



Hate Crime Laws: Dangerous and Divisive

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[Advisory: This Issue Paper reports on various crimes or incidents, some of which involve the use of vile and offensive language. Persons who do not want to read such language in print should not read this paper.]

Introduction

Almost every year since 1991, bills have been offered in the Colorado Legislature to broaden Colorado's "Ethnic Intimidation" statute. The bills would turn the statute into a "hate crime" statute, bring homosexuals, transsexuals, transvestites, the elderly, and the disabled within its scope.

Laws in some other jurisdictions protect not only these classes, but also blindness (Connecticut), sensory handicap (Washington state), marital status (N.Y., D.C.), personal appearance (D.C.), family responsibility (D.C.), matriculation (D.C.), political affiliation (Iowa, W.V., D.C.), involvement in human or civil rights activities (Montana), association with protected persons (Iowa), and service in the U.S. Armed Forces (Vermont). Should proposals to broaden the Colorado law be adopted, it seems difficult to argue that the additional special statuses protected in other jurisdictions should not likewise be included.

Often, public debate on the Colorado bills revolves around whether homosexuals should "count" as a special group covered by the law. If the Colorado perennial becomes law, other groups will make claims for similar special status.

The divisive and unnecessary debate illustrates why Colorado's "Ethnic Intimidation" statute should be repealed. Rather than obsessing about which groups are or are not deserving of special favor from Colorado's criminal law, the Legislature should guarantee equal protection of the law to all citizens.

I. Hate Crimes Statistics

Advocates of “hate crime” laws often assert that there has been a huge increase in hate crimes. This is incorrect. After the 1990 enactment of a federal statute requiring local enforcement to provide hate crime statistics to the FBI for publication in an annual report, more and more local agencies have been collecting hate crime data. Accordingly, the number of crimes recorded has increased. The increase is plainly an artifact of increased data-gathering.

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there were over [two thousand lynchings](#), most of them in the South, and most of them involving black males. Modern America tolerates homosexuality to a degree unknown in Western civilization since the days of the Roman Empire. Today, gay pride parades include marchers dressed in flamboyant attire strutting down the streets of American cities; a century ago, any such parade would likely have been attacked by an angry mob, a mob tacitly condoned or actively supported by local law enforcement. The assertions by some interest groups that hate crimes are worse than ever is profoundly disrespectful to our American ancestors who suffered abuses at a rate immensely worse than today.

Nevertheless, some advocacy groups continue to exaggerate the extent of hate crimes. For example, the Southern Poverty Law Center (a direct mail fundraising group which does not actually engage in poverty law) claimed that in 1996, twenty-one people were murdered because they were homosexual. The FBI, though, said that the actual number was two.¹ Similarly, Kerry Lobel, executive director of the National Gay and Lesbian Task Force, alleges that there is “a national emergency” of hate crimes.²

To the contrary, today’s America is far more racially tolerant, and far more accepting of homosexuality, than was any previous generation of Americans.

A careful look at hate crimes data shows that such crimes are a tiny fraction of major violent crimes -- and that many “hate crimes” are non-violent personal conflicts. The federal Hate Crimes Reporting Act of 1990 requires that “intimidation” be included as a reported crime. This category, which consists of threats which are never carried out, accounts for 56%³ of the FBI’s annually reported hate crimes against persons.

In comparison to total crime rates, the number of hate crimes is very, very low. In Colorado, for example, the Colorado Bureau of Investigation reported that there were 143 homicides in Colorado; one of these was a hate crime. Coloradoans were victimized by 26,312 burglaries in 2001. Only one of these was a hate crime. There were 1,588 arsons in Colorado in 2001; five were hate crimes. Thus, in all of 2001, there were seven crimes in CBI’s “major offenses” category which were hate crimes -- out of a total of tens of thousands of major offenses.

Nationally, [according to the FBI](#), there were 9,730 hate crime incidents, comprising 11,451 separate offenses in 2001. (This includes all “hate crimes,” not just major offenses.). There were 11.8 million Crime Index offenses (murder, rape, robbery, aggravated assault, burglary, larceny-theft, and motor vehicle theft) in 2001 in the United States, plus millions more misdemeanors and simple assaults. The FBI data show that fewer than one in ten thousand personal or property crimes in America is a hate crime.

The FBI reported 13,752 total homicides in 2001, [ten of which were hate crimes](#), one of which involved a homosexual. Overall, the FBI found that 14% of hate crimes involved homosexuals.

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is suffering an epidemic hate crime crisis which requires immediate new legislation appears to be indefensible, according to government data.

II. The Practical Impact of Hate Crime Laws

Hate Crime laws are not needed to punish people who commit heinous crimes. For example, Wyoming has no “hate crimes” law, but the killers of Matthew Shepherd were sentenced to life in prison without parole, and would have been sentenced to death, but for the request of Shepherd’s parents. Likewise, when James Byrd was dragged to his death by three men in Texas, the Texas criminal justice system reacted with its characteristic severity; two of the killers are on death row, and the third was sentenced to life imprisonment. A hate crimes law in Texas could not have increased their punishment by one iota, nor could it have deterred their acts any more than the existence of the death penalty did.

A. Colorado’s Statutes

In Colorado, the Ethnic Intimidation statute appears to make very little difference in either major or lessor violent crimes. For example, in the case of *People v. Juvenile Court, City and County of Denver* (813 P.2d 326, Colo.,1991), the Colorado Supreme Court reviewed the convictions of several teenagers who had attacked some Japanese exchange students with baseball bats and clubs, robbed them, and beat them on the head repeatedly. The perpetrators were charged with attempted first degree murder, aggravated robbery,

second degree assault, various other crimes – and with ethnic intimidation. The perpetrators were motivated in part by hatred of Japanese people, but in this case, the extra offense of ethnic intimidation could hardly compare with the major violent felony charges that the defendants had to face. In 2002, the Colorado Supreme Court affirmed the sentences the defendants received: 60 years in prison.⁵

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What about in other, more minor cases? A careful look at the Ethnic Intimidation statute shows it is almost entirely duplicative of other parts of the criminal code. The statutory crime of Ethnic Intimidation ([Colorado Revised Statutes](#), 18-9-121) encompasses:

- Causing bodily injury (which is already prohibited by statutes involving Harassment, Assault and other violent crimes).
- Placing a person in fear of imminent lawless action against his person or property (covered by Menacing or Harassment).
- Damaging someone’s property (already covered by Criminal Mischief, arson, and other property offenses).

The perpetrator must have an intent to harass or intimidate because of the victim’s “race color, religion, ancestry, or national origin.” The crime is a class 1 misdemeanor, except that causing fear of imminent lawless action is a class 5 felony.

Prosecutors have many other tools to use against people who make threats, deface property, or hit people. These include:

- Menacing (a threat or physical action that attempts to place another person in fear of imminent serious bodily injury). C.R.S. 18-3-206. Class 3 misdemeanor, class 5 felony if with a deadly weapon.
- Criminal Mischief (damaging property). C.R.S. 18-4-501. A class 3 or 4 felony, or a class 2 or 3 misdemeanor, depending on the value of the property. A convicted juvenile must have his driver’s license revoked.
- Trespass. C.R.S. 18-4-502/503/504. A class 4 or 5 felony, or a class 2 or 3 misdemeanor, depending on the circumstances.
- Criminal Tampering. C.R.S. 18-4-506. Tampering with the property of another. Class 2 misdemeanor.
- Defacing Property. C.R.S. 18-4-509. Damaging or defacing a historical monument. Class 2

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misdemeanor. Perpetrator must personally repair the property. Requires drivers license revocation for juveniles.

- Desecration of Venerated Objects. C.R.S. 18-9-113. Class 3 misdemeanor. If a place or worship or burial is desecrated, a class 1 misdemeanor. Restitution is mandatory.
- Disorderly Conduct. C.R.S. 18-9-106. Includes making an “obviously offensive utterance” in a public place which “tends to incite an immediate breach of the peace”; making unreasonable noise in a public place or near a private residence; displaying a deadly weapon in a public place in a manner calculated to cause alarm. A class 1 petty offense, or a class 2 misdemeanor for the weapon crime. Obviously many actions which qualify as Disorderly Conduct could also qualify as higher-level crimes as well.
- Disrupting a Lawful Assembly. C.R.S. 18-9-108. A class 3 misdemeanor.
- Interfering with Staff, Faculty, or Students of Educational Institutions. C.R.S. 18-9-109. A class 3 misdemeanor.
- Harassment. C.R.S. 18-9-111. With intent to harass or annoy a person, touching him, or directing obscene language at him in a public place; following him about in a public place; or communicating by any means “in a manner intended to harass” or to threaten bodily injury or property damage; repeatedly communicating at inconvenient hours. A class 3 misdemeanor. If perpetrated with intent to harass or intimidate because of “race color, religion, ancestry, or national origin,” a class 1 misdemeanor. The class 1 misdemeanor covers most of the same ground as the Ethnic Intimidation statute. If accompanied by credible threats plus stalking or repeated communications, the crime is a class 6 felony.

The special penalty for ethnic harassment in the Harassment statute encapsulates the legal effect of the Ethnic Intimidation statute: harass someone because you hate women in general, or because you hate a particular woman, and it’s a class 3 misde-

meanor. Harass someone because you hate blacks, and it’s a class 1 misdemeanor.

In short, the Ethnic Intimidation statute (and its analogue in the Harassment statute) do not criminalize conduct which would otherwise be legal. Rather, the statutes specify that the law will grant preferential status to some victims, while holding that equally-serious crimes against other victims will be punished at a lower level.

B. Notable Cases

The [Appendix](#) to this Issue Paper contains a chart summarizing every case of alleged “Ethnic Intimidation” which was reported in the *Rocky Mountain News* since the enactment of the Colorado Statute. Of course the cases reported in the paper do not represent every single case in which a District Attorney used the Ethnic Intimidation statute. Even so, it is striking to see how little importance the statute has in most cases. Almost always, the alleged perpetrator is charged with crimes which carry at least as much penalty as Ethnic Intimidation, and usually the top charges carry far heavier penalties.

The main cases in which Ethnic Intimidation is the only crime charged come out of a few incidents in high schools or colleges. The newspaper reports do not contain enough information about these cases to determine whether the accused could have been charged with some crime in addition to Ethnic Intimidation -- although the language of the Colorado Intimidation statute means that almost any crime which could be proven to be Ethnic Intimidation could be also be proven to be harassment.

Significantly, a large fraction of the cases in which Ethnic Intimidation is charged do *not* involve premeditated racist harassment. Rather, these cases involve spontaneous fights (e.g., a hunter gets mad

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at a wildlife officer and hits him) in which someone utters a racial epithet. If a teenage girl gets into a fistfight with a stranger, and calls her a “fucking bitch”, the teenager may be charged with a class 3 misdemeanor; but if the teenager calls the stranger a “spic”, then the teenager can be -- and often is -- charged with a class 1 misdemeanor.

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While the Disorderly Conduct and Harassment statutes impose penalties for use of abusive language in public (especially during a fight), the Ethnic Intimidation statute imposes special, extra penalties, for racial epithets.

As detailed below, there was at least one major case in which the Ethnic Intimidation statute was egregiously abused, and invoked for what amounted to nothing more than a nasty dispute between some neighbors in Evergreen. Other states have also experienced abuse of similar statutes, in which ordinary interpersonal conflicts are turned into serious felonies because someone hurls an angry epithet.

For example, In San Jose in 1993, two neighbors got into an argument over grass clippings. Neighbor One used a lawn mower without a grass catcher, to blow grass onto neighbor Two’s lawn. Later, there was a fight, and the son of neighbor One punched neighbor Two. Normally, this would be a misdemeanor assault. But in California, the incident resulted in a felony conviction, because the son called neighbor Two a “cocksucker” and a “faggot.”⁷ As detailed in the [Appendix](#), the Ethnic Intimidation is sometimes used in cases such as this in Colorado, in which insulting words are used during a fight.

At an Ohio campground, a man and his wife played their radio too loudly, and bothered the people at the next campground. When the park ranger told the couple to turn the radio down, they did, but 15 minutes later, they turned it up again. The husband then yelled that he ought to shoot the campers at the next campsite. He did not take violent action in any way.

This misbehavior should have been prosecuted, since the man was clearly guilty of disturbing the peace and of making a threat. Instead, he was convicted of a “hate crime” felony and sentenced to a year and a half in prison. During his tirade, the man said the words “niggers” and “black motherfuckers.” If he had not said those words, his offense would have been a misdemeanor, subject to a sentence of no jail time, or up to six months.⁸ It is certainly a skewed system of criminal justice in which the word “nigger” leads to a much harsher sentence than does a death threat.

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Advocates of hate crimes laws contend that the laws punish conduct, rather than speech or beliefs, but at least in some cases, this contention is incorrect. In the Ohio campground case, for example, the defendant had lived next door to an elderly black woman for nine years, without any problems. The cross-examination of the defendant inquired “Never gone out and had a beer with her?” “Never went to a movie?” “Never invited her to a picnic at your house?” After the defendant described his black friends, the prosecutor demanded to know if any were “really a good friend.”⁹

The *Rocky Mountain News* editorialized:

“Hate-crime prosecution often requires jurors and judges to delve into the mindset of the perpetrators and requires prosecutors to dig up old statements that might reflect on the defendants’ attitudes toward others. This amounts to the criminalization of opinions - something we thought most Americans agreed was not acceptable in a free society.”¹⁰

In contrast, ordinary laws about harassment, disturbing the peace, and so on merely require fact-finding about what the defendant did on a particular occasion -- not about the history of his social life and every politically incorrect comment he ever made.

III. Justifications for Hate Crimes Laws

A. "Hate crimes are more severe"

If this were really true, then the crime would be at a higher offense level – such as aggravated assault instead of simple assault. The theory depends on hate crimes actually being a little more severe – worse than the ordinary crime, but not so much worse as to move into a higher offense category. In any case, the availability of a sentencing range on any given offense always allows a judge to mete out extra punishment for crimes which are modestly more serious.

In terms of psychological injury, research shows that hate crimes are less severe; victims of various crime types suffer approximately the same psychological injury, except that hate crime victims are much less likely to suffer lowered self-esteem.¹¹

B. "Hate crimes have broader impact"

Some hate crimes do have a broad impact, causing widespread fear. But so do some ordinary crimes, such as carjackings, child kidnappings, and crimes in public places such as shopping malls, public transportation, or college campuses. The "Son of Sam" murderer in New York City had a gigantic public impact, although his killing spree would not be classified as a "hate crime."

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Some people argue that hate crimes must have special punishment because they can provoke collective self-defense by a neighborhood or community. Yet self-defense, either individually or collectively, is a lawful activity in every state of the union.

It is laudable, not something to be condemned. Besides, other crimes, such as child kidnapping, may also lead to community self-defense.

The odds that a person will be victimized by a hate crime in a given year are about one in twenty

thousand. The odds of being a crime victim in general in a given year are about one in ten.¹² Surely the widespread fear caused by crime in general far outweighs the fear of hate crime. The risks of ordinary crime are quite substantial, while the risks of being victimized by a hate crime are tiny.

IV. What Harm do such Laws do?

A. Undermining Federalism

Pressure to create a federal "hate crimes" law threatens the [already-battered values of federalism](#) in our criminal justice system. Our Constitution nowhere gives Congress general authority over criminal law, yet since the 1960s, Congress has enacted extensive criminal statutes, under the specious pretext that a crime committed entirely within a single state somehow falls within Congressional power to regulate interstate commerce.

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Federalization of crime diverts federal criminal justice resources from areas where the federal role is constitutionally legitimate and indispensable -- such as combating foreign terrorists.

Federalization also makes law enforcement unaccountable. Whereas sheriffs are elected by the people, and police chiefs appointed by Mayors, the federal law enforcement apparatus is subject to very few practical checks and balances.

Finally, hate crimes advocates have failed to prove that there is a pattern of states refusing to prosecute the crimes which would be covered by a federal statute.

B. Encouraging hoaxes and wasting law enforcement resources

Migdalia Maldonado, a former Assistant District Attorney for Kings County (Brooklyn), in the Civil Rights Bureau, explains:

Given the heightened social awareness of bias crime the concomitant special attention that allegations of this sort receive from law enforcement officials and the media, the complainant is keenly aware that if the crime perpetrated against him or her is deemed a bias crime, he or she will be accorded special protections, and a perpetrator will be dealt with more harshly by the courts. A complainant, therefore, has an incentive to tailor his or her presentation of the facts so as to obtain a bias crime designation. This motive...leads to a *relatively high incidence of false reports*.¹³

In New York City during the David Dinkins administration, a 12 and a 14 year old black from the Bronx claimed that their lunch money had been stolen by a gang of whites who had smeared the victims' faces with white shoe polish. As a response to what was, in all likelihood, a childhood lie to cover up spending the lunch money on something else, Mayor Dinkins ordered 200 detectives to investigate that case; they conducted hundreds of witness interviews.¹⁴

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In a city as crime-ridden as New York under David Dinkins, when one deploys many thousands of police man-hours on a fool's errand, one can be almost certain that the absence of the police from genuine anti-crime work means that many additional violent felonies perpetrated against genuine victims – many of them black – were not solved because the trail went cold while the detectives searched for the non-existent white gang and its shoe polish. Those New York City criminals who went free

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Do we have such hoaxes in Colorado? Definitely yes.

A black couple in Arvada drew swastikas on their walls, and ransacked their own house, without removing any property. Two weeks later, they set their car on fire. They were in financial trouble, and perpetrating an old-fashioned fraud, using the false claim of an ethnic intimidation crime to attract sympathy.¹⁵

On Sugarloaf Mountain, near Boulder, a man set a fire on his home, and falsely claimed that he was the victim of anti-Semitism.¹⁶

In downtown Denver, the owner of the Egg Shell Restaurant painted swastikas on his restaurant, added some anti-Semitic graffiti, and set fire to the basement, pretending to be the victim of a skinhead attack.¹⁷

Even when the crimes reported are not hoaxes, there is still a misallocation of resources. When you say that more resources are going to be spent on investigation of graffiti, minor assaults, and disturbing the peace, you are necessarily saying that law enforcement is going to spend fewer resources on other offenses. Explained a former Commander of the Bias Enforcement Unit of the New York City Police Department, "Many of these are minor crimes, but we treat them as if they were homicides."¹⁸

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C. Dividing people against each other

In the Middle Ages, the law required a greater punishment for killing a rich man or noble than

it did for killing a peasant or a laborer. While American law has traditionally abhorred such distinctions, hate crimes statutes have begun to select favored members of identity groups, implicitly announcing that some people are more important than others. After the murder of Matthew Shepherd, the Laramie City Council considered a hate crimes law. One of the speakers against the law was the mother of an eight year old child who had recently been murdered. She wondered why the murder of her child would be considered less important than the murder of someone else's child.¹⁹

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When a Colorado legislative committee rejected a proposed "hate crimes" bill, Sue Anderson, executive director of Equality Colorado, said "we have an ethnic intimidation act where we penalize people additionally if they have committed a crime based

on race, religion, national origin, ancestry or color. But for other categories, that's not bad enough to penalize them additionally. It sends a very loud and clear message that says 'these other populations don't matter enough.'"²⁰

Of course Ms. Anderson's bill likewise sent a loud and clear message that *other* groups (which are protected in other jurisdictions) "don't matter enough" to be included in her bill. Ms. Anderson's favored law would create a state policy that transvestites "matter enough" but veterans, political or human rights activists, and married or divorced people "don't matter enough."

Once the government gets into the business of claiming that some identity groups deserve special favor, it is difficult to see why *every* identity group should not be given the same favor. Certainly the number of women who are criminally attacked because of their marital status (having divorced an abusive spouse who continues to stalk them) far exceeds the number of homosexuals who are criminally attacked because of their sexual orientation.

How sad to see the Legislature engaged in annual debates over which particular groups ought to "matter" more than other groups. Our nation's motto *E pluribus unum* announces that no matter where a person comes from, he is, first and foremost, an American. Regardless of whether one's ancestors were born in London, Vilna, Mexico City, or Oklahoma City, all Americans are equal in the eyes of the law.

The best way for our legal system to send a message against prejudice is for the law to apply to everyone equally, without regard to identity politics: to treat people the same, regardless of race, to treat crime victims equally without special categories of race, religion, sexual orientation, or similar categories, and to treat criminals equally without special punishments for bad beliefs.

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D. Infringing freedom of thought

Envy, hatred, love, and greed are ordinary human emotions. They may be connected to a political belief system – such as a Marxist who believes that he should hate businessmen, or a Syrian who is envious of the success of Israel. Or such emotions may have no connection to a political world-view. Bigotry against people because of race, sex, religion, or sexual orientation is usually closely connected to a political world-view. To punish someone because of his or her bad political thoughts, or because of his bad political words expressed during a crime, is to punish him extra because of the beliefs he holds.

Over the last two decades, many practitioners of identity politics have become ardent advocates for a wide range of political censorship: speech codes on campuses and in workplaces; forced indoctrination programs for people joining such institutions, and forced re-education programs for people who deviate from the official norms. In Canada, Sweden, and other countries, "hate speech" is used to censor conservative Christians who teach that the Bible

says that homosexual conduct is wrong, or to censor people who [criticize the European Union](#), or who disparage Islamic intolerance.

Louis Brandeis was the first Jew to serve on the United States Supreme Court. All his life, he encountered anti-Semitism. On the Court, Justice McReynolds refused to speak to Brandeis because Brandeis was Jewish. Brandeis saw the rise of the Nazi movement in Germany, and saw that many Americans sympathized with the German's hostility towards the Jews. Yet Brandeis recognized that freedom of speech could not be granted only to persons whose ideas were inoffensive. In [United States v. Schwimmer](#), he joined with Justice Oliver Wendell Holmes to declare: "If there is any principle in the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought--not free thought for those who agree with us but freedom for the thought we hate."

Gay journalist Jonathan Rauch writes:

Personally, being both Jewish and gay, I do not expect everybody to like me. I expect some people to hate me. I fully intend to hate those people back. I will criticize and excoriate them. But I will not hurt them, and I insist that they not hurt me. I want unequivocal,

no-but protection from violence and vandalism. But that's enough. I do not want policemen and judges inspecting opinions.

I think it's ironic and a little sad that gays, of all people, would endorse a criminal sentence that has overtones of forced re-education. Homosexuals know a thing or two about being sent for therapy or reeducation to have their attitudes straightened out. Jews, too, know something about courts that decide whose belief is "hateful." As on campus, so in the courtroom: the best protection for minorities is not prejudice police but public criticism — genuine intellectual pluralism, in which bigots, too, have their say.²¹

"I do not want policemen and judges inspecting opinions."

The stirring words of Justices Holmes and Brandeis were expressed in a dissenting opinion, and today's U.S. Supreme Court is not always speech-protective. But simply because the Supreme Court decides not to overturn a "hate crimes" law enacted by one state does not mean that other states should push their own laws up to the limits of what the Supreme Court will allow. Legislators take their own oath to obey the Constitution, and they have the discretion and the responsibility to reject proposed laws which the legislators believe will infringe constitutional values -- regardless of whether courts are likely to void such laws.

Similarly, although the Fourteenth Amendment guarantees Equal Protection of the laws, courts in the Jim Crow era often upheld laws discriminating against black people; today, courts often uphold misnamed "affirmative action" laws which discriminate against whites and Asians. In the Jim Crow era and today, constitutionally conscientious legislators can still choose to vote against all discriminatory laws; such legislators would be acting in accordance with their own oath to support the Fourteenth Amendment, even during times when courts are unwilling to do so.

Although the media tend to be very supportive of identity politics and hate crimes laws, the public at large seems to have a firmer grounding in the principle of equality before the law. A Wirthlin poll found that 92% of the public agreed that criminals should be punished solely for their acts, and not for their beliefs.²²

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V. Quigley v. Aronson: A Case Study in the Harm Caused by Colorado's Ethnic Intimidation Statute

In Evergreen in the 1990s, lived a pair of neighboring families who did not get along: the Quigleys and the Aronsons. The use of

Colorado's Ethnic Intimidation statute in this neighborhood dispute attracted national attention,

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ruined a family's life, brought false accusations of crime, and harmed the reputation of law enforcement in Jefferson County. Rather than preventing ethnic tension, the Ethnic Intimidation statute made neighbor-to-neighbor arguments into problems worse by at least an order of magnitude.

In 1993, the Quigley family moved into Hiwan. The Aronson family moved into a home two houses away in 1994. One day, the dogs belonging to each family got into a fight. The

Rocky Mountain News summarized what happened next:

Soon both families were phoning animal control officers about each others' dogs. There was an allegation that one family had stolen decorative rocks from the other family's yard. There was hostility about a near miss with a vehicle, which one family charged was deliberate. There was an accusation that one of the women had spread rumors that the other was having an affair with a local teenager.

It was only by chance, the Aronsons said later, that they discovered their police scanner picked up conversations on the Quigleys' cordless telephone.

What they heard sent them to the Denver office of the Anti-Defamation League, a group founded in 1913 to fight the defamation of Jewish people and protect their rights.

The Aronsons, who are Jewish, said they heard the Quigleys discuss a campaign to drive them from away with Nazi scare tactics: tossing lamp shades and soap on their lawn; putting pictures of Holocaust ovens on the house; dousing an

Aronson child with flammable liquid.

Six years later, Dee Quigley testified that her telephone remarks about scaring away the Aronsons were sick black humor and she deeply regretted them.²³

The Aronsons went to the Anti-Defamation League, which called in a pair of volunteer lawyers, one of whom was Gary Lozow, a leading proponent of the 1988 Ethnic Intimidation Act. The lawyers advised the Aronsons that they could legally record cordless phone conversations with the Quigleys, and so the Aronsons recorded 260 conversations, amassing hours and hours of tapes. The Aronsons' lawyers contacted the Jefferson County District Attorney's office, and the Quigleys were charged with Ethnic Intimidation in December 1994.

The Aronsons sued the Quigleys, and the Quigleys countersued. Neither family collected a penny from the other. In December 1995, Jefferson County District Attorney Dave Thomas apologized to the Aronsons, who received \$75,000 from Jeffco's insurers.

The District Attorney's office had not listened to the tapes before filing charges. Weeks after charges were filed, the tapes were studied, and "We decided Mrs. Quigley was simply blowing off steam, venting," prosecutor Steve Jensen later acknowledged.

But by then, much harm had already been done. The ADL had held a press conference supporting the Aronson civil lawsuit against the Quigleys, but the simultaneous announcement of 13 charges being filed by the Jefferson County District Attorney gave the matter vastly greater public and media attention. According to the *News*:

The Quigleys got hate mail. They got telephone death threats. They got suspicious packages, including a shoebox full of dog feces.

They hired security guards, who told them not to stand in front of their windows. When they shopped, they took the guards with them or went to towns where they wouldn't be recognized.

The Quigleys, who are Catholics, were shocked when their own priest denounced them from the pulpit.

William Quigley lost his job.

The Aronsons' lawyers eventually paid a \$350,000 settlement. (The lawyers had not realized that five days after the wiretapping began, a new federal statute was enacted which restricted wiretaps of cordless phones.) A jury awarded a 10 million dollar judgment against the ADL. (The case is currently on appeal to the federal Tenth Circuit.)

It is true that the Jefferson County District Attorney's Office could have avoided the whole fiasco by prudently insisting that it review the alleged evidence in the case *before* filing charges - - rather than relying on the story painted by lawyers for one side in a neighborhood dispute. It is also true that ethnic intimidation/hate crime laws are precisely the kinds of laws which are likely to cloud the judgment of public officials. Such laws can even cloud the judgment of outstanding public interest

organizations such as the Anti-Defamation League. How ironic that the Anti-Defamation League was found to have defamed a family and ruined their lives. Because emotions run so high on issues of identity politics, public officials and public interest sometimes make snap judgments which have terrible consequences.

Repeal of the Ethnic Intimidation statute (and of its analogue within the Harassment statute) could help prevent a recurrence of cases like Quigley/Aronson, and would send a strong signal to prosecutors that

cases involving identity politics should be taken seriously -- that is, the cases should be subjected to careful scrutiny before a defendant's reputation is destroyed through charges based on a hoax or flimsy evidence.

VI. Anti-Hoax Laws

It is often argued that hate crimes are worse than ordinary crimes because they have a broader impact. Sometimes this is true, and judges can and should take the impact of a crime into account at sentencing. Colorado law properly gives judges a sentencing range in most cases, so that the sentence can be adjusted to fit the crime. Hate crimes advocates, however, go further, and insist that a special new crime category be created.

If the argument for a special category of hate crimes laws is compelling, then so is the argument for a new law imposing especially strict punishment for hate crimes hoaxes.

False reporting of a crime (C.R.S. 18-8-111) is a class 3 misdemeanor. Just as the Ethnic Intimidation Statute turns many class 3 misdemeanors into class 1 misdemeanors or class 5 felonies, the false reporting statute should be amended so that false reporting of Ethnic Intimidation is a class 1 misdemeanor or a class 5 felony (depending on the whether the falsely reported crime was itself a misdemeanor or a felony).

To the extent that arguments in favor of special hate crimes laws are persuasive, the argument for special anti-hate-crime-hoax laws are at least as persuasive. For example, some hate crime perpetrators do intend to create a climate of fear in the community. (Other perpetrators just have a personal dispute with someone, and are not trying to send a broad message.) Every hate crime hoax perpetrator, though, intends to create a climate of fear, since

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hoaxes are perpetrated with the aim of achieving publicity.

Hate crime laws are promoted under the theory that, even though they simply recriminalize already-criminal conduct, they send a message to law enforcement, school administrators, and the public that such crimes are especially heinous, and should be taken very seriously. Precisely the same can be said about hate crime hoaxes -- which are sometimes treated quite offhandedly by the authorities. At the University of Mississippi in the Fall of 2002, the entire campus went through an uproar lasting for weeks when it was discovered that some black students had been victimized by racist graffiti with language such as “Fucking Nigger.” Then, it was discovered that the perpetrators were black, and were creating a hate crime [hoax](#). They

had attempted to severely damage the reputation of the university, which is trying mightily to overcome its racist past, and they had wasted many thousands of hours of faculty and student time (and thus wasted many, many thousands of taxpayer dollars) as the campus held meeting after meeting on the supposed “hate crimes.”

Yet after the hoax was uncovered, law enforcement refused to take action,

leaving the perpetrators to face nothing more serious than university discipline.

The most infamous hate crimes hoax in America was the [Tawana Brawley case](#), in which a teenage black girl in New York came home late -- but before doing so, smeared herself with feces and made up a lie that she had been raped by a policeman. The case was so palpably false that a New York prosecutor Steven Pagonis eventually won a libel suit against the “Reverend” Al Sharpton for the lies which Sharpton had told about the Pagonis supposedly being complicit in the non-existent crime. Yet no criminal charges were ever brought against Sharpton, his co-conspirator Alton Maddox, or against the teenage

who created the hoax. Quite plainly, there are at least some prosecutors and school administrators who need to be given a very strong signal that hate crime hoaxes ought to be taken seriously.

Hate crimes laws are also promoted as a means of teaching the public that tolerance regarding race and sexual orientation is an especially important value. Precisely for this reason, hate crime hoaxes ought to be punished with special severity, because they are deliberately intended to create an atmosphere of intolerance.

Like hate crimes, hate crime hoaxes do not occur every day in Colorado. But over the years, a substantial number of hoaxes have been perpetrated. In the 1996 book *Crying Wolf: Hate Crimes Hoaxes in America*, Laird Wilcox (a scholar of right-wing and left-wing extremist movements) presents numerous cases.

As long as Colorado’s Ethnic Intimidation law remains on the statute books in any form, it ought to be strengthened adding a provision making ethnic intimidation hoaxes subject to substantially more severe penalties than ordinary criminal hoaxes. Supporters of the Ethnic Intimidation statute should have no objection to this reform, since it reinforces the goal of the statute: creating a Colorado in which people do not need to fear being the victim of a crime because of their race or ethnicity.

Conclusion

The great promise of American law is Equal Protection: everyone is equal before the law. Colorado’s Ethnic Intimidation statute runs contrary to this promise, by creating preferred classes of victims. Proposed “hate crimes” laws would make the problem even worse. Different groups should not be contending for special status in our criminal law. Identity politics strikes at the heart of the American motto of *e pluribus unum*, and encourages people to think of themselves as members of

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particular groups -- rather than as, most of all, Americans first. Laws based on identity politics lead to skewed prioritization of law enforcement resources, and impinge on values of free speech, which includes the freedom to hold and express the most odious ideas. Until Colorado's statute is repealed, it should be improved by stronger penalties for the creation of hoaxes.

Endnotes

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⁵ *Close v. People*, 48 P3d 528 (Colo. 2002).

⁶ Michael O'Keefe, "Teen to Face Prosecution for Remarks," *Rocky Mountain News*, Mar. 18, 1998.

⁷ Jim Jacobs & Kimberly Potter, *Hate Crimes: Criminal Law & Identity Politics* (N.Y.: Oxford, 2000), pp. 26-27. (Hereinafter "Jacobs & Potter.").

⁸ Jacobs & Potter, p. 34.

⁹ Jacobs & Potter, pp. 106-07.

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¹⁴ Jacobs & Potter, p. 51.

¹⁵ Laird Wilcox, *Crying Wolf: Hate Crimes Hoaxes in America* (Olathe, Kan.: Editorial Research Service, 1996), pp. 54-55, citing *Rocky Mountain News* stories.

¹⁶ Wilcox, p. 68, citing *Boulder Daily Camera*.

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¹⁸ Jacobs & Potter, p. 101; James C. McKinley, "Tracking Crimes of Prejudice: A Hunt for the Elusive Truth," *New York Times*, June 29, 1990, p. A1.

¹⁹ Rob Blanchard, "The 'Hate State' Myth," *Reason*, May 1999; slightly corrected version on Independent Gay Forum website, <http://www.indegayforum.org/articles/blanchard1.html>

²⁰ John Sanko, "Committee Stalls 'Hate Crimes' Bill. Similar Measure to Expand State's Existing Law to be Heard Today," *Rocky Mountain News*, January 14, 1999, p. 24A

²¹ Jonathan Rauch, "Thought Crimes," *The New Republic*, Oct. 7, 1991, reprinted for Independent Gay Forum, <http://www.indegayforum.org/articles/rauch50.html>

²² Wirthlin Worldwide poll of 1,013 respondents, July 23-26, 1999. The poll was commissioned by the Family Research Council.

²³ Karen Abbott, "Fur Hasn't Quit Flying from 1994 Dogfight," *Rocky Mountain News*, Nov. 19, 2002.

Appendix
Ethnic Intimidation Cases in Colorado

Date	Location	Victim	Top charge	Circumstances	Ethnic Intimidation conviction?	Sentence/ convictions
12/02	Heritage Elementary School, Cherry Creek	Playground equipment	Criminal mischief, Ethnic intimidation (possible) No perpetrators caught			
6/01	Cortez	Transsexual Indian teenager	1st degree murder	Late night drinking	Yes, by plea	48 years, 2d deg. Murder plea
3/01	Denver, Lincoln High School	2 Vietnamese students	2d degree assault	Locker room fight, baseball bat. 5 male assailants Accidental water spill.		
11/98	Boulder	3 Asian men	Burglary, assault	4 Hispanic men		
4/98	Denver	Ethiopian cabdriver	Assault	2 drunk men hit cab driver after not paying fare in advance, as driver requests. Use racial slurs.	Not charged, because of lack of intent	2 years
1/98	South suburbs	Japanese man	DUI, 3d degree assault Traffic altercation. "Go the fuck back to Japan."			
12/97	Denver	Black women	Harassment	Store clerk calls woman a "nigger" and threatens to hit her.	Not charged	
12/97	Denver	Boy and girl	Assault	On RTD bus		
11/97	Colorado Springs	Homeless black male	Assault	Sidewalk confrontation		

Date	Location	Victim	Top charge	Circumstances	Ethnic Intimidation conviction?	Sentence/ convictions
11/97	Denver	African immigrant, white woman	1st degree murder	Skinhead gang attack at bus stop		Pleas: Life for killer; 12 years for accessory
11/97	Denver			Assault at 7-11		
9/96	Denver	Black cab driver	Assault	3 men use racial epithets during attack	Acquitted	Sentences of 2 to 5 year minima for various defendants
1996	Columbine High School	Jewish boy	Ethnic intimidation	School bullying		
10/31/96	Lamar Community College	None		Burning a cross for a few seconds	Plea guilty	Sentenced to diversity training
10/96	Highlands Ranch	Ethnic intimidation	Black Vice-principal takes student's baseball cap. 15-year-old student writes note with death warnings and racial slurs. Note is discovered under a computer keyboard			
10/95	Douglas County High School	Black employee	Ethnic intimidation	Student leaves racist note on windshield		
1/94	Denver	2 Viet. Women	Burglary, theft, third-degree sexual assault	Home invasion. Bigot is jealous that Vietnamese have jobs Convicted on all counts, including EI		

Date	Location	Victim	Top charge	Circumstances	Ethnic Intimidation conviction?	Sentence/ convictions
1/95	Denver	Anti-Semitic graffiti		Arrest warrants for 21 white racists. EI & other criminal charges for 4. More serious charges for other 17, not EI		
12/94	Cortez	Indians	Assault	2 men drink, decide to "pick on some Indians." Alley attack		
9/94	Aurora restaurant	3 black men	Attempted murder	3 white men, drunk, throw rocks, shoot		
9/94	Denver, South High	2 Russian teens		6 Viet. Teens. Knife and club assault. School argument		
6/94	Colo. Springs	Black man	1st deg. Assault	3 Hisp. males. Stabbing		
6/94	Colo. Springs	Black senior citizen	EI	Teenage girl spray paints racial epithets on car		
8/93	CU Boulder	Black male	3d deg. assault; felony EI	Two students fight. The white one allegedly utters racial epithet before attack.		
1/93	Denver, near mob dispersing from anti-Klan protest on ML King Day	2 white youths	1st deg. assault	Two black youths are beating up a white. White youths attempt to stop the fight, and are severely assaulted	Acquitted	Convicted of 1st and 2d degree assault
1/93	Boulder	Male	Felony	Male CU student. Bar fight		
7/92	Fort Collins	Black CSU co-ed	EI, Illegal use of a stun gun	17-year-old Boulder girl zaps college student with a stun gun, in downtown Fort Collins		

Date	Location	Victim	Top charge	Circumstances	Ethnic Intimidation conviction?	Sentence/ convictions
2/92	Alamosa County	Hispanic wildlife officer	Assault, EI	Argument in wildlife office over rancher's claim that an elk damaged his hay. Defendant slugs officer once on the chin, and uses an ethnic slur. Threatens to kill the officer if he comes on the ranch.		
9/91	Denver	3 white young people		2 drunk youths shout "What's that white boy doing in my neighborhood?" and threaten to rape the female. Two drunks approach the victims, and say, "You think you're tough, you white punk." Drunks jump on one man, injure his face, and repeatedly punch the 2 women.		
11/90	CU-Boulder	Police officer and security guard	Misdemeanor ethnic intimidation	Outside a party, two football players allegedly make racial comments, taunting police officer and security guard.	Students deny comments. Charges dropped in plea bargain.	Plea of guilty to Disorderly Conduct
10/90	Park near Teikyo Loretto Heights University, Denver	6 Japanese students	Attempted murder	3 white teenagers attack, rob, and viciously club students. (Discussed in main text of this Issue Paper.)	Yes	60 years in prison

Date	Location	Victim	Top charge	Circumstances	Ethnic Intimidation conviction?	Sentence/ convictions
6/90	Denver	2 Denver Zephyrs baseball players, one of them black	1st degree assault	Judge: "This was a barroom brawl that got out of hand." The black victim "was called a derogatory name during the fight"	Yes	Perp. 1: 10 years in prison for first-degree assault. Perp. 2: six years in prison for second-degree assault and ethnic intimidation
4/90	Denver	Black man	Harassment, EI	Drunk Skinhead male points a switchblade at the victim, threatens to kill him, and shouts, "All niggers must die"		Plea to felony menacing
1/90	Denver	Assumption Greek Orthodox Church		Spray painting	Yes, by plea	Plea to criminal mischief, desecration of a venerated object, and ethnic intimidation
11/89	CU-Boulder	Black student	ethnic intimidation and harassment	Student is confronted in CU library, and called a racist name three times. Perpetrator raises his fist at her, as if to hit her.		

Date	Location	Victim	Top charge	Circumstances	Ethnic Intimidation conviction?	Sentence/ convictions
2/89	Northeastern Junior College, Sterling		Reckless endangerment, ethnic intimidation, disorderly conduct	Three black and three white students in off-campus fight over a woman		2 whites plead guilty to reckless endangerment and disorderly conduct. Receive 2 year suspended sentence

This Appendix was compiled by review the 295 articles in the *Rocky Mountain News* electronic database in which the phrase “ethnic intimidation” appeared, from 1989 through January 2003. Media tend to report major crimes more than minor ones. The Appendix reports only on criminal cases within Colorado. Newspapers often report an arrest or initial charges in a case, but not the final disposition.

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