn, Yankel Rosenbaum, a twenty-nine-year-old Jewish scholar visiting from Australia, was surrounded by a mob and stabbed to death during the rioting that followed the death of seven year old Gavin Cato, an African-American child struck by a car driven by a Hasidic male. Rosenbaum was in no way responsible for young Cato's death. He was killed only because he was a Hasidic Jew. Grand juries immediately investigated both deaths.

After hearing testimony from more than thirty witnesses, including
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2. The jury convictions of three of the defendants in one of the trials were reversed on the law and the indictments against them were dismissed, without prejudice to the People to represent appropriate charges to another grand jury. People v. Bollander, 549 N.Y.S.2d 17 (N.Y. App. Div. 1989). The cases against those three defendants were represented to another grand jury. The defendants were indicted and subsequently convicted. The defendants did not appeal those convictions.
3. The jury convictions of those three defendants were affirmed. People v. Kim, 545
eyewitnesses, police officers, accident reconstruction experts and the driver of the car, a multi-racial grand jury investigating Gavin Cato’s death decided that there was no evidence to indict anyone in this case. To further the interests of justice and because of intense public scrutiny, I took the unusual step of requesting that the proceedings of the grand jury, secret by law in New York, be made public. My application was denied. Although a mob had surrounded Yankel Rosenbaum prior to his stabbing only one person was apprehended. The grand jury investigating Rosenbaum’s death could obtain sufficient evidence to indict only one man for murder. That man, Lemrick Nelson, was subsequently tried and acquitted.

III. ANTI-BIAS STATUTES

Even before I became District Attorney, my experience as the Special Prosecutor in the "Howard Beach Case" demonstrated to me that all too frequently people are assaulted merely because of their race, ethnicity, religion or sexual orientation. As a result, when I became the chief law enforcement officer in Brooklyn in 1990, I immediately created a Civil Rights Bureau to handle these "hate crime" cases. This Bureau is also responsible for prosecuting those who prey on a very vulnerable group of recently-arrived immigrants from many different countries. Regrettably, the highly publicized "Howard Beach," "Bensonhurst," and "Crown Heights" cases were not the only bias-related cases to occur recently in New York City. In the first ten months of 1992, my Civil Rights Bureau began the investigation and prosecution of sixty-one cases. Among the Bureau’s investigations were cases in which a group of African-American children had their faces painted white, rocks were thrown at a bus of Jewish children riding home from their yeshiva, and a young white honor student was raped by two young black men who allegedly told her she was the right color to be raped.

Because of these and other terrible bias-related crimes, I endorse and urge the passage of New York State Governor Mario Cuomo’s anti-bias bill. Currently, under New York law, a civil rights violation is only a misdemeanor. A person who strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race, color, religion, or national origin of that person commits only a misdemeanor. Currently, there is no penal statute in New York State which would make bias-related violence or intimidation against a person a felony.


However, whether the current or proposed New York State bias-related violence statutes, or those of many other states, would pass Constitutional
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of the New York State District Attorneys Association, the Superintendent of the New York State Police, and a large number of police chiefs from local police departments from across New York State.

7. Section 40-c(2) of the Civil Rights Law provides:
No person shall, because of race, creed, color, national origin, sex, marital status or disability, as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his civil rights, or to any harassment, as defined in section 240.25 of the penal law, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.


8. N.Y. PENAL. LAW § 240.30 (McKinney 1989). This section is titled Aggravated harassment in the second degree.

9. Governor Cuomo's 1992 anti-bias bill stated in pertinent part:
§ 490.05 Bias related violence or intimidation in the second degree.
A person is guilty of bias related violence or intimidation in the second degree when, with the intent to deprive an individual or group of individuals of the exercise of civil rights because of the individual's or individuals' race, creed, color, national origin, sex, disability, age, or sexual orientation, that person intentionally, knowingly, or recklessly causes damage to the property of another, engages in sexual intercourse by forcible compulsion or deviate sexual intercourse by forcible compulsion as defined in article one hundred thirty of this chapter, or causes physical injury to another individual.

§ 490.10 Bias related violence or intimidation in the first degree.
A person is guilty of bias related violence or intimidation in the first degree when, with the intent to deprive an individual or group of individuals of the exercise of civil rights because of the individual's or individuals' race, creed, color, national origin, sex, disability, age, or sexual orientation, that person intentionally, knowingly, or recklessly causes the death of another individual.

Bias related violence or intimidation in the first degree is a class C felony.

10. At the state level, the response to reports of bias-related violence has been significant. Nearly every state has enacted some bias legislation. See ADL LAW REPORT: HATE CRIME STATUTES: A 1991 STATUS REPORT 24-26 app. a (1991). In addition, during
muster remains an issue. In *R.A.V. v. St. Paul*, the Supreme Court ruled that a city ordinance defining a bias motivated crime was unconstitutional because it violated free speech provision of the First Amendment to the United States Constitution. The Court found that the ordinance was "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." The Court focused on the danger of government censorship and regulation of speech. While the goal of the St. Paul ordinance was to regulate "fighting words," the Court found that it failed to do so. Instead, the Court ruled, the ordinance banned only bias-related words which amounted to content discrimination, and in its practical operation to "actual viewpoint discrimination," rendering the ordinance invalid. The Court stated:

the last session of the United States Congress, Congressman Charles Schumer (D-NY) introduced a bill (HR 4797) to "make sentencing guidelines for federal criminal cases that provide sentencing enhancements for hate crimes." Congressman Schumer will reintroduce that bill during the current session of the United States Congress.

12. The ordinance stated:

whenever places of public or private property have a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 2541 (citing *St. Paul*, MINN. LEGIS. CODE § 292.02 (1990)).
13. Id. at 2542.

15. The Court has not said that "fighting words" constitute no part of the expression of ideas, but only that they constitute "no essential part of any exposition of ideas." Id. at 572 (emphasis added).

16. In its opinion, the Court offers examples of content based speech which would be unconstitutional. First, "the government may prescribe libel, but it may not make the further content discrimination of prescribing only libel critical of the government." *R.A.V.*, 112 S. Ct. 2543. Second, "[a] State might choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example only that obscenity which includes offensive political messages." Id. at 2546. Third, "the Federal Government can criminalize only those threats of violence that are directed against the President...[b]ut the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities." Id. Finally, "a State may choose to regulate price advertising in one industry but not in others because the risk of fraud...is in greater view than...but a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion..." Id.

17. Id. at 2545, 2547.


20. Wisconsin's 1989-90 "hate crime" statute states in pertinent part:

(1) If a person does any of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under ch. 939 to 948.

(b) Intentionally selects the person against whom the crime is directed, or the property which is damaged or otherwise affected by the crime.

(c) Because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

(2) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.

(c) If the crime committed under sub. 1 is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

21. Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase*
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   (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
   (c) If the crime committed under sub. 1 is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

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[a] statute specifically designed to punish personal prejudice impermissibly infringes uppon an individual’s First Amendment rights, no matter how carefully or cleverly one words the statute. The statute is directed solely at the subjective motivation of the actor—his or her prejudice. Punishment of one’s thought, however repugnant the thought, is unconstitutional.22

In Mitchell, the defendant’s speech was determined to be evidence of his intentional selection of his victim. The use of the defendant’s speech, as circumstantial evidence to prove the defendant’s selection, “makes it plain that the statute sweeps protected speech within its ambit and will chill free speech.”23

C. People v. Miccio

In the first case in New York following the R.A.V. decision, a case prosecuted and argued by the Civil Rights Bureau of my Office, charges related to bias crime were upheld as constitutional.24 In People v. Miccio, three defendants, allegedly acting in concert, assaulted two people. Just prior to the beatings, one of the defendants stated ‘[w]e don’t want any Spics or Niggers in the neighborhood.’ The court found that the behavior proscribed in the aggravated harassment26 and civil rights laws27 was not bias-related fighting words, as in the St. Paul ordinance.28 Instead, the New York statutes targeted the defendant’s physical actions. The defendant’s actions were not a result of his biased thought or expression, but were a result of his violent behavior and physical intimidation based upon bigotry.

IV. CLOSING REMARKS

Certiorari was recently granted in the Mitchell case.29 We must wait to learn if the Supreme Court chooses to extend R.A.V. and, ultimately, if bias-related crime legislation in any form is permissible.

Nevertheless, even if we were to have the necessary penal statutes and convictions in every case, we cannot expect law enforcement alone to end racial strife. We must understand that increasing prison populations has little relation to public safety. In addition, it threatens our fiscal survival. Prosecuting the guilty is not enough. Law enforcement, alone, cannot pacify the hate or cure the prejudice which cause bias-related crimes.

Prosecutors also have an obligation to ensure that crimes of racial or ethnic bigotry do not occur because it is far better to prevent a crime than to prosecute a case. When I became District Attorney in 1990, I launched two significant initiatives which I believe will provide long-term solutions to bias-related crime.

First, we must look to education to prevent prejudice. Accordingly, I created an adopt-a-school program called Project Legal Lives in which members of my staff reach out to the young people in Brooklyn schools. Prosecutors must forge a positive link between the schools and the criminal justice system. The program teaches a basic lesson—that the key to community harmony is mutual respect. In its pilot phase, in 1990, the program operated in fifty-eight schools. During the 1991-1992 school year, I was able to expand the program to 126 schools. This year, my program is in 201 schools working with 12,000 children in 241 classrooms. By the end of my first term I expect to have members of my staff in all 350 public, private, and parochial elementary schools in Brooklyn.

In Project Legal Lives, an Assistant District Attorney or other staff member from my office is paired with a fifth grade teacher to form a team. Together, they teach the importance of rules and laws to fifth graders. They use a law-related curriculum designed to raise the children’s consciousness about bias and drug abuse. The young men and women from my Office visit the classrooms, sit down with the fifth graders, talk with them, and tell them what is important—openly and honestly. I am confident that these exchanges will lead to self-esteem and respect for others, as well as an increase in the students’ knowledge about the criminal justice system and its relationship to the community. This program is a sound investment. I know it will be the legacy of my office.

Second, during the past two years I have established numerous advisory councils comprised of the major ethnic groups, senior citizens, a women’s group, members of the gay and lesbian community and union health and safety experts. The purpose of these councils is to advise me about law enforcement issues facing their constituents. But these councils also have proved invaluable when a particular group believes that it is the victim of
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22. 485 N.W.2d at 814.
23. Id.
25. Id. at 763.
29. 113 S. Ct. at 812.
bias crimes. For example, when violence erupted in Crown Heights in 1991, my African-American and Jewish Advisory Councils met in emergency joint sessions to discuss methods to ease tensions and to contribute to reestablishing the calm.

Third, I believe that bias crimes require the highest priority from the District Attorney and his or her senior staff. Using the most experienced attorneys and investigators should be the rule in these cases, not the exception. Each team which investigates bias cases is diverse in terms of race, sex, and ethnicity.

When a person is victimized because of his or her race, ethnicity, religion, or sexual orientation, the resulting harm is greater than the harm caused by the injury alone. In addition, all members of that victim’s group frequently suffer feelings of isolation, guilt, fear, and frustration.

The government has an obligation to protect all people equally. Protecting the weak ultimately makes us all stronger. Bias crimes injure some, but demean everyone. They reflect the worst of our society. Therefore, all required steps, legislative, judicial and administrative, should be taken to combat bias-related crimes.