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HATE-MOTIVATED VIOLENCE



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Glenn A. Gilmour

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Department of Justice Canada. The views expressed
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EXECUTIVE SUMMARY

The Study

The purpose of this study is to examine how Canada's *Criminal Code* should address what is often referred to as racially motivated violence. Thus, this paper is restricted to considering various responses by the criminal law to the problem: it does not address civil or other remedies that lie outside the domain of the criminal law, such as creating a civil damages action relating to hate-motivated violence, or using various human rights commissions to combat this problem more effectively.

Methodology

The study relied for its analysis on an examination of legal periodicals on the topic of racially motivated violence in several jurisdictions. As well, additional information on the topic was provided by reports from government organizations (e.g., in England, reports on the topic from the Home Office), reform-minded organizations (e.g., the Australian Law Reform Commission) and private organizations (e.g., in Canada, the League for Human Rights of B'nai Brith, and in the United States, the American Anti-Defamation League). Also, a selective, albeit not systematic, examination was made of newspapers and magazines, both Canadian and foreign, to obtain information on specific examples of racially motivated violence. The criminal law of certain foreign jurisdictions was also examined to see how they respond to the problem of racially motivated violence. These were the United States, England, Australia, New Zealand, France, Germany and Sweden. These countries, it was felt, would provide a useful overview of possible directions for reform in this area.

Findings

Given the purpose of the study — to explore how the criminal law should combat the problem of racially motivated violence — a number of options present themselves.

The first option is to have the criminal law do nothing to respond to the problem of hate-motivated violence. This would mean that evidence of hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera, should in no way be used to increase the penalty for committing the basic crime, and so would be a change from the present criminal law. The one advantage of this option is that, for those who believe strongly in freedom of expression, it protects a person's most repugnant beliefs. Its disadvantage is that it rejects the use of the criminal law to denounce hate-motivated conduct and would weaken the protection that the criminal law now affords to minority groups.

The second option is to immediately create a federal hate crime statistics act to obtain more information on the incidence of hate-motivated violence in Canada. The advantage of this option is that it would provide a national picture of hate crime activity in Canada: it would enable Canadians to obtain needed information about these crimes and who commits them. Also, it might help spur the development of collecting such data at the local police level. The disadvantage of this option is that it might be, at this point in time, an ineffective use of federal resources; that is, until more collection of such data is carried out at the municipal and provincial levels.

The third option is that the present law be maintained: that the only response of the criminal law to hate-motivated conduct should continue to be use of evidence of hate-motivated conduct as an aggravating factor to increase the penalty for the basic crime beyond that which is normally imposed through the application of judge-made sentencing principles. This option's advantage is that it views hateful motivation as part of a series of aggravating factors used to enhance the penalty for committing a basic crime that is capable of broad application; also, it offers the familiarity that comes with present practice. Its disadvantages are that the role of aggravating factor has had to be determined by appeal courts following cases where a lesser sentence had been imposed at trial, and that it is not the most effective way to publicly denounce such conduct.

The fourth option is to set out specifically, in sentencing guidelines or in the *Criminal Code*, that the fact that a person has committed a crime by reason of hatred of another's actual or perceived race, colour, religion, ethnic origin, et cetera, should increase the penalty for committing the basic crime. This could be done as part of a scheme for setting out aggravating factors generally, or by having a specific *Code* provision that enhances the penalty for a crime when it is hate-motivated. The advantage of this option is that it would better denounce such conduct by setting it down publicly, especially if the *Code* were used for this purpose. Its disadvantage is that this approach arguably does not fully denounce the distinct harm caused by such conduct.

The fifth option would build into the actual definitions of certain crimes, such as assault and mischief, provisions providing for an automatic penalty enhancement where the crime is hate-motivated. Its advantage would be to strongly denounce certain criminal conduct. However, this approach depends on selection of only a few basic crimes for the purpose; otherwise, the definitions of several crimes would have to be so amended, which would lead to lengthy repetition. Moreover, like the preceding option, it assumes that hate-motivated conduct is merely a more serious instance of the basic crime, rather than something harmful in its own right.

The sixth option is to create a specific crime of institutional or religious vandalism, and another crime of bias intimidation that would have as part of its definition the commission of certain general crimes, such as mischief, assault, or threatening harm, by reason of a person's actual or perceived race, colour, religion, ethnic origin, et cetera, and

which would be more severely punished than the general crime. Its advantage is that it would recognize the distinct harm of hate-motivated crimes and denounce them with the maximum possible impact of the criminal law. Its disadvantage would be, on the one hand, to duplicate existing law and, on the other hand, to adopt an ad hoc approach to the criminalization of hate-motivated conduct by only singling out some criminal conduct for penalty enhancement.

The seventh option argues for the creation of a general crime of hate-motivated violence. Its advantage is that it would create a principled approach to the issue, so that any criminal conduct that is hate-motivated could be prosecuted pursuant to this general crime. Its disadvantage is its vagueness, that it might have to be further defined by the use of a schedule to identify specific offences that would fall under it, that the broader it is the more it could stretch the bounds of credulity, and that it might result in the creation of a parallel criminal code relating to hate-motivated violence that would destroy the cohesion and unity of the present *Criminal Code*.

The eighth option calls for an amendment to the definition of the crime of first-degree murder so that hate-motivated murder would fall within that definition. Its advantage is that it would denounce the worst kind of hate-motivated violence — hate-motivated murder. There does not appear to be any disadvantage to this proposal.

The ninth option is that, should a crime or crimes of bias-motivated violence be created, incitement to commit such violence would be caught by the criminal law. No special crime need be created, given that the general rules governing incitement, et cetera, to commit a crime would apply once a specific crime (or crimes) of hate-motivated conduct is created. There does not appear to be a disadvantage to this option.

The tenth option is that, if a crime (or crimes) of hate-motivated behaviour is created, a principled approach to determining the penalty for the crime should preferably be adopted, such as having the maximum penalty for the crime equal one and one-half times that for committing the basic crime. A disadvantage of this option is that this range may be viewed as being too high, and that a better approach may be to raise the penalty closer to the maximum penalty range existing in the present law.

The eleventh option would set out the *mens rea* component for any hate-motivated crime. It argues that the preferable *mens rea* component should be that of purposely or recklessly harming a victim or vandalizing property by reason of hatred of the victim's actual or perceived race, colour, religion, ethnic origin, et cetera. The advantage of this proposal is its focus on the hateful motivation of the accused. As an alternative, it is argued that the *mens rea* component could include the concept of negligence, but the disadvantage of such an approach is that it could criminalize acts of unconscious racism. A crime of hate-motivated violence so defined would arguably have a minimal denunciatory and educative impact.

The twelfth option argues that the definition of an "identifiable group" should protect the members of a group identifiable on the basis of race, national or ethnic origin, colour, religion, sex, age, mental or physical disability, or sexual orientation. The advantage of this option is that it would extend the protection of the criminal law as regards hate-motivated violence to the same groups protected from discriminatory treatment set out in subsection 15(1) of the *Canadian Charter of Rights and Freedoms*. Its disadvantage might be that it would extend such protection to groups not at risk of hateful violence because of their belonging to such groups — for example, the aged. Whatever list of criteria is chosen, it is strongly argued that "sexual orientation" be added to the list, given the fact that homosexuals have been victims of violence because of their sexual orientation.

The thirteenth option generally argues that the definition of any sentencing provision or of a specific crime or crimes of hate-motivated behaviour should include those who are attacked because of their support for members of such identifiable groups. The advantage of this proposal is that it would ensure that the criminal law denounce all hate-motivated behaviour, whether or not the victims belong to the identifiable group so hated. There does not appear to be any disadvantage to this option.

The fourteenth option would have consideration given, ancillary to the creation of a crime or crimes of hate-motivated violence, to creating a damages provision that would allow the criminal court, on completion of a trial, to award punitive damages to the victim of such violence. The advantage of this proposal is that it would add to the public condemnation of such activity, as well as provide some limited recompense to the victim. The disadvantage is that it might be viewed as not being in pith and substance criminal law.

The fifteenth option, in light of the Rodney King case in the United States, suggests that consideration be given to the creation of a crime of violating a person's constitutional rights. The advantage of this option would be to emphasize the importance of the rights and freedoms set out in the *Charter*. Its disadvantages, however, are numerous. They include the difficulty of defining the crime, and the fact that the limits on double jeopardy protection in the United States do not apply in Canada.

1.0 INTRODUCTION

In January 1993, seven Montreal-area synagogues were defaced with swastikas and a Nazi slogan. The attacks, which appeared to be orchestrated, were described as the worst acts of anti-Semitic vandalism in Quebec in nearly three years.¹ In June 1993, a Tamil who had left Sri Lanka to escape the ethnic strife there was viciously attacked by three men, whom he had never seen before, at the end of his work shift at a Toronto restaurant. Police said the attack was racially motivated. A 19-year-old skinhead linked to white supremacist organizations was subsequently charged with aggravated assault and denied bail.²

These incidents are vivid illustrations of what is often called racist or racially motivated violence. However, because of the problems inherent in the concept of race,³ a more accurate definition is needed. Thus, terms such as hate-motivated violence, hate-motivated conduct, hate crimes, bias-motivated violence, or bias-motivated conduct, are generally used in this paper instead. This is, however, subject to one caveat: where reference is made to material that has used terms such as racist violence or racially motivated violence, those terms generally will be used in order to be consistent with the original author's terminology.

What is meant by the term "hate-motivated violence"? The term has been broadly defined. For example, the Australian Human Rights and Equal Opportunity Commission defined the term "racist violence" to include not only physical attacks upon a person but also verbal and nonverbal intimidation, harassment and incitement to racial hatred. This would include intimidating phone calls as well as threatening insults and gestures.⁴ Robin Oakley, in a consultant's report to the Council of Europe on racial violence and harassment, points out that while the popular image of racial violence involves acts of a serious criminal nature, such as murder or serious wounding of victims, nonetheless minor assaults and "non-physical" actions such as jostling, spitting, verbal and written abuse — unprovoked and repeated — constitute racial harassment that more forcefully contributes to the "everyday racism" that affects victims' lives.⁵ Given this context, the term "hate-motivated violence"

¹ I. Peritz, "Vandals deface seven synagogues with swastikas, anti-Semitic slogan", *The [Montreal] Gazette*, Tuesday, January 5, 1993, p. A1.

² R. DiManno, "The quiet dignity of a Tamil beaten by racists", *The Toronto Star*, Wednesday, June 16, 1993, p. A7.

³ These problems are discussed at pp. 29-30 of this paper.

⁴ Human Rights and Equal Opportunity Commission, Report of the National Inquiry into Racist Violence in Australia, *Racist Violence* (Canberra: Australian Government Publishing Service, 1991), pp. 10-13.

⁵ R. Oakley, *Racial Violence and Harassment in Europe*, a consultant's report prepared for the Council of Europe, ref. MG-CR (91) 3 rev.2 ([Strasbourg]: Council of Europe, [1993]), pp. 12-13.

at the very least covers conduct already caught by the present criminal law that is motivated by hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera. This would cover serious acts of violence against people or property, or threats of such violence. In this regard, many of the acts of harassment referred to above also would be caught by the present criminal law. Minor assaults, such as spitting on someone, are nonetheless assaults. Writing racist graffiti on someone's property without their consent would constitute the crime of mischief (commonly called vandalism). However, the extent to which the criminal law should be used to curtail racist activity, including acts of harassment, that is not already caught by the present criminal law, is not addressed by this paper. In particular, the following discussion does not address whether a crime of racist insult should be created. Nor does it address whether racist organizations should be criminalized. As well, it does not recommend changes to what are commonly known in Canadian criminal law as the crimes of hate propaganda. These issues involve the criminalization of activities, which involves carefully balancing the guarantees of freedom of expression and freedom of association found in the *Canadian Charter of Rights and Freedoms*⁶ with the need to uphold the right to equality and to protect human dignity. Therefore, these issues are best left to be examined by future research papers.

There is one other limitation on this study. It addresses criminal law solutions to the problem of hate-motivated violence. Hence, it does not address noncriminal remedies to address the problem, such as civil actions for damages, or remedies that could be provided under various human rights agencies.

Why is this an issue of sufficient importance to warrant study? First, there is rising concern about hate group activity in Canada. For example, the League for Human Rights of B'nai Brith Canada has for several years published an annual audit of anti-Semitic incidents that are reported to it. Table One of the 1992 *Audit of Anti-Semitic Incidents* shows a general increase in such incidents over the years, from 63 in 1982 to 196 in 1992.⁷ The 1992 Audit expressed concern over the bolder, more open activities of the far right, and pointed out that, while the League has had to react in recent years mostly to hate propaganda and recruitment efforts by these groups rather than to more violent forms of anti-Semitic

⁶ *Canadian Charter of Rights and Freedoms*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11, s. 2(b)(d).

⁷ League for Human Rights of B'nai Brith Canada, *1992 Audit of Anti-Semitic Incidents* (Downsview, Ont.: B'nai Brith Canada, 1993), Table 1, p. 5. The audit, on p. 3, states that incidents are classified into two categories: (a) vandalism, defined as an act involving physical damage to property, and (b) harassment, defined as any incident of abuse or threat directed against an individual, group or institution. Hate propaganda directed quite specifically at Jews is included in the harassment classification.

activity, the more extremist groups remain active and pose a threat of violence, and described major incidents of synagogue desecration.⁸

Attacks against homosexuals have been reported by others. For example, in Montreal, incidents of "gay-bashing" reported by the press include not only assaults but, in some cases, the killing of homosexuals.⁹ One Canadian legal commentator has recently stated that "[i]t is not hyperbole to assert that queer-bashing is a social phenomenon of epidemic proportions".¹⁰ As well, the police in some cities, including Ottawa and Toronto, have recently set up special units to investigate hate-motivated crimes.¹¹

⁸ *Ibid.*, pp. 5-6, 6-7, 11.

⁹ See S. Semenak, "Stabbing victim was dying of AIDS: Friends say killing was part of recent wave of attacks on gays", *The [Montreal] Gazette*, Tuesday, March 21, 1989, pp. A1-A2; S. Semenak, "Gay Bashing: Montreal gays say it's getting worse as gangs cruise streets for trouble", *The [Montreal] Gazette*, Monday, March 27, 1989, p. A5; A. Picard, "Hate slaying of gay man stuns Montreal: Police charge four neo-Nazi skinheads", *The [Toronto] Globe and Mail*, Friday, December 5, 1992, pp. A1-A2.

¹⁰ C. Petersen, "A Queer Response to Bashing: Legislating Against Hate" (1991) 15 *Queen's L. J.* p. 237.

¹¹ See M. McClintock, "Gays seek hate crime law", *The Ottawa Sunday Sun*, May 16, 1993, p. 10, which pointed out that since January, 1993, all complaints of attacks on homosexuals and other hate crimes have been followed up by the new Ottawa Police Bias Crimes Unit, which up to the date of the article had investigated five cases of attacks on gays; G. Swainson, "Hate crimes on rise, police say", *The Toronto Star*, Wednesday, June 16, 1993, p. A7, which stated that Metro police were expected to release a report to the Metro Police Services Board in July, 1993 showing that about 70 crimes related to race, nationality, religion or sexual orientation have been reported since February 1993.

Secondly, Canada is a multicultural, pluralistic nation. The demographic reality is that the proportion of immigrants living in Canada who were born in Asia as opposed to Europe has increased over the years,¹² and this trend apparently will intensify in the early part of the 21st century.¹³ Moreover, Canada has taken constitutional and other legal steps to recognize and protect this reality. For example, section 27 of the *Charter* provides that the "*Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians"; and in 1988, the federal government passed the *Canadian Multiculturalism Act*, which sets out the policy of the Canadian government in recognizing and promoting the multicultural heritage of Canada.¹⁴ In the realm of criminal law, the *Criminal Code* contains crimes of hate propaganda, designed to protect certain "identifiable groups" from the harm caused by hate propaganda.¹⁵ And yet, there is no other provision in the *Code* that specifically denounces hate-motivated conduct of a more immediate violent nature.

Given this context, hate-motivated violence should not be viewed as a marginal problem, but rather as a matter of serious concern that must be addressed in public policy.

¹² According to statistics compiled from the 1991 Census, although the share of the Canadian population made up of immigrants has remained relatively stable during the past several decades, there has been a change over the years concerning where immigrants have come from. Overall, in 1991 there were 5.3 million immigrants in Canada (defined as persons who are, or have been, landed immigrants in Canada) representing 16 percent of the total population. While the majority of the immigrant population was born in Europe, this proportion of the immigrant population declined from 62 percent in the 1986 Census to 55 percent in the 1991 Census. The percentage of immigrants born in Asia increased from 18 percent in 1986 to 25 percent in 1991. Almost one-half (48 percent) of recent immigrants who came to Canada between 1981 and 1991 were born in Asian countries. Over one-half (57 percent) of the immigrant population lived in one of the three largest metropolitan areas (Montreal, Toronto, and Vancouver). For the first time, the Census also counted nonpermanent residents (persons who held student or employment authorizations, Minister's permits or who were refugee claimants). There were 223,500 nonpermanent residents in 1991, representing slightly less than one percent of the population. Persons born in Asia represented the largest proportion (55 percent) of nonpermanent residents. Nearly three quarters (72 percent) of all nonpermanent residents lived in Toronto, Montreal, and Vancouver. Statistics Canada, *Census 91, Immigration and Citizenship: The Nation* (Ottawa: Statistics Canada, 1992), pp. 1-2. See also "The Daily", Statistics Canada, Tuesday, December 8, 1992, for a summary of this 1991 Census document.

¹³ See T. J. Samuel, *Visible Minorities in Canada: A Projection* (Toronto: Canadian Advertising Foundation, 1992). By Mr. Samuel's calculations, the number of visible minorities in Canada rose from 1.6 million in 1986 to about 2.6 million in 1991 and will rise to about 5.7 million in 2001 — an increase of over 3.5 times during the 15 years. The term "visible minority" is defined by Mr. Samuel as meaning persons who are nonwhite, non-Caucasian and nonaboriginal, comprising persons who trace their origins to Asia, Africa, the Caribbean, and Latin America.

¹⁴ *Canadian Multiculturalism Act*, R.S.C. 1985 (5th Supp.), c. 25.

¹⁵ *Criminal Code*, R.S.C. 1985, c. C-35, ss. 318-319.

What do we know about recent incidents of hate-motivated violence in Canada? How does the compiling of data in relation to such violence compare with that in other jurisdictions? What is known about those who commit such violence? How is our present criminal law attempting to combat such violence, and how has this attempt been received by interested parties? Indeed, how have other jurisdictions attempted to combat bias-motivated conduct? Are they ignoring this issue? Or are they taking measures — by enacting legislation or otherwise — to prevent such violence?

Whom should Parliament try to protect in combatting hate-motivated violence? In criminal law, the concept of race, along with other criteria, has been used in the hate propaganda legislation that is primarily intended to prevent the promotion of hatred against members of an "identifiable group". But is the concept of race a useful one? Should Parliament protect from such violence members of the same identifiable groups that are protected by the present hate propaganda legislation? Or should the identifying factors for protecting persons from hate-motivated violence be expanded? For example, should "sexual orientation" be added as an identifying factor?

The Rodney King incident in the United States serves as an example of the federal legal mechanisms that are available in that country to prosecute persons, including police officers, for violations of a person's civil rights where prosecutions pursuant to state penal laws have failed. What are the implications of the Rodney King incident for Canada? For example, would it be appropriate to provide a remedy in criminal law for the violation of a person's constitutional rights in Canada?

Finally, what options are available for combatting hate-motivated violence? For example, should the criminal law do nothing to respond to such violence? Should a federal hate crimes statistics statute be enacted that would result in the collection of hate crimes statistics nationally? Should the issue be addressed solely by means of sentencing procedures and, if so, how should these be constructed? Is it justifiable to treat hate-motivated violence as a separate crime from other, more general crimes, such as assault? If a crime (or crimes) of hate-motivated violence were to be created, how should such a crime be defined? For example, should it be restricted to only cover some criminal conduct or, generally, all criminal conduct? What should its *mens rea* requirement be? And should the awarding of punitive damages in relation to such crimes be permitted if possible? This paper will attempt to provide informed insight into these issues.

2.0 METHODOLOGY AND LITERATURE

2.1 Methodology

In researching the issue of hate-motivated criminal conduct, this study examined existing criminal law practice in Canada and certain foreign jurisdictions, relevant case law, legal periodicals relating to the topic, government publications (e.g., in England, documents published by the Home Office), proposals for reform in this area by national reform-minded agencies (e.g., the Law Reform Commission of Australia), publications by interested private organizations (e.g., the League for Human Rights of B'nai Brith Canada and the American Anti-Defamation League), and recent, selective newspaper articles about specific incidents of hate-motivated criminal conduct.

This examination was not confined to Canada for two reasons. First, the problem of hate-motivated criminal conduct is not confined to Canada. As recent events in other parts of the world have shown — from attacks on immigrants in Germany to ethnic cleansing in Bosnia — this is a problem that plagues the world. Confining the study only to Canada in light of these recent international events would lend an air of unreality to discussion of the problem. Secondly, the purpose of this paper is to consider carefully to what extent Canada's criminal law needs to be reformed to address the problem. In considering reform, it is necessary to examine how other jurisdictions have acted, or are considering acting, to combat the problem; they may serve as useful guides for reform of Canadian criminal law in this area.

An important question, however, is: What jurisdictions should be selected in examining possible avenues for reform? Those chosen were the United States, England, Australia, New Zealand, France, Germany and Sweden. The United States was chosen, not simply because of its geographic proximity to Canada, but because it is often a fertile source of reform in criminal law. The United States has most aggressively pursued a policy of combatting hate-motivated violence through the use of specific hate crimes legislation. England, Australia and New Zealand are Commonwealth countries with legal traditions similar to that of Canada, and whose legal responses to criminal law issues are often studied to assist in developing proposals for reform of Canadian criminal law. Germany, France and Sweden were selected as being reasonably representative of the approach of Western Europe in combatting hate-motivated violence.

2.2 Literature Review

Although little legal literature exists on the issue of hate-motivated crime in Canada, much has been written on this subject in recent years in other jurisdictions, such as the United States, England, and Australia. In the context of creating specific criminal legislation to combat bias-motivated violence, the most exhaustive and even the most critical literature is found in the United States.

This chapter focusses on certain aspects of the material studied: what is known about the incidence of hate-motivated conduct both in Canada and in some of the other jurisdictions studied, what is known about those who engage in this conduct, and what problems arise for those who favour increased use of the criminal law in this area, given this information. Other chapters will explore in greater detail other issues raised in examining this problem.

2.2.1 Data on Hate-motivated Violence

2.2.1.1 A Brief History of Hate-motivated Violence in Canada

Canada has a long history of hate-motivated violence towards racial or ethnic minorities. For example, in 1907 in Vancouver, a mob of whites attacked the Chinese and Japanese communities, causing at least extensive damage to stores and, it was claimed by one report, "several fatalities".¹⁶ During World War II, members of the Japanese Canadian community were interned and their property confiscated.¹⁷ In the 1970s, a series of subway attacks against members of the South Asian community

¹⁶ See W. Gleberzon, *Ethnicity and Violence: Racial Conflict in Vancouver* (unpublished, undated, on file at the Human Rights Library, Fauteux Hall, University of Ottawa) pp. 7-8.

¹⁷ See K. Adachi, *The Enemy That Never Was: A History of the Japanese Canadians* (Toronto: McClelland and Stewart, 1991), pp. 199-306. For additional reading on racism in Canada, see, e.g., S. Barrett, *Is God a Racist? The Right Wing in Canada* (Toronto: University of Toronto Press, 1987); O. McKague, ed., *Racism in Canada* (Saskatoon: Fifth House Publishers, 1991); P. S. Li, ed., *Race and Ethnic Relations in Canada* (Toronto: Oxford University Press, 1991); B. Singh Bolaria and P.S. Li, *Racial Oppression in Canada*, Enl. 2d ed. (Toronto: Garamond Press, 1988).

in Toronto helped to result in creation of a task force to study that problem.¹⁸ In a 1980 study on interracial conflict in Canada,¹⁹ Dhiru Patel pointed out that:

Historically, ... established leaders in Canadian society (both individual and institutional) have made key contributions to interracial violence, for example, to the anti-Chinese riot of 1887 and the anti-Chinese/Japanese riot of 1907 in Vancouver. In both cases, the local newspapers, respectable individuals (businessmen, clergymen, politicians) and organizations played a very prominent role in at least preparing the groundwork and instigating the violence, which claimed "scores" of Chinese lives. The timing of the riots seems to have been related to white workers' alleged fears of economic competition, especially at a time of recession²⁰

Patel agreed with studies which suggested that:

[R]acial violence in Canada cannot be explained sufficiently in terms of the "deviant-individual" or the impersonal "social-forces" perspectives alone. The earlier violence initiated by the dominant community against the Japanese and Chinese and the more recent violence against non-whites in Montreal, Toronto, and Vancouver are two cases in point: prominent, respectable individuals and social institutions and organizations played an important, if not a critical, role in the former

¹⁸ W. Pitman, *Now is Not Too Late* (Submitted to the Council of Metropolitan Toronto by Task Force on Human Relations) (Toronto: 1977). Pp. 91-92 of Pitman's report, the scenario of a racial attack is set out. (This scenario was compiled from 31 incidents where racial motivation appeared to be a factor.) Specifically, on p. 91, the report states:

In the vast majority of incidents reported and investigated, the victim did not know his assailant and had done nothing that could be reasonably construed as a provocation. Most of the victims were of Indian sub-continent origin, nearly all were males. All of the assailants were males and few were above the age of 22. Alcohol had usually been consumed by the assailant immediately prior to the attack. ... Assailants do appear to believe that their victims are more socially cohesive and "smarter with money" than they are. Assailants were always from low income families in our admittedly limited sampling, and virtually always had experienced the extended absence of the male parent while growing up.

¹⁹ D. Patel, *Dealing with Interracial Conflict: Policy Alternatives* (Montreal: Institute for Research on Public Policy, 1980).

²⁰ *Ibid.*, p. 9.

case, and the strength and pervasive nature of at least latent racism is indicated in the latter.²¹

2.2.1.2 Recent Canadian Data

One of the major difficulties in determining the extent of hate-motivated violence in Canada is that information on such incidents is not systematically collected and reported on a national scale. Thus, available data about such violence provide, arguably, a limited view of the scope of the problem. As noted earlier, the 1992 *Audit of Anti-Semitic Incidents* stated that 196 anti-Semitic incidents across Canada were reported to the League for Human Rights of B'nai Brith Canada that year. Although there was a 22 percent decrease over the preceding year, this decrease was expected, given the rash of anti-Semitic incidents that occurred during the Gulf War. These figures still constituted an 11 percent increase over 1989.²² Of the incidents reported in 1992, 56 involved acts of vandalism and 150 involved acts of harassment.²³ Of the acts of harassment (defined as any incident of abuse or threat directed against an individual, group or institution, including incidents of hate propaganda), three involved acts of violence and eight involved threats of violence, the remainder being incidents of slurs and hate propaganda.²⁴ The 1992 Audit also reported that a significantly large number of all types of incidents were directed at individuals, and that there was a disturbing rise in incidents directed at non-Jewish institutions, the latter indicating the increased efforts of hate groups to target high schools and universities and the average person on the street.²⁵

In the context of compiling incidents of hate-motivated conduct, it is useful to examine a 1991 research report prepared for the Economic Council of Canada, *Economic and Social Impacts of Immigration*.²⁶ The report analyzed the data of anti-Semitic incidents compiled by the B'nai Brith League for Human Rights from 1982 to 1989, a total of 615 incidents. The results of this analysis showed a strong

²¹ *Ibid.*, p. 11.

²² League for Human Rights of B'nai Brith Canada, *1992 Audit of Anti-Semitic Incidents* (Downsview, Ont.: B'nai Brith Canada, 1993), p. 5.

²³ *Ibid.*, Table 1, p. 4.

²⁴ *Ibid.*, Table 3, p. 9.

²⁵ *Ibid.*, p. 8.

²⁶ Economic Council of Canada, *Economic and Social Impacts of Immigration* (Ottawa: Minister of Supply and Services Canada, 1991).

positive correlation between the raw frequency of anti-Semitic incidents and the proportion of Jewish residents in the region. While the uncorrected number of anti-Semitic incidents showed no significant change over time, there was evidence of an increase over time in the number of incidents reported, once the effects of other variables (e.g., proportion of Jewish residents, unemployment rates) were taken into account.²⁷

In addition, the B'nai Brith League for Human Rights, in its report, *Skinheads in Canada and Their Link to the Far Right*,²⁸ outlined several incidents of neo-Nazi skinheads engaging in anti-Semitic activity (including assaults, threats, and desecration of synagogues) and concluded:

The Skinhead movement has become a serious threat to the Jewish community and the multicultural fabric of Canadian society. Their activities have become more organized, open, violent and pervasive. Communities from coast-to-coast are threatened.²⁹

Of course, evidence of anti-Semitic activity is but one aspect of hate-motivated activity in Canada. What about incidents of hate-motivated violence directed against members of visible minorities because of their race or colour of their skin?

To begin with, there are indications of systemic discrimination against members of visible minorities. In his recent report to the Ontario government following the riots in Toronto in the spring of 1992, Stephen Lewis asserted that, while every visible minority experienced the wounds of systemic discrimination throughout Southern Ontario, the root kind of racism to be dealt with was anti-black racism.³⁰ In the context of criminal justice reform, a consensus appears to have

²⁷ *Ibid.*, pp. 116-117. It should be pointed out that the report did recognize that it was possible that the results of its analysis of anti-Semitic incidents represented a reporting artifact — i.e., that it represented increased awareness of the interest of the B'nai Brith League for Human Rights in collecting such data, rather than a true increase in the level of anti-Semitism. The report noted that favouring this interpretation was the fact that when analysis was restricted to incidents involving some form of threat or violence (more serious incidents that were less likely to be subject to fluctuations in reporting levels) the results showed no evidence of a change over time. Nonetheless, the report, on p. 117, stated that the analysis of the data "is certainly a disquieting result that underlies the need for close monitoring of the situation".

²⁸ League for Human Rights of B'nai Brith Canada, *Skinheads in Canada and Their Link to the Far Right* (Downsview, Ont.: B'nai Brith Canada, 1990).

²⁹ *Ibid.*, pp. 22.

³⁰ S. Lewis, *Report to the Ontario Government on Race Relations* (Toronto: 1992), pp. 2-3.

developed that the treatment of aboriginal persons by the present criminal justice system has promoted inequitable, not equitable, treatment.³¹

But, assuming that systemic discrimination against visible minorities is a major problem in Canada, to what extent has that translated into bias-motivated violence against those minorities? Recently, Jeffrey Ross systematically studied the extent of right-wing violence in Canada, by studying newspaper clippings and similar sources for incidents of such violence taking place between 1960 and 1990. The incidents, totalling 159, covered only persons who had instigated violence or who were in direct confrontational activities, but did not include activities that only promoted violence. Nor did these include threats, harassment, or defacement of property such as cemetery desecrations. The results included the following:

- (a) Canada has consistently experienced a relatively annual low level of right-wing violence with two exceptions. During 1980-81, there were 23 incidents (accounting for almost 15 percent) and again in 1989 there were 27 events, (contributing to 17 percent) of the total number of events (159) in the 1960-90 period. Otherwise the number of attacks hovered around 5.3 incidents per year;
- (b) As regards the type of event for radical right-wing violence, more than half of the attacks (89) were directed specifically at people. These were mainly assaults, many of which occurred during protest situations, with the balance divided between bombings and other types of actions;
- (c) In descending order of frequency, the provinces of Ontario, Quebec, and British Columbia have experienced the overwhelming majority of right-wing incidents (96.9 percent). These events have occurred in provinces where the majority of Canadians, particularly large *émigré*, minority, and immigrant populations, live;
- (d) Most acts of right-wing violence were acts committed by individuals unaffiliated or not claiming membership with a particular group, or by groups not wishing to be publicly identified by their actions. The bulk of actions for which a culprit could be found have been executed in recent years by skinheads (26) while the remainder are equally divided between neo-fascist groups, such as the Western Guard, and anti-communist nationalists;

³¹ Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice* [Report 35] (Ottawa: Law Reform Commission of Canada, 1991).

- (e) The majority of attacks (58 events) are of a racist nature. In descending order of importance the attacks of an anti-communist/nationalist nature (56) and anti-Semitic ones (17) hold second and distant third place positions respectively;
- (f) In the three decades covered by this data set only six people were killed as a result of radical right-wing violence, i.e., only four percent of acts of this kind of violence ended in deaths to the participants (these included a Sikh restaurant worker killed on his way home from work in Vancouver, and a homosexual activist killed by skinheads in Montreal). One hundred and twelve people were injured as a result of radical right-wing violence in Canada. In order of frequency, the type of people injured were domestic noncombatants (73), police (18), foreign noncombatants (13), and radical right members (8). The majority of people attacked were of Canadian and not foreign citizenship;
- (g) As regards the categories of victims, the majority of them (57.5 percent) are protesters, members of an audience or passersby. In other words, few specific people have been targeted. Those hurt have been random. The majority hurt are Canadian citizens.³²

Ross therefore concludes that the amount of right-wing violence in Canada pales in comparison with that occurring in the United States, suggesting that policymakers, the media, and academics are overreacting to radical right-wing violence.³³

Given that incidents of right-wing or hate-motivated violence, according to Ross, do not appear to be numerous, one could argue that there is no substantial problem that requires a legislative response to such violence. In short, the problem of hate-motivated violence in Canada is not a major one, unlike in the United States, where the legacy of historically rooted institutional racism against blacks (such as slavery and later the separate-but-equal doctrine) has arguably produced a systemic racism, which the United States is striving to combat. Because there is no equivalent problem of hate-motivated violence like that in the United States, there is no need to follow the approach of several American states by creating specific criminal laws to deal with such violence.

However, the mere fact that reported incidents of hate-motivated violence are not numerous does not necessarily mean that the problem is not serious. First, such violence does occur, and in a multicultural nation like Canada, that in itself should

³² J. I. Ross, "Research Note: Contemporary Radical Right-Wing Violence in Canada: A Quantitative Analysis" (Autumn, 1992) *5 Terrorism and Political Violence* 72, No. 3, pp. 82-92.

³³ *Ibid.*, p. 93.

cause concern. Secondly, in the absence of mechanisms to obtain nationwide data about hate-motivated crimes, it is difficult to measure accurately the full scope of the problem. In short, present methods of data collection on hate-motivated violence in Canada make it difficult to determine the extent of such violence. It may well be asked: If a national inquiry were created to look specifically at the issue of hate-motivated violence in Canada, would it find the same degree of violence that was found in Australia by the national inquiry into racist violence by that country's Human Rights and Equal Opportunity Commission?³⁴ In fact, even where such mechanisms exist, a criticism made about the collection of data concerning racial harassment or racial violence is that persons who are the victims of such violence but who are wary of the police may not report these incidents.³⁵

2.2.1.3 Recent Foreign Data

Perhaps the best-known recent examples of hate-motivated attacks in a foreign jurisdiction have been those against immigrants and refugees in Germany, which have

³⁴ See Human Rights and Equal Opportunity Commission, Report of the National Inquiry into Racist Violence in Australia, *Racist Violence* (Canberra: Australian Government Publishing Service, 1991) [hereinafter *Racist Violence*]. That Commission announced its study into the problem in December, 1988, commissioned research papers on different aspects of racist violence in Australia, conducted public hearings into the issue, and issued its report in 1991. Among its findings, p. 387: "Racist violence is an endemic problem for Aboriginal and Torres Strait Islander people in all Australian States and Territories." and "Racist violence on the basis of ethnic identity in Australia is nowhere near the level that it is in many other countries. Nonetheless it exists at a level that causes concern and it could increase in intensity and extent unless addressed firmly now."

³⁵ See, e.g., P. Gordon, *Racial Violence and Harassment* 2nd ed. (London: Runnymede Trust, 1990), p. 6, which states about Britain:

It is impossible to be precise about the extent of racial violence if only because it is now established that a substantial proportion of all incidents of attack and harassment are not reported by the victims. The 1981 Home Office Report estimated that in any one year, about 7,000 incidents would be reported to the police in England and Wales, although it added that this was almost certainly an underestimate. Since then, the Policy Studies Institute survey of 'black and white Britain' has shown just how much of an underestimate this was.

The PSI survey, carried out in 1982, asked respondents not just about incidents which they had reported to the police, but about incidents which they had not reported. It found that in 60 percent of all cases no report was made to the police. On this basis, it concluded, the actual frequency of racial incidents could be as much as ten times that estimated by the 1981 Home Office survey which had been based only on incidents recorded by the police. ... (Colin Brown: *Black and White Britain: the third PSI survey*, Heinemann, 1985).

raised concerns about the growth of right-wing violence there.³⁶ But recent incidents of hate-motivated violence can be found in all other jurisdictions, including the United States, England, Australia, and other Western European countries. Many of these jurisdictions, unlike Canada, have taken steps, or have recommended taking steps, to obtain a more comprehensive national picture of the extent of hate-motivated violence in their countries. Consider, for example, the jurisdictions of the United States, England, Australia and France.

The United States

The FBI, in January 1993, released the first data available from its statistical program on hate crimes compiled under the federal *Hate Crime Statistics Act* of 1990.³⁷ These initial data were acknowledged to be limited. They covered the calendar year 1991 and were supplied by nearly 3,000 law enforcement agencies in 32 states. Hate crime occurrences were recorded by 27 percent of the 2,771 agencies participating; the remainder reported that no such offences came to their attention. A total of 5,558 hate crime incidents involving 5,775 offences were reported in 1991. Intimidation was the most frequently reported hate crime, accounting for one of three offences. Racial bias motivated six out of ten offences reported; religious bias, two out of ten; and ethnic and sexual orientation bias, each one out of ten. Bias against blacks accounted for 36 percent of the total, the highest percentage, followed by anti-white bias at 19 percent, and anti-Jewish bias at 17 percent.³⁸

Reporting of hate crimes is also required by some states. For example, the first full year of reporting hate crimes under the Florida *Hate Crimes Reporting*

³⁶ For example, in November, 1992, a woman and two girls of Turkish nationality in Mölln died after firebombs were thrown into their home, and in May, 1993, two young Turkish women and three girls died in Solingen after their house was set alight with petrol. S. Kinzer, "3 Turks Killed; Germans Blame a Neo-Nazi Plot", *The New York Times*, Tuesday, November 25, 1992, pp. A1, A7; E. Fuhr, "Girls' deaths in fire-bomb attack mark a new stage in far-right violence", reprinted in *The [Hamburg] German Tribune*, December 5, 1992, p. 5; A. Tomforde and D. Gow, "Turks riot after 5 die in house fire", *Manchester Guardian Weekly*, vol. 158, no. 25, week ending June 6, 1993, p. 7.

³⁷ These data are summarized in a newsletter from the United States FBI, undated, sent to the author in January, 1993.

³⁸ The report has been criticized for being incomplete because many local governments did not cooperate in sending data. See S. Labaton, "Poor Cooperation Deflates F.B.I. Report on Hate Crimes", *The New York Times*, Wednesday, January 6, 1993, p. A10. L. Duke, "With Gun and Flame, A Hate Crime Begins: FBI Probes Burning of Black Clerk in Florida", *The Washington Post*, Tuesday, January 7, 1993, p. A3, also briefly summarizes this data.

*Act*³⁹ was 1990. During that year, 259 incidents of racially motivated crime were reported. An analysis of these data revealed the following:

The typical hate crime is racially motivated, is committed by an adult male against another adult male, and is directed against the person. Words are the most frequent indicator of the hate motivation, and assault is most often the underlying offense. Most victims are white, and most offenders are white. When race of victim is matched to race of offender, there are slightly more blacks victimizing whites (53 percent) than whites victimizing blacks (39 percent). Given the proportion of whites to blacks in the population and further given the generally known pattern of racism against blacks, the unexpected finding that blacks victimize whites slightly more often than whites victimize blacks warrants some further investigation. Although there is no firm indication of it among the data at hand, it is possible that there is a racial differential in the way victims take advantage of the new hate crimes statutes. The finding might also be a function of the way the hate crime law is enforced.⁴⁰

England

In 1985, the Association of Chief of Police Officers (hereinafter referred to as the ACPO) in England and Wales issued a statement of "Guiding Principles Concerning Racial Attacks".⁴¹ Recognizing the need to deal with these racial attacks promptly and efficiently, and to monitor these incidents, the ACPO agreed upon an operational definition of a racially motivated incident as follows:

- (a) any incident in which it appears to the reporting or investigating officer that the complaint involves an element of racial motivation; or
- (b) any incident which includes an allegation of racial motivation made by any person.

³⁹ Fla. Stat. Ann. § 877.19 (West 1993 P.P.).

⁴⁰ E. H. Czajkoski, "Criminalizing Hate: An Empirical Assessment", (September, 1992) 56 *Federal Probation*, No. 3, p. 39.

⁴¹ These guiding principles are set out in Annex F of the Report of the Inter-Departmental Racial Attacks Group, *The Response to Racial Attacks and Harassment: Guidance for the Statutory Agencies* (London: Home Office, 1989). According to this report, at footnote 5, this definition was later adopted by the Association of Chief of Police Officers (Scotland) in 1987.

This broad definition recognized the need to include the perception of the victim as regards the attack as an important factor in determining if the incident was racially motivated. This definition is the one adopted by the Home Office, and all police forces in Great Britain now have defined procedures for recording and monitoring racial incidents.

Police statistics indicate an increase in reports of racially motivated attacks in Great Britain. A total of 6,559 incidents were reported to the police in England and Wales in 1990 according to the Home Office, compared with 5,383 incidents in 1988 and 5,055 in 1989. The total for Scotland was 299 in 1988, 376 in 1989, and 636 in 1990.⁴² Incidents of racially motivated attacks in 1992 included the crimes of murder and assault.⁴³

Australia

The Report of the National Inquiry into Racist Violence in Australia examined incidents of racist violence that have occurred recently in that country.⁴⁴ The report stated that the Peter Tan case was the most extreme example of alleged racist violence reported to the Inquiry. Peter Tan was a Perth taxi driver who was attacked without provocation by two juveniles, suffered horrific injuries to the head, and died. One of the offenders was charged. The accused told police, "I don't like Chinese, to start with, so I belted shit out of him." The youth, although charged with murder, was convicted instead of manslaughter, and received a sentence of only two years and five months.⁴⁵

The Inquiry, however, noted that no official statistics were kept to identify particular crimes as having a racial element, and that this had caused significant problems in estimating the extent of racist violence and responding to it. The Inquiry

⁴² These statistics are cited by P. Gordon, "Racial Incidents in Britain 1988-90: A Survey", in (April 1992) *The Runnymede Bulletin*, No. 255 (London: Runnymede Trust), pp. 7-9, according to figures released in *Hansard*, 3 June, 1991, 6 June, 1991 and 3 July, 1991.

⁴³ See H. Mills, "Knock on the door brings growing fear of racial abuse and attack", *The [London] Independent*, Monday, November 9, 1992, HOME 3. The article points out that in one part of South London, three racially motivated killings occurred within the past 18 months. See also P. Gordon, "Racist Violence and Racist Terrorism" in (September 1992) *The Runnymede Bulletin*, No. 258, (London: Runnymede Trust) who states, on p. 1, that "[t]his year alone so far, six people have died as a result of what appears to have been racially-motivated violence."

⁴⁴ *Racist Violence*, *supra*, footnote 19.

⁴⁵ *Ibid.*, pp. 157-158.

recommended that data on racially motivated offences should be collected and analyzed at both a state and federal level; that "uniform national procedures" needed to be developed for the collection of statistics on racist violence, intimidation and harassment; and that the results of such data collection should be analyzed and published annually to provide uniform information on the incidence of racially motivated crime in Australia.⁴⁶

France

In determining the extent of hate-motivated violence in France, a good starting point is the 1989 Report of the Commission nationale consultative des droits de l'homme on the struggle against racism and xenophobia in France, which is summarized by Robin Oakley in his consultant's report on racist violence and harassment to the Council of Europe. That 1989 report provided a systematic, statistical picture of the extent of racial violence and harassment in France from 1979 to 1989, tabulating officially recorded incidents for those years.⁴⁷

The report distinguished between incidents of "antisemitism" and "racism" (i.e., against immigrants) and also between "actions" and "threats" (menaces). The category "actions" covers personal assault, shooting, arson and damage to property; the category "threats" covers graffiti, leaflets and other written materials and telephone calls. While the pattern of incidents of anti-Semitism was different from that of racism, in that anti-Semitic incidents tended to oscillate unevenly over the previous ten years, there had been a resurgence of anti-Semitic activity during 1990, with the desecration of Jewish cemeteries. For the most part, however, this activity consisted of threats rather than actual physical violence.

In contrast, the pattern of recorded incidents of racism showed that there had been a general increase in this form of activity in France since 1982. Since 1982, between 56 and 70 "actions" had been recorded for each year. The level of "threats" was stable in the mid-1980s (around 100) but since 1987 had risen to 135 in 1988 and 237 in 1989. During those three years, six persons were killed and 120 injured as a result of incidents of racism, with around 80 percent of the recorded incidents having been aimed at Maghrebians.⁴⁸

⁴⁶ *Ibid.*, pp. 313-315.

⁴⁷ R. Oakley, *Racial Violence and Harassment in Europe*, a consultant's report to the Council of Europe, ref. MG-CR (91) 3 rev. 2 ([Strasbourg]: Council of Europe, [1993]), pp. 23-25.

⁴⁸ *Ibid.*, pp. 23-24.

By a 1990 law, the Commission must, on March 21 of each year, present to the government a report on racism that is immediately made public.⁴⁹ In its 1991 report, the Commission included statistics from the Ministry of the Interior which showed that in 1991 there were 91 racist actions, of which 50 were directed against Jews, 55 against Maghrebians, and 17 against others.⁵⁰

2.2.2 Analysis of Persons Who Commit Hate-motivated Violence

What do we know about those who commit hate-motivated crimes? Daniel Goleman, in an 1990 article for *The New York Times*, summarizes the findings of American scientists studying hate crimes, focussing on who commits such crimes, what motivates them, and exactly why people who would not commit violent crimes on their own act so freely in groups. These findings are:

- (a) They are far more lethal than other kinds of attacks, resulting in the hospitalization of their victims four times more often than is true for other assaults;
- (b) They are crimes of youth: most of those who perpetrate them are in their teens or 20's. But they are not crimes of youthful rebellion: those who carry them out are venting feelings shared by their families, friends and community;
- (c) The large majority are committed by people in groups of four or more. And the more people in the group, the more vicious the crime; and
- (d) They reflect the primal emotions aroused by love of one's own group. These deep feelings of group identity are particularly vivid in times of economic and political uncertainty and among people who suffered emotional neglect as children.⁵¹

Given these data, some legal commentators have questioned the utility of creating specific crimes of hate-motivated violence. It has been argued that the bias attack is seen by the perpetrator as a positive act that reinforces the attacker's love for

⁴⁹ Loi n° 90-615 du 13 juillet 1990, *Tendant à reprimer tout acte raciste, anti-sémite ou xénophobe*, JO 15 juill. 1990, p. 8333, Art. 2.

⁵⁰ Rapport de la Commission nationale consultative des droits de l'homme, *La Lutte Contre le Racisme et la Xénophobie 1991* (Paris: La Documentation française, 1992), pp. 17-26.

⁵¹ D. Goleman, "As Bias Crime Seems to Rise, Scientists Study Roots Of Racism", *The New York Times*, Tuesday, May 29, 1990, pp. C1, C5.

the group to which he or she belongs. Because of the "mindless" nature of the hate crime, hate crimes legislation has little, if any, general deterrent value and any special deterrent value depends upon the offender's disassociation from racist elements of his group following release, an unlikely rehabilitation.⁵²

It is also argued that hate crime laws might actually increase bigotry. As regards the offender, punishing a person for hate-motivated behaviour is unlikely to cure a person of his or her hate; if the offender goes to jail, the hatred will likely be reinforced, and the offender will probably feel very resentful towards the very group to which the victim belongs. As regards the larger population, one argument is that these laws may stir resentment of minorities among the larger population. For example, persons may believe that the minorities are being treated in a more favourable manner, leading to resentment like that of children who dislike a "teacher's pet". Another argument is that hate crimes legislation may act to disempower minorities, because it implies that minorities are incapable of holding their own without special protection. This may lead some members of the majority population to believe that there is something really wrong with the minorities. And, there is the danger that the hate crime laws may be used against minority members.⁵³

Ancillary problems are also pointed out. For example, there is the difficulty of drafting legislation in this context. As American legal commentator Susan Gellman argues, the drafting of an ethnic intimidation statute requires a series of "near Solomonic decisions", such as what types of bias to address: race, religion and ancestry only, or sex or sexual orientation as well? What types of behaviour should be included: symbolic acts such as cross-burning, or existing crimes committed with a bias motive? Should intraethnic as well as interethnic situations be covered? Should standards be subjective or objective? At what point does behaviour become criminal instead of merely being offensive? For example, is "slut" a sexist or a personal slur?⁵⁴

Another American legal commentator argues that a further problem with these crimes lies in proving that the accused was motivated by racism. In the absence of an

⁵² J. R. Berg, "State Legislators Battle Bigotry: Is the Ethnic Intimidation Law a Constitutionally Infirm and Ineffectual Weapon?" (1991) 20 *Capital Univ. L. Rev.* 971 pp. 990-992.

⁵³ P. Gerstenfeld, "Smile When You Call Me That!: The Problems with Punishing Hate Motivated Behavior" (1992) 10 *Behavioral Sciences and the Law*, pp. 280-285. For similar arguments, see S. Gellman, "Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws" (1991) 39 *UCLA L. Rev.* pp. 385-393.

⁵⁴ Gellman, *supra*, footnote 38, pp. 383.

explicit admission of racial motivation, inferences about motive would have to be drawn from circumstantial evidence, inferences that may be highly inaccurate given the inherent ambiguity of motive.⁵⁵ Prosecutors may have a difficult time proving racist motive because multiple motives may impel an individual to action, and the prosecutor may have difficulty proving the racial motivation in the face of the existence of other motivations.⁵⁶ As a result, it is contended that the requirement of proving motive has seriously undercut the efficacy of existing hate crimes. Prosecutors, rather than risk an acquittal on a charge under a hate crimes statute, often charge a person who has committed a crime evidencing racial motivation under traditional criminal law statutes. And, a jury's reliance on its own subjective intuitions about the motivations behind an individual's conduct may encourage arbitrary application of the statutes against disfavoured groups for whom the statutes were intended in the first place.⁵⁷

2.3 Summary

This chapter has shown that, historically, Canada has not been free of incidents of hate-motivated violence. Recent Canadian data on the scope of such violence have been limited in scope. For example, the League for Human Rights of B'nai Brith Canada audits anti-Semitic incidents that are reported to it. Jeffrey Ross's quantitative analysis of right-wing violence in Canada did not include an examination of incidents of hate-motivated vandalism such as cemetery desecration. Indeed, different conclusions have been expressed as to just how serious a problem such violence is, in the Canadian context. Nonetheless, Canadian data relating to hate-motivated conduct are not collected and reported systematically by police forces on a

⁵⁵ J. Morsch, "The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation" (Fall 1991) 82 *J. Crim. L. & Criminology*, No. 3, p. 667.

⁵⁶ *Ibid.*, p. 668. In this regard, in Canada, the shooting death of Leo Lachance illustrates the difficulty of proving racial motivation. Lachance, an aboriginal, was shot to death by Carney Nerland in Prince Alber Saskatchewan on January 28, 1991. Nerland had a long history of association with white supremacist groups, including being appointed head of the Church of Jesus Christ Christian-Aryan Nations in 1989. At sentencing on Nerland's plea of guilty to a manslaughter charge, the trial judge concluded that Nerland's political beliefs were not connected to the shooting on the facts of the case and so was not able to increase sentence as would have been possible had racial motivation been proved. Public concern over the outcome of this case resulted in the formation of a commission of inquiry to look into the shooting death of Leo Lachance. It reported, among other things, that the police and prosecution should have paid more attention to the possibility that Nerland's racism could have explained his reckless behavior in shooting Lachance. For a full analysis of this case, see *Report of Commission of Inquiry into the Shooting Death of Leo Lachance* (Saskatchewan, 1993) (Chair: E.N. Hughes).

⁵⁷ *Ibid.*, pp. 671-672.

national scale. In contrast to Canada, other jurisdictions, such as the United States, England and France, have put in place reporting mechanisms that provide a more comprehensive national picture of the scale of hate-motivated behaviour; or, like Australia, have created a national inquiry to examine the scope of such violence throughout the country.

As regards what such data reveal about those who commit hate crimes, certain American studies indicate that these crimes are more vicious than other kinds of attacks, that they are committed by youths, often in groups, and that they are committed by those who have strong feelings of group identity. This has led some American commentators to question the effectiveness of hate crimes legislation as a deterrent to hate-motivated conduct or as a means of decreasing the level of bigotry within society.

Nonetheless, in the Canadian context, the present law clearly views hate-motivated violence as serious criminal conduct deserving of greater punishment than that accorded the usual commission of a crime. This will be explored in more detail in the next chapter.

3.0 PRESENT LAW

3.1 Case Law and Proposals for Reform

Hate-motivated criminal conduct is not ignored by the present criminal law. For example, instances of assault or of damage to property motivated by the attacker's hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera, are treated more severely by the criminal courts for the purpose of sentence.

In *R. v. Ingram and Grimsdale*,⁵⁸ the accused persons, 21 and 18 years old respectively, had attacked a Mr. Kanji, a native of Tanzania who had recently arrived in Toronto. They initially assaulted him in a subway car, then, after he had left the car, followed him and pushed him off the subway platform onto the tracks below. The victim severely fractured both legs and suffered severe damage to the knee joints. The trial judge found that the attack was completely unprovoked and was racially motivated. The accused were convicted of assaulting Mr. Kanji and causing him bodily harm. The trial judge imposed a sentence of 23 months' imprisonment on Ingram and 16 months' imprisonment on Grimsdale. The Crown appealed the sentence. Dubin J.A. held that the trial judge erred in failing to hold that the racial motivation for the attack was an aggravating factor to be taken into account at the sentencing stage, just as it would be an aggravating factor if the victim were elderly, feeble or retarded.⁵⁹ He asserted that an assault that is racially motivated attacks the very fabric of Canadian society by eroding the fundamental principle that every member of society must respect the dignity, privacy and person of the other; that it renders the offence more heinous; that such offences invite imitation and repetition and incite retaliation; and that this danger is even greater in a multicultural, pluralistic, urban society. The sentence to be imposed in such a case must be one that expresses the public's abhorrence for such conduct and its refusal to countenance it.⁶⁰ Accordingly, the sentence was increased, to a term of two and one-half years' imprisonment for Ingram, apparently the more aggressive of the two, and a term of two years' imprisonment for Grimsdale.

⁵⁸ *R. v. Ingram and Grimsdale* (1977), 35 C.C.C. (2d) 376 (Ont. C.A.).

⁵⁹ *Ibid.*, p. 377.

⁶⁰ *Ibid.*, p. 379.

In *R. v. Lelas*,⁶¹ the accused had pleaded guilty at trial to three charges of mischief to property, the value of which exceeded \$1,000. The accused and a companion had taken cans of spray paint and used them to paint swastikas on a nearby synagogue, a Hebrew school, and an automobile. The accused, 22 years old, had been involved in several white supremacist groups, and subscribed to the teachings of Ernst Zundel, which claimed that the Holocaust was a hoax. After this incident, there was an outbreak of the daubing of swastikas on synagogues across Canada. The accused had cooperated with the police, had admitted to the crimes, and had apologized to the Jewish community. At trial, he was sentenced to six months' imprisonment concurrent on each charge, together with two years' probation. On appeal of the sentence, Houlden J.A. argued that an offence that is directed against a particular racial or religious group is more heinous, as it attacks the very fabric of our society; that several similar incidents occurred within a brief period of time after the commission of these offences; that the desecration of a place of worship is a serious matter, because it not only damages the physical structures of the buildings but also causes emotional injury and upset to the members of the congregation; and that the accused's acts were done to strike fear and terror and to cause emotional upset to the Jewish community.⁶² "When mischief is racially or religiously motivated and is done to cause emotional injury or shock to a particular segment of Canadian society, it calls for a far more severe penalty than mischief which is done merely to damage property."⁶³ Accordingly, the sentence was increased to imprisonment for one year concurrent on each count, with the probation order to stand.

In *R. v. Simms*,⁶⁴ the accused Simms and others went to the home of a Mr. Rutherford who, the accused believed, some 30 years before had broadcast a tape that identified a person as a member of the S.S., and the broadcasting of which, the accused believed, had caused the person so identified to commit suicide. At Mr. Rutherford's house, the accused and another person, Swanson, attacked the victim. Simms kicked at Mr. Rutherford while Swanson struck him in the head with a stick. As a result of the blow, the victim suffered permanent blindness in one eye. Simms claimed that he belonged to several white supremacist and fascist organizations. At trial, he was given a sentence of 60 days' imprisonment on a guilty plea to simple assault, while Swanson was given a sentence of five months' imprisonment on a guilty plea to aggravated assault. The majority of the court held that the racially inspired

⁶¹ *R. v. Lelas* (1990), 41 O.A.C. 73.

⁶² *Ibid.*, p. 77.

⁶³ *Ibid.*, p. 77.

⁶⁴ *R. v. Simms* (1990), 66 C.C.C. (3d) 599 (Alta. C.A.).

assault required strong deterrent sentences and therefore increased the sentence to 12 months' imprisonment for Simms and 18 months' imprisonment for Swanson.⁶⁵

These cases clearly show that the fact that an accused was motivated to commit a crime by reason of hatred of a person's actual or perceived race, religion, colour, ethnic origin, et cetera, is an aggravating factor that should be used by judges to increase the term of imprisonment at the sentencing stage.

What are the potential advantages or disadvantages of dealing with hateful motivation at the sentencing stage? One reason that the British government uses for not creating a crime of racial harassment is that it would mean that prosecutors would have to prove the element of racial motivation, making it difficult to obtain convictions.⁶⁶ Admittedly, this is true. But assuming that a prosecutor seeks to increase the penalty for a crime because an accused acted out of hateful motivation, evidence of such motivation must be produced. If introduction of evidence of hateful motivation is sought at the sentencing stage, and the accused objects to the evidence of such motivation, is a lesser standard of proof needed than would be required at trial?

Applying general sentencing principles, the answer to this is clearly no. In *R. v. Gardiner*,⁶⁷ the Supreme Court of Canada held that any facts relied upon by the Crown in aggravation at the sentencing hearing, if contested by the accused, must be proved beyond a reasonable doubt, not by the civil standard of proof on the balance of probabilities.

However, it should be pointed out that the Court in *Gardiner* also stated that the strict rules that govern at trial do not apply at a sentencing hearing, and, more particularly, that the hearsay rule does not govern the sentencing hearing. "Hearsay evidence may be accepted where found to be credible and trustworthy."⁶⁸ Thus, it

⁶⁵ *Ibid.*, pp. 507-508. Harradence J.A., who would have imposed a lesser sentence than the other judges, stated nonetheless that the accused were motivated to attend at the home of the victim by the philosophy espoused by the white supremacist groups with which the accused were associated and that that philosophy not only condoned but extolled violence against those perceived to be opposed to that philosophy. Such conduct, in his view, had to be sternly denounced by the courts. *Ibid.*, pp. 506-507.

For a brief discussion of present protections offered by the *Criminal Code* in combatting racially motivated violence, see T. Cohen, *Race Relations and the Law* ([Canadian Jewish Congress], 1988), pp. 122-124.

⁶⁶ See pp. 45-46 of this paper.

⁶⁷ *R. v. Gardiner*, [1982] 2 S.C.R. 368, 68 C.C.C. (2d) 577.

⁶⁸ *Ibid.*, per Dickson J. (as he then was), p. 414 (S.C.R.).

appears that, although the Crown must prove disputed circumstances beyond a reasonable doubt, such proof may be met by the use of hearsay evidence,⁶⁹ although there is some dispute on the issue at least as regards the voluntariness rule in respect of a statement made to a person in authority.⁷⁰

Thus, an advantage of dealing with the issue of hateful motivation at the sentencing stage appears to be that evidence of such motivation may be proved beyond reasonable doubt by hearsay. But it may be asked if this is a substantial advantage over introducing such evidence at trial. Evidence of an accused's motivation could include statements made at the time of the attack, evidence of belonging to or sympathizing with white supremacist or neo-fascist organizations, et cetera. Arguably, the introduction of such evidence at the trial stage will prove to be no great disadvantage to the prosecution (given that at the sentencing stage, such evidence, if disputed, requires proof beyond a reasonable doubt in any event), and will have the decided advantage of placing the accused's hateful motivation up-front in the trial itself.

In the specific context of hate-motivated crimes, it has been advocated that the present law's approach is unsatisfactory and should be changed to denounce such motivation more forcefully. For example, in the Parliamentary Committee Report *Equality Now!*⁷¹, it was argued that racially motivated crimes must be punished and must be seen by the public to be severely dealt with. It therefore recommended that "Justice Canada should prepare amendments to the *Criminal Code* to allow judges to impose an additional consecutive sentence when the principal criminal act is racially motivated."⁷² The response of the Minister of Justice was to agree with the aim of the proposal, but not with the means put forward to implement it. The Minister stated that the then recently created Canadian Sentencing Commission would be asked

⁶⁹ See, e.g., *R. v. Wilcox* (1988), 53 C.C.C. (3d) (N.W.T.S.Ct.) (hearsay evidence of damage estimates allowed); *R. v. Boyd* (1983), 8 C.C.C.(3d) 153 (B.C.C.A) (at a dangerous offender proceeding, there was no need to prove that the accused's statements to psychiatrists were voluntarily made).

⁷⁰ See the decision of Anderson J.A., dissenting in part, in *Boyd*, *ibid.*, pp. 158-159.

⁷¹ Canada, House of Commons, Report of the Special Committee on Visible Minorities in Canadian Society, *Equality Now!* (Ottawa: 1985) (Chair: B. Daudlin).

⁷² *Ibid.*, pp. 73-75. It was also pointed out there that the Ontario Attorney General had issued guidelines to crown attorneys to assist them in prosecuting criminal offences with a racial component. The Committee suggested that all attorneys general should issue similar guidelines to their crown attorneys so that racially motivated crimes were effectively dealt with, which could include community service, compensation and restitution to the visible minority community or individual.

to consider the case of racially motivated crimes in examining the possibility of establishing sentencing guidelines to reduce disparity among sentences.⁷³

The Sentencing Commission, in existence from 1985 to 1987, proposed a series of reforms that included the creation of a permanent Sentencing Commission and presumptive sentencing guidelines that could be departed from in accordance with a series of primary aggravating (or mitigating) factors.⁷⁴ The list of primary aggravating factors included the "[p]resence of actual or threatened violence", "[m]anifestation of excessive cruelty towards victim", and "[v]ulnerability of the victim, due, for example, to age or infirmity".⁷⁵ However, no primary aggravating factor was suggested that focussed exclusively on the fact that the accused was motivated by hatred of the victim's actual or perceived race, colour, religion, ethnic origin, et cetera.⁷⁶ And, to date, no sentencing guidelines have been created.

Nonetheless, interested organizations continue to press for reform in this area that would involve amending the *Criminal Code* to denounce hate-motivated violence more forcefully. For example, B'nai Brith Canada argues that, among reforms that should be made to the criminal law regarding hate-motivated violence, the principle that hateful motivation be used as an aggravating factor to increase sentence should be codified, possibly as an add-on sentence akin to the provision in the *Code* that creates a consecutive sentence where a firearm was used in the commission of a crime (*Code* section 85); that specific various hate crimes be created (e.g., where the act is one of

⁷³ Canada, *Response of the Government of Canada to Equality Now!* (Ottawa: Ministry of Supply and Services Canada, 1985), p. 17. The concept of a consecutive sentence being imposed in the case of a racially motivated crime was also rejected by the Canadian Bar Association's Special Committee on Racial and Religious Hatred, which supported instead referring the issue of guidelines for sentencing to the Sentencing Commission. See Special Committee on Racial and Religious Hatred, *Hatred and the Law* (Winnipeg: Canadian Bar Association, 1985), p. 14-15.

⁷⁴ Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Minister of Supply and Services Canada, 1987).

⁷⁵ *Ibid.*, p. 320.

⁷⁶ The Commission, however, did point out that the list was not exhaustive and that other circumstances may be invoked in justifying a departure from the guidelines (although it added that its primary list was based on extensive research into the jurisprudence). *Ibid.*, pp. 320-321. Consistent with the fact that the list was not exhaustive, the Commission added that "the personal circumstances or characteristics of an offender should be considered as an aggravating factor only when they relate directly to the commission of the offence". *Ibid.*, p. 322. If an accused committed a crime by reason of hateful motivation, it appears that that would amount to a personal characteristic of an offender that should be considered as an aggravating factor. The guidelines and the list of aggravating factors were not intended to be enacted as legislation. Instead, the proposal was that they be tabled in Parliament by the Minister of Justice, where, unless objected to by means of a negative resolution of the House of Commons, they would come into force after a short passage of time. *Ibid.*, pp. 305-309.

vandalism against a synagogue, mosque, Sikh temple or church); and that a hate crimes statistics act, similar to that enacted in the United States, should be created.⁷⁷ Also, a national symposium on women, law and the administration of justice recommended that the *Criminal Code* be amended, in part, to provide that acts of racism be deemed to be aggravating factors in the commission of a crime.⁷⁸

3.2 Summary

This chapter has shown how our criminal law now combats cases of hate-motivated violence. Case law, arising out of appeals to higher courts where a lesser sentence had originally been imposed by the trial court, has led to this sentencing principle: evidence of criminal conduct motivated by hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera, constitutes an aggravating factor that increases the penalty at the sentencing stage for committing the basic crime. A crime committed because of such motivation is seen as being particularly heinous because it attacks the very fabric of a multicultural, pluralistic society.

However, the way the present law addresses such behaviour has been criticized. The major criticism is that a more public condemnation of such conduct is needed. As a result, some have argued the need for amendments to the *Criminal Code*, such as an amendment that would allow the court to impose a consecutive sentence where it is proved the crime was racially motivated, as well as for the creation of a crime or crimes of hate-motivated behaviour, such as a crime of vandalism of a religious institution.

In the chapters to follow, this paper will examine options for reform of the criminal law in combatting hate-motivated violence, beginning with what perhaps is the first question that should be considered: However the criminal law should be reformed to better combat hate-motivated violence, whom should the criminal law protect?

⁷⁷ These proposals are outlined in a memorandum to the author from Mr. Ian Kagedan, Director of Government Relations, B'nai Brith Canada, dated July 7, 1993.

⁷⁸ Canada, Department of Justice, National Symposium on Women, Law and the Administration of Justice (1991: Vancouver, B.C.), vol. 2, *Recommendations from the Symposium* (Ottawa: Minister of Supply and Services Canada, 1992), p. 150.

4.0 WHO SHOULD BE PROTECTED?

4.1 Problems and Issues in Deciding Whom to Protect

Although the term racist violence or racially motivated violence is often used to describe criminal conduct motivated by a person's actual or perceived hatred of a victim's race, ethnic origin, religion, et cetera, there are nonetheless difficulties with the concept of race.

In the realm of anthropology, there appears to be a prevailing view that the concept of race is a useless one. For example, Ashley Montagu claims that "[t]he idea of 'race' represents one of the most dangerous myths of our time"⁷⁹ Montagu explains that there are generally three major population groups — the Negroid or black, the Caucasoid or white, and the Mongoloid. However, it is preferable to call these major groups rather than races. The use of the term "major group" is purely arbitrary, indicating only that the likenesses in certain characters exhibited by some populations appear to link more closely than to other populations.⁸⁰ On the other hand, as David Goldberg points out, the primary contemporary uses of "race" assume significance in terms of class or culture. Of the two, since World War II, the cultural conception of race has come to enjoy considerable commitment, though not without controversy. Generally, the cultural conception includes identifying race with language group, religion, group habits, mores or customs.⁸¹

Given the difficulties associated with the concept of race, it may be asked why the concept is used in modern legislation at all. The answer is that race is used in this context not to promote the idea of racial superiority but to attack it. Nonetheless, a crime of racial motivation, if interpreted strictly in accordance with "race" in its biological meaning — assuming that race has such a meaning — would include only those large population groups referred to earlier: generally, the Mongoloid, the Negroid, and the Caucasoid. To avoid such a restrictive interpretation, legislation

⁷⁹ A. Montagu, *Man's Most Dangerous Myth: The Fallacy of Race*, 4th ed. (Cleveland, Ohio: World Publishing Co., 1964), p. 23. He adds, on p. 24, that the myth of race refers not to the fact that physically distinguishable populations of man exist, but the belief that physical and mental traits are linked, and that the physical differences are associated with differences in mental capacities.

⁸⁰ *Ibid.*, pp. 24-28. See, as well, A. Montagu, *Statement on Race: An Annotated Elaboration and Exposition of the Four Statements on Race Issued by the United Nations Educational, Scientific, and Cultural Organization*, 3d ed. (New York: Oxford University Press, 1972), pp. 7-13.

⁸¹ D. Goldberg, "The Semantics of Race" (October 1992), 15 *Ethnic and Racial Studies*, No. 4, pp. 546-553.

that aims to prosecute hatemongers has additional criteria in order to protect a broader range of groups.⁸²

In Canadian criminal law, the crimes of hate propaganda (set out in *Code*, sections 318-319) are the only crimes that are designed to protect certain groups from certain hateful conduct. More specifically, they protect certain identifiable groups from, generally, the destructive effects of wilful promotion of hatred.⁸³ Section 318(4) defines "identifiable group" as meaning "any section of the public distinguished by colour, race, religion, or ethnic origin."

Assuming that additional measures should be taken to combat hate-motivated violence (e.g., by using sentencing guidelines or a *Code* amendment to set out that hateful motivation is an aggravating factor that increases penalty, or by creating a crime or crimes of hate-motivated violence), it seems appropriate that such measures at least protect the same groups that are currently set out in *Code*, section 318(4). There are two reasons for using the present definition of "identifiable group" as a starting point. First, as a policy matter, Parliament has already decided that those groups are particularly vulnerable to hate propaganda attacks. If members of such groups are protected from venomous speech, it appears even more appropriate that they be protected when the criminal conduct consists, not of speech, but of acts of violence against them or their property. Secondly, providing protection to members of the same groups promotes a consistency of approach in the criminal law.

A more difficult issue, however, is whether or not the present list of identifying factors set out in section 318(4) is too narrow in scope. Should other factors be included that are not now in the definition of "identifiable group"?

The United States provides a useful guide as to the variety of groups that may be singled out for protection by hate crimes legislation. A majority of the states have

⁸² For example, in *King-Ansell v. Police*, [1979] 2 N.Z.L.R. 531 (C.A.), the New Zealand Court of Appeal held that the Jews of New Zealand were an "ethnic group" so as to permit prosecution of the leader of the National Socialist Party of New Zealand for intentionally exciting ill-will against them where the statute protected groups identifiable on the basis of "colour, race, or ethnic or national origins". And in England, the courts have held, in civil discrimination suits under the *Race Relations Act 1976*, that Sikhs and "gipsies" qualify as a protected "ethnic group" under a definition of "racial group" that means a group of persons "defined by reference to colour, race, nationality or ethnic or national origins". See *Mandla v. Dowell Lee*, [1983] 1 All. E.R. 1062 (H.L.); *Commission for Racial Equality v. Dutton*, [1989] 1 All. E. R. 306 (C.A., Civil Division). In all these cases, the courts refused to interpret the term "ethnic group" in a manner pertaining to a narrow biological definition of "race".

⁸³ These crimes are (a) advocating or promoting genocide (b) inciting hatred in a public place where such incitement is likely to lead to a breach of the peace and (c) wilfully promoting hatred, other than by private communication, against an "identifiable group".

legislated hate-motivated crimes of some sort, and the majority of these statutes are based on, or similar to, model legislation proposed by the American Anti-Defamation League (hereinafter referred to as the ADL). This model legislation proposes, in part, a crime of intimidation if a person commits certain basic crimes "by reason of the actual or perceived race, colour, religion, national origin or sexual orientation of another individual or group of individuals".⁸⁴ Thus, it includes "national origin" and "sexual orientation" as identifying factors. While most states use the criteria of "race, religion and ethnicity" as factors in defining the accused's motivation, some states also add "sexual orientation" and "gender" as factors. A minority of states also include other factors such as "mental or physical disability or handicap", "age", and even "political affiliation".⁸⁵

Thus, the groups or members of groups that are protected by American state penal law relating to bias-motivated conduct do not fall within the narrow biological concept of race. In fact, the terminology used to describe these types of crimes is not uniform. For example, legal commentators use phrases to define this kind of crime that range from "ethnic intimidation laws",⁸⁶ to "bias crimes",⁸⁷ to "hate-motivated behaviour",⁸⁸ to "racially-motivated violence".⁸⁹

The broad range of groups covered by the bias crimes of various American states raises an important question: On what basis should our criminal law protect members of certain groups? One possible principle is that it is wrong for an attacker to select victims on the basis of certain immutable characteristics over which they have no control. Factors such as colour, race, ethnic origin and sex fall within the

⁸⁴ Anti-Defamation League of B'nai Brith, ADL Law Report, *Hate Crimes Statutes: A 1991 Status Report* (New York: Anti-Defamation League, 1992), p. 4.

⁸⁵ According to Appendix B of the above report, *ibid.*, pp. 22-23, 28 states as of 1991 included "race", "religion" and "ethnicity" as factors in defining motivation for their bias intimidation crimes; 13 states included "sexual orientation" as a factor in defining motivation; ten states included "gender" as a factor in defining motivation; eight states included "mental or physical disability or handicap" as a factor in defining motivation; two states included "age" as a factor in defining motivation; and three states included "political affiliation" as a factor in defining motivation.

⁸⁶ See, e.g., S. Gellman, "Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws" (1991) 39 *UCLA L. Rev.*, p. 333.

⁸⁷ See, e.g., P. Finn, "Bias Crime: Difficult to Define, Difficult to Prosecute" (Summer, 1988) 3 *Criminal Justice*, No. 2, p. 19.

⁸⁸ See, e.g., P. Gerstenfeld, "Smile When you Call me That!: The Problem With Punishing Hate Motivated Behaviour" (1992) 10 *Behavioral Sciences and the Law*, p. 259.

⁸⁹ See, e.g., G. L. Padgett, "Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies" (1984) 75 *J. Crim. L. & Criminology*, No. 1, p. 103.

scope of this principle. So also do other factors such as age, or mental or physical disability. However, this principle would obviously be too narrow, because it would not cover a person's religion (since a person, in theory, can change his or her religion). Another principle could be that the *Code* should protect members of those groups who are at risk of being physically attacked because of their membership in the group. This, for example, would protect gays or lesbians, although not necessarily the aged (in the latter case, there is little evidence of criminal attacks against the elderly on the basis that the attackers hate the elderly). The difficulty with using this as an organizing principle is that, although history and the present may indicate what groups could be at risk of violence now, it is difficult to predict what groups would be at risk of violence in the future. For example, in a population that is growing older, is it possible that, in the future, hatred may build up among the young towards the elderly for using too many resources at the expense of the young?

In this context, Canadian proposals for reform concerning the definition of "identifiable group" for the crimes of hate propaganda are useful. Specifically, the Law Reform Commission of Canada noted the difficulty of adhering to a general principle in determining which groups should be protected by those crimes, and recognized that an ad hoc list of groups would have to be created. The Commission recommended that the definition be expanded to include the specifically enumerated criteria of "colour, race, ethnic origin, religion, national origin, sex, age, or mental or physical disability" set out in the equality guarantee of subsection 15(1) of the *Charter*.⁹⁰ Given that the *Charter* guarantees members of such groups protection from discrimination, it is arguable that any criminal law initiatives to combat hate-motivated violence (against people or property) should protect members of these same groups.

Arguably, though, such a proposal raises two issues. First, what conduct would be caught if the definition of "identifiable group" were expanded to include "sex" as a protected category? If "sex" were to be included as a criterion, then misogynists who commit crimes against women would face an increased penalty for committing crimes motivated by hatred of the victim's gender. It may be argued that including gender as a factor in defining hate-motivated criminal conduct is

⁹⁰ Law Reform Commission of Canada, *Hate Propaganda* [Working Paper 60] (Ottawa: Law Reform Commission of Canada, 1986) pp. 31-33, rec. 1 at 40; Law Reform Commission of Canada, *Recodifying Criminal Law (Revised and Enlarged Edition of Report 30)* [Report 31] (Ottawa: Law Reform Commission of Canada, 1987) s. 1(2) p. 11. As well, the Commission, in its *Hate Propaganda* Working Paper, welcomed public feedback on the issue of whether or not to expand the definition to include the concept of "sexual orientation", while acknowledging that there was justification to include that concept on the basis that homosexuals had been victims of violence in the past. However, in its final proposals on the definition of the crimes of hate propaganda in Report 31, p. 11, "sexual orientation" was not included as a factor in defining the term "identifiable".

unnecessary, given that the present *Code* already has created specific crimes of sexual assault.⁹¹ Much literature surrounding rape and sexual assault suggests that acts of sexual violence committed by men against women are perpetrated, not for the purpose of sexual gratification, but to assert power and dominance over women.⁹² Does this mean that sexual assaults are motivated by hatred of women, so that, say, the creation of a separate crime of hate-motivated assault that included "sex" as a criterion would duplicate the crimes of sexual assault? Assuming such overlap exists, prosecutions for sexual assault would no doubt continue to be prosecuted under the sexual assault provisions, because they are specifically designed to address sexual assaults and so are designed in such a way as to properly balance the rights of an accused with the right of women to be treated fairly and with dignity by the criminal justice system. Moreover, what this argument ignores is the possibility of violent attacks made against women, motivated by hatred of women, that are not sexual assaults. Such attacks could result in an increased penalty as a hate-motivated act of violence if "sex" were included as an identifying factor.

Secondly, should measures taken by the criminal law to protect against hate-motivated violence protect a person identifiable on the basis of "sexual orientation"? As noted earlier, in Canada, homosexuals have been selected as targets of violence, and there is concern that "gay-bashing" is reaching epidemic proportions.⁹³ In the United States, the first national study focussing exclusively on anti-gay violence was conducted by the National Gay and Lesbian Task Force in 1984. The study sampled 1,420 gay men and 654 lesbians in eight American cities. Among those surveyed, 19 percent reported having been punched, hit, kicked or beaten at least once in their lives because of their sexual orientation. Forty-four percent had been threatened with physical violence and 94 percent experienced some type of victimization (including verbal abuse, physical assault, police abuse, weapon assault, vandalism, and/or being spat upon, chased or followed, or pelted with objects). As well, 70 homicides involving gay victims were reported to the Task Force by local organizations for the year 1988. Of these, 22 were classified as unambiguously anti-gay by local groups or police. And, anti-gay murders were often marked by extreme brutality.⁹⁴

⁹¹ See *Code*, sections 271-273, creating the crimes of sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, and aggravated sexual assault.

⁹² See S. Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Bantam Books, 1976); L. M. G. Clark & D. J. Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Educational Press, 1977).

⁹³ See pp. 3-4 of this paper.

⁹⁴ K. T. Berrill, "Anti-Gay Violence and Victimization in the United States: An Overview" (September, 1990) 5 *Journal of Interpersonal Violence*, No. 3, p. 274. The article is contained in a special issue entitled "Violence against Lesbians and Gay Men: Issues for Research, Practice, and Policy". See also J. Peters, "When

Given the fact of hate-motivated violence against homosexuals, it appears most appropriate to include "sexual orientation" as a criterion for protecting members of certain groups in any definition of hate-motivated violence.

4.2 Summary

This chapter focussed on this issue: Members of which groups should be protected from hate-motivated violence? The chapter first examined the difficulties associated with the concept of race, and surveyed the use of other criteria in addition to race that are used to protect certain groups from harmful conduct. It examined whether or not there is an overarching principle that can be applied to determine which groups to select for this purpose. Is it that persons should not be selected as victims of crime because of someone's hatred of immutable characteristics? Or should the issue focus on those groups most at risk of violence in our society? The chapter argued that it is difficult to apply a single principle, and that an ad hoc list of criteria may be the best approach available.

At the very least, it is argued that protection from hate crimes should apply to members of an "identifiable group" as now defined for the purpose of the hate propaganda legislation — that is, "any section of the public distinguished by colour, race, religion or ethnic origin". However, this is arguably too narrow a list of criteria. A better list would be one that includes those criteria specifically set out in the equality guarantee of subsection 15(1) of the *Charter* — that is, those of "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". In addition, it is strongly argued that "sexual orientation" should be included in this list of criteria, given the fact that homosexuals are at risk of physical violence for no other reason than that they are homosexual.

Given that members of certain groups should be protected from hate-motivated violence, is the present law the most satisfactory way of ensuring this aim? One way of answering this question is to compare the present approach taken by Canadian criminal law with that taken by other jurisdictions. The next chapter examines how certain foreign jurisdictions tackle the problem of hate-motivated violence.

5.0 FOREIGN JURISDICTIONS

In assessing the appropriate response of Canadian criminal law to bias-motivated violence, it is useful to find out to what extent other jurisdictions have taken measures to combat such violence. Although not necessarily determinative to the issue, their responses to this problem may indicate directions for reform that Canada might follow.

5.1 The United States

Of all foreign jurisdictions, the United States has most aggressively pursued a policy of legislating specific crimes to combat hate-motivated conduct, responding to such violence at both the federal and state level.

5.1.1 Federal Law

5.1.1.1 The *Hate Crime Statistics Act* of 1990

In 1985, a variety of concerned groups, from the Anti-Defamation League of B'Nai Brith, to the National Gay and Lesbian Task Force, to police organizations, argued the need to gather national statistics on hate crimes. Implementation of the legislation was delayed because of opposition by right-wing conservatives to the inclusion of statistics on violence against gays and lesbians.⁹⁵ The *Hate Crime Statistics Act* was finally passed in 1990.

Briefly, the federal *Hate Crime Statistics Act*⁹⁶ provides that the Attorney General of the United States must acquire data, for the calendar year 1990 and each of the succeeding four calendar years, about crimes that manifest evidence of prejudice based on race, religion, sexual orientation or ethnicity — including, where appropriate, the crimes of murder, non-negligent manslaughter, forcible rape, aggravated assault, simple assault, intimidation, arson, and destruction, damage or vandalism of property. The Act also requires the Attorney General to establish guidelines for the collection of such data, including the necessary evidence and criteria that must be present for a finding of manifest prejudice, and procedures for

⁹⁵ For a discussion of the legislative history of this bill, see J. M. Fernandez, "Bringing Hate Crime into Focus — The Hate Crime Statistics Act of 1990, Pub. L. No. 101-275" (1991) 26 *Harv. C.R.-C.L. L. Rev.* 261. See also J. B. Jacobs and B. Eisler, "The Hate Crime Statistics Act of 1990" (1993) 29 *Crim. L. Bull.* 99 for a critical analysis of the Act and its guidelines.

⁹⁶ Pub. L. 101-275, 104 Stat. 140 (1990).

carrying out the purposes of the Act. No cause of action is created by the Act, such as an action based on discrimination owing to sexual orientation. Data acquired under the Act must be used only for research or statistical purposes and may not contain any information that may reveal the identity of an individual victim of a crime. Finally, the Attorney General is required to publish an annual summary of the data so acquired.

As one legal commentator has pointed out, the FBI's draft guidelines for collecting hate crimes data remind officers to be careful and conservative when determining bias. Because of the difficulty of ascertaining the offender's subjective motivation, before an incident can be reported as a hate crime the guidelines require that sufficient objective facts be present to meet a probable cause-type standard that bias motivated the criminal act.⁹⁷

5.1.1.2 *Religious Vandalism Act of 1988*

In 1988, the federal government passed legislation that specifically made religious vandalism a crime.⁹⁸ The statute generally provides that a person commits a crime who intentionally damages or destroys any religious real property (such as a church, synagogue, mosque, or cemetery) where the loss is more than \$10,000, or who obstructs by force any person in the enjoyment of that person's free exercise of religious beliefs when the defendant travels in interstate or foreign commerce.

5.1.1.3 *Federal Civil Rights Legislation*

The federal government has also used civil rights legislation to prosecute instances of hate-motivated violence. It appears that four statutory provisions are used for criminal prosecutions: 18 U.S.C. §§ 241, 242 and 245, and 42 U.S.C. § 3631.

Section 241 of 18 U.S.C.⁹⁹ provides for criminal penalties, in part, where two or more persons conspire to injure, oppress, threaten or intimidate any inhabitant of the United States in the free exercise of any right or privilege secured to him by

⁹⁷ Fernandez, *supra*, footnote 1, pp. 285-286.

⁹⁸ *Religious Vandalism Act*, 18 U.S.C.A. § 247 (West 1989 Supp.).

⁹⁹ 18 U.S.C.A. § 241 (West 1993 P.P.).

the Constitution or laws of the United States. Section 242 of 18 U.S.C.¹⁰⁰ provides for criminal penalties for, in part, whoever, under colour of any law, wilfully subjects any inhabitant of the United States to the deprivation of any rights protected by the Constitution or laws of the United States or to different punishments, by reason of his colour or race. Section 245 of 18 U.S.C.¹⁰¹ provides for criminal penalties, where, in part, a person, whether or not acting under colour of law, by force or threat wilfully injures, intimidates or interferes with any person because of his race, colour, religion, or national origin, and the person is engaging in a variety of activities such as attending a public school, applying for employment, using the services of a restaurant, and travelling in any facility of interstate commerce. Section 3631 of 42 U.S.C.¹⁰² provides for criminal penalties where, in part, a person, whether or not acting under colour of law, by force or threat of force wilfully injures, intimidates or interferes with any person because of his race, colour, religion, sex, handicap, familial status or national origin and because he is or has been occupying any dwelling.¹⁰³

These statutory provisions do afford protection for victims of hate-motivated violence, but they are subject to limitations. For example, 18 U.S.C. § 241 requires that two or more persons conspire in the harmful act, which would exempt single

¹⁰⁰ 18 U.S.C.A. § 242 (West 1993 P.P.).

¹⁰¹ 18 U.S.C.A. § 245 (West 1969 and 1993 P.P.).

¹⁰² 42 U.S.C.A. § 3631 (West 1992 P.P.).

¹⁰³ Sections 241 and 242 of 18 U.S.C., for example, were originally enacted by the American Congress during the Reconstruction era after the American Civil War in order to protect blacks. A clear example of a hate-motivated crime prosecuted under these sections is *United States v. Price*, 383 U.S. 787 (1966), where those sections were used to prosecute the police officers and other individuals who murdered three civil rights workers in Mississippi in 1964. Prosecutions under these sections require that it be proved that the accused intended to deprive the victim of his or her civil rights. See, e.g., *Screws v. United States*, 325 U.S. 91 (1945). For a discussion of criminal liability arising out of a violation of these federal civil rights provisions, see Annotation, "Criminal Liability, Under 18 USC § 241, 242, for Depriving, or Conspiring to Deprive, A Person of His Civil Rights — Supreme Court Cases", 20 L Ed 2d 1454. For an example of prosecutions under 18 U.S.C. § 245 and 42 U.S.C. § 3631, see *United States v. Johns*, 615 F.2d 672 (1980, 5th Cir.), cert. denied, 449 U.S. 829 (1980), where members of the Ku Klux Klan had fired into the homes of black community leaders to discourage interracial living arrangements and dating.

actors from its ambit. And 18 U.S.C.A. § 242 requires that the offender be acting under colour of law, et cetera. Nonetheless, these statutory provisions are regarded as useful tools in the effort to prosecute hate crimes.¹⁰⁴

5.1.1.4 Other Government Initiatives

In April 1992, Representative Charles Schumer of the House of Representatives introduced a bill to direct the United States Sentencing Commission to make sentencing guidelines for federal criminal cases involving hate crimes.¹⁰⁵ Generally, the bill would have required the Commission to provide guidelines that would enhance sentences by not less than three offence levels for offences that were hate crimes. A hate crime was defined as "a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice, based on the actual or perceived race, colour, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals."¹⁰⁶ A legislative hearing on the bill was held before the Subcommittee on Crime and Criminal Justice of the House of Representatives' Committee on the Judiciary in July 1992. Although it was approved by the House of Representatives at the end of the last Congress, the Senate adjourned before it could take up the measure.¹⁰⁷ President Clinton, as a candidate for the Presidency, endorsed the bill during the recent presidential election campaign.¹⁰⁸ Representative Schumer intends to reintroduce the bill in the new Congress.¹⁰⁹

¹⁰⁴ See, e.g., G. L. Padgett, "Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies" (1984) 75 *J. Crim. L. & Criminology* p. 103; C. H. Jones, "An Argument For Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 And The Thirteenth Amendment" (1986) 21 *Harv. C. R.-C.L. L. Rev.* p. 689; L. Pantell, "A Pathfinder on Bias Crimes and the Fight Against Hate Groups" (1991) *Legal Reference Services Q.* 39. In addition, federal civil rights law allows victims to launch civil actions for deprivation of these rights. See, e.g., 42 U.S.C.A. § 1983 (civil action for deprivation of any rights secured by the Constitution and its laws by any person acting under colour of any statute); 42 U.S.C.A. § 1985(3) (civil action for conspiracy depriving a person of any right as a citizen of the United States).

¹⁰⁵ *Hate Crimes Sentencing Enhancement Act of 1992*, H.R. 4797, 102d Congress, 2d Session (1992).

¹⁰⁶ *Ibid.*

¹⁰⁷ Anti-Defamation League, *1992 Audit of anti-Semitic Incidents* (New York: Anti-Defamation League, 1993), p. 33. According to that audit the bill will be one of the League's top priorities in the 103rd Congress.

¹⁰⁸ See Editorial, "Crime and Punishment", *The New Republic*, October 12, 1992, p. 7.

¹⁰⁹ L. Greenhouse, "High Court to Rule on Tough Penalties in Hate-Crime Laws", *The New York Times*, Tuesday, December 15, 1992, pp. A1, B14.

5.1.2 State Law

The American states have a variety of criminal laws that can be used to combat bias-motivated conduct. Some laws are behaviour-specific and limited in scope (e.g., some states make it a crime to burn a cross, to wear masks at a public gathering, or to steal religious artifacts).¹¹⁰ Others, with a much broader scope, are essentially of two kinds: those that would impose a higher sentence than would be normally imposed when the basic crime is committed because of bias motivation; and those that create a general crime of violating a person's civil rights under the state or federal constitution, which may also be used to prosecute hate crimes.

5.1.2.1 Specific Hate Crime Laws

The model for this kind of law is, in large part, that proposed by the Anti-Defamation League (ADL). Its model legislation provides for crimes of institutional vandalism and intimidation; a civil action that is available to a victim for injury or damage to property arising out of this criminal conduct; and requirements for the collection, reporting and use of information about hate crimes by police officers and for the training of police officers in order to identify such crimes.¹¹¹

The crime of institutional vandalism is generally defined as knowingly vandalizing, defacing or damaging (a) any church, synagogue or place used for religious worship or other religious purpose; (b) any cemetery, mortuary or other facility used for the purpose of burial or memorializing the dead; (c) any school, educational facility or community centre; (d) generally, any grounds adjacent to these structures; and (e) any personal property contained therein. Depending on the degree of damage, the crime is treated as a misdemeanour or as varying degrees of felonies.¹¹²

The crime of intimidation is defined as follows:

- A. A person commits the crime of intimidation if, by reason of the actual or perceived race, colour, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section ____ of the Penal

¹¹⁰ See, e.g., Fla. Stat. Ann. § 876.17-19, § 876.15 (West 1976 and 1993 P.P.); N.Y. Penal Law § 155.30(9) (Consol. 1992 Supp.).

¹¹¹ Anti-Defamation League of B'nai Brith, ADL Law Report, *Hate Crimes Statutes: A 1991 Status Report* (New York: Anti-Defamation League, 1992), pp. 4-5.

¹¹² *Ibid.*, s. 1, p. 4.

Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault, and/or other appropriate statutorily proscribed criminal conduct).

- B. Intimidation is a _____ misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for commission of the offense).¹¹³

Thus, this crime of intimidation requires, in addition to the basic criminal conduct, proof of the perpetrator's motive or intent in targeting the victim or the victim's property because of his or her race, colour, religion, national origin or sexual orientation.¹¹⁴ The result is a more severe penalty than that imposed for the basic crime. According to the ADL, the enhanced penalties should be sufficiently severe to have their desired deterrent impact. As well, the statute is most effective when it increases the penalties for the broadest range of criminal conduct.¹¹⁵ The ADL adds: "Presently, almost every state in the nation has some form of hate crimes legislation. More than one-half of these states have enacted laws based on, or similar to, ADL's model hate crimes statute."¹¹⁶

The definitions of these hate crimes vary from state to state. For example, Oregon has a crime of intimidation in the second degree (where a person, in part, intentionally threatens to inflict serious physical injury to another person or to cause substantial damage to another's property, because of the person's perception of the other's race, colour, religion, national origin or sexual orientation), and a crime of intimidation in the first degree (where two or more persons, in part, intentionally, knowingly, or recklessly cause physical injury to a person because of such perception).¹¹⁷ Ohio has an ethnic intimidation statute that increases the penalty for the crimes of aggravated menacing, menacing, criminal damaging or endangering, criminal mischief or telephone harassment, when committed by reason of the race, colour, religion, or national origin of another person.¹¹⁸ New York has a crime of aggravated harassment in the second degree when a person, in part, with intent to

¹¹³ *Ibid.*, footnote 17, s. 2, p. 4.

¹¹⁴ *Ibid.*, footnote 17, p. 2.

¹¹⁵ *Ibid.*, footnote 17, p.2.

¹¹⁶ *Ibid.*, footnote 17, p. 1.

¹¹⁷ Or. Rev. Stat. § 166.155 (1989), set out in P. B. Gerstenfeld, "Smile When You Call Me That!: The Problems With Punishing Hate Motivated Behavior" (1992) 10 *Behavioral Sciences and the Law* pp. 262-263.

¹¹⁸ Ohio Rev. Code Ann. § 2927.12 (Page 1987).

harass, annoy, threaten or alarm another person, strikes, shoves, or kicks another person because of the race, colour, religion or national origin of such person.¹¹⁹ The hate crimes statute of Illinois affords protection to persons attacked by reason of their race, colour, creed, religion, ancestry, gender, sexual orientation, physical or mental disability or national origin, and provides, in addition, that the injured person may bring a civil action for damages, an injunction or other appropriate relief for the injury suffered.¹²⁰

The important legal issue that arose in relation to the legislation creating these hate crimes was whether or not such legislation was constitutional. The state courts were divided on this issue. The courts in Oregon, Florida and New York held that their hate crimes legislation was constitutional.¹²¹ However, the courts in Wisconsin and Ohio held that their hate crimes legislation was not constitutional, largely on the ground that such crimes, by increasing the penalty for the basic crime because of the accused's hateful motivation, violated the freedom of speech guarantee of the First Amendment of the Constitution.¹²² In June 1993, the United States Supreme Court resolved this uncertainty by holding that such hate crimes statutes were indeed constitutional.

In *Wisconsin v. Mitchell*,¹²³ the accused was one of a group of young black men. After discussing a scene from the movie "Mississippi Burning", which showed a white man beating a young black, the group moved outdoors where a young white teenager was seen walking on the other side of the street. The accused said, "You all want to fuck somebody up? There goes a white boy; go get him." He counted to three, pointed in the boy's direction, and the group rushed the boy, beating him severely. The accused was convicted of aggravated battery, but because he was found to have selected the victim because of the victim's race, the penalty was increased

¹¹⁹ N.Y. Penal Law § 240.30 (Consol. 1992 Supp.). For a discussion of bias crime in New York and of so-far stalled legislative efforts to strengthen the criminal law in this area, see A. Abramovsky, "Bias Crime: A Call for Alternative Responses" (1992) 19 *Fordham Urb. L.J.* 875; State of New York, *Governor's Task Force on Bias-Related Violence* [Final Report] (New York: Division of Human Rights, 1988).

¹²⁰ Ill. Ann. Stat., ch. 38, para. 12-7.1 (Smith Hurd 1992 P.P.).

¹²¹ See *State v. Plowman*, 838 P.2d 558 (Or. 1992); *State v. Hendrix*, 813 P.2d 1115 (Or. App. 1991); *State v. Beebe*, 680 P.2d 11 (Or. App. 1984); *Dobbins v. State*, 605 So.2d 922 (Fla. App. 5 Dist. 1992); *People v. Grupe*, 532 N.Y.S. (2d) 815 (N.Y. City Crim. Ct. 1988).

¹²² *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992); *State v. Wyant*, 597 N.E.2d 450 (Ohio 1992).

¹²³ *Wisconsin v. Mitchell*, decided in the United States Supreme Court, on June 11, 1993, No. 92-515, 61 LW 4575 (unreported). [Note: The decision, at time of writing, is found in 61 United States Law Week 4575, short form 61 LW 4575.]

pursuant to the Wisconsin hate crime statute to four years in jail (the maximum otherwise would have been two years). The Wisconsin Supreme Court, however, held that the hate crimes statute violated the First Amendment, the freedom of speech guarantee of the United States Constitution, because it sought to punish one's motive for acting, and that it was constitutionally overboard because it would have a "chilling effect" on the exercise by others of freedom of speech.¹²⁴

On appeal, the United States Supreme Court rejected these arguments. Chief Justice Rehnquist, delivering the unanimous opinion of the Court, argued that, traditionally, sentencing judges have considered a wide variety of factors in determining what sentence to impose on a convicted accused. The accused's motive for committing the crime was one important factor. The Court pointed out that in the case of *Barclay v. Florida*,¹²⁵ it had allowed the sentencing judge to take into account the accused's racial animus in determining if the accused should be sentenced to death, and, in effect, the same principle was applied by the Wisconsin Legislature when it decided to increase penalties in relation to bias-motivated crimes. As regards motive, the Court argued that motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which had been previously held to be constitutional. The Court distinguished its decision in *R.A.V. v. City of St. Paul*¹²⁶ from this case, pointing out that whereas the *R.A.V.* case involved an ordinance directed at expression,¹²⁷ the statute in this case aimed at conduct unprotected by the First Amendment. The Court added:

¹²⁴ *State v. Mitchell*, N.W.2d 807 (Wis. 1992). The court therefore reversed the sentence and remanded the case to the lower court for resentencing on the aggravated battery conviction.

¹²⁵ *Barclay v. Florida*, 463 U.S. 939 (1983).

¹²⁶ *R.A.V. v. City of St. Paul*, 505 U.S. —, 120 L. Ed. 2d 305 (1992). For a discussion of the effect of the *R.A.V.* case on freedom of expression, see A. R. Amar, "The Case of the Missing Amendments: *R.A.V. v. City of St. Paul*" (1992) 106 *Harv. L. Rev.* p. 124.

¹²⁷ In *R.A.V. v. City of St. Paul*, *ibid.*, the United States Supreme Court ruled on the constitutionality of an ordinance passed by the city of St. Paul, Minnesota, that made it a misdemeanor to place on public or private property a symbol, object, etc., including a burning cross, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, colour, creed, religion, or gender. The accused had been prosecuted under the ordinance for burning a cross inside the fenced yard of a black family. In an opinion delivered for the Court by Justice Scalia, it was held that the ordinance was unconstitutional. Briefly, the majority of the Court held that the ordinance was unconstitutional because it only criminalized a specific category of "fighting words" — those that were messages of bias-motivated hatred — while permitting the use of "fighting words" in connection with other ideas. Selectively criminalizing these kinds of fighting words because of the hateful idea the message conveyed amounted to content-based discrimination that violated the First Amendment.

[T]he Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. ... The State's desire to redress these perceived harms provides an adequate explanation for its penalty enhancement provision over and above mere disagreement with offenders' beliefs or biases. As Blackstone said long ago, "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness." 4 W. Blackstone, Commentaries *16.¹²⁸

And, the Court found no merit in the contention that the statute was overboard.¹²⁹

5.1.2.2 Civil Rights Provisions

Some states have created statutory provisions that give rise to criminal liability for a violation of a person's civil rights under the state or federal constitution or laws. For example, the California Penal Code provides, in part, that no person, whether or not acting under colour of law, shall by force wilfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise of any right secured to him under the constitution or laws of the state or of the United States because of the other person's race, colour, religion, ancestry, national origin, disability, gender, or sexual orientation. However, no person shall be convicted of that crime based on speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat. It is also a crime to knowingly deface, damage or destroy the property of any person for the purpose of intimidating or interfering with the free

¹²⁸ *Mitchell, ibid.*, p. 4578.

¹²⁹ *Mitchell, supra*, footnote 29, p. 4578 *per* Rehnquist, C.J.: The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional "overbreadth" cases. We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty-enhancement. ... We are left ... with the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property. This is simply too speculative a hypothesis to support Mitchell's overbreadth claim.

exercise of such rights because of the other person's race, colour, religion, ancestry, national origin, disability, gender, or sexual orientation.¹³⁰

5.1.2.3 Hate Crime Reporting Statutes and Police Initiatives

A number of states have legislated the reporting of hate crimes by the police in order to better analyze the commission of hate crimes in their respective states.¹³¹ For example, Florida has a *Hate Crimes Reporting Act* that requires police to collect data on incidents of hate crimes, and an annual report on that data is published by the state.¹³²

As regards police initiatives, under the auspices of the ADL and the U.S.A. Conference of Mayors, a survey of 157 cities revealed that police departments in 47 percent (73) of them have special written policies, procedures or directives on reporting and responding to bias-motivated crime. Police departments in 31 percent (48) of the cities have a special unit or task force to handle bias-motivated criminal activity.¹³³ It appears that one of the more successful efforts in the United States has occurred in Boston, where the Boston Police Department has set up a Community Disorders Unit to combat racial violence. The Unit oversees all racial violence cases

¹²⁹ Cal. Penal Code, § 422.6 (West, 1993 P.P.). The Penal Code also provides that where a person is not punished under section 422.6, the fact that the crime was committed against a person in violation of the person's civil rights as set out in section 422.6 is an aggravating factor that can raise a crime not punishable by imprisonment in the state prison to one punishable by imprisonment in the state prison or county jail not to exceed one year, or by a fine not to exceed ten thousand dollars, or by both, in circumstances where, e.g., actual physical injury is caused (§ 422.7); as well, except in cases punished under Section 422.7, a person who commits a felony or attempts to commit a felony or acts in concert with another because of the victim's race, colour, religion, nationality, country of origin, ancestry or sexual orientation must receive a higher jail term (§ 422.75). Massachusetts also has created a statute that allows for criminal prosecution of a breach of a person's civil rights under the constitution or laws of that state or of the United States. See Mass. Ann. Laws c. 265 § 37 (Law, Co-op. 1992). Additional provisions also allow for civil suits for interference of a person's rights secured by these constitutions or laws. See, e.g., Mass. Ann. Laws c. 12 § 11H (Law, Co-op. 1988) (the attorney general of the state may bring a civil remedy for injunction or other civil remedy); Mass. Gen. L. c. 12 s. 11I (Law, Co-op. 1988) (private persons may sue for a violation of their rights). For a discussion of the Massachusetts law in this regard, see V. N. Lee, "Legislative Responses to Hate-Motivated Violence: The Massachusetts Experience and Beyond" (1990) 25 *Harv. C.R.-C.L. L. Rev.*, p. 287.

¹³¹ The ADL's status report on hate crimes statutes indicates that 17 states had hate crimes data collection statutes. 1991 *Status Report*, *supra*, footnote 17, pp. 22-23.

¹³² See Fla. Stat. Ann. § 877.19 (West 1993 P.P.).

¹³³ Anti-Defamation League & United States Conference on Mayors, *Addressing Racial and Ethnic Tensions: Combatting Hate Crimes in America's Cities* (New York: Anti-Defamation League, 1992), p. 5.

and has taken responsibility for coordinating an interagency task force of local, state and federal enforcement agencies that has successfully brought to trial a number of suspects.¹³⁴ This Community Disorders Unit is the model on which the Ottawa Police Bias Crimes Unit is based.

5.2 England

The most obvious hate crimes in England, specifically defined in terms of criminalizing racial hatred, are those concerning incitement to racial hatred, now found in Part III (ss. 17-29) of the *Public Order Act 1986*.¹³⁵ Criminal liability ensues where a person uses or publishes words or behaviour or written material that is threatening, abusive, or insulting where, having regard to all the circumstances, racial hatred was likely to be stirred up or the person intended to stir up racial hatred. There are also the crimes of possessing racially inflammatory material with a view to publication, and of inciting to racial hatred by the distribution, showing, or playing of films, videos, sound recordings and other media, including, generally, broadcasting. The definition of "racial hatred" means hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship), or ethnic or national origins. Neither religion nor sexual orientation is included in the definition. Nonetheless, given the wide interpretation of "ethnic group" by case law, an attack on Jews, for example, would be regarded as an attack against an ethnic group.¹³⁶

Legislation has also been enacted to protect racial groups in the context of football hooliganism. Section 3(1) of the *Football (Offences) Act 1991* makes it an

¹³⁴ See C. Wexler and G. T. Marx, "When Law and Order Works: Boston's Innovative Approach to the Problem of Racial Violence" (April 1986) *Crime & Delinquency*, 32(2), pp. 210-216. They add, at p. 207:

Boston offers an example of a rare contemporary effort to cope with the problems of racial violence and harassment through an active law enforcement effort. What is more, it appears to be relatively successful. In 1979 (the first full year for which separate statistics were collected), 533 racial incidents were reported. Yet, by 1984, the number had dropped by two-thirds to 181. The Boston Police Department, through the creation of its Community Disorders Unit (CDU), played a major role in this decline.

¹³⁵ *Public Order Act 1986* (U.K.), 1986, c. 64, ss. 17-29. See R. Card, *Public Order: The New Law* (London: Butterworths, 1987), pp. 93-116 for an in-depth discussion of the offences set out in that Part [hereinafter referred to as *Public Order: The New Law*].

¹³⁶ See, e.g., *Public Order: The New Law*, *supra*, footnote 41, pp. 95-96.

offence to take part in chanting of an indecent or racist nature at a designated football match.¹³⁷

Section 5(1) of the *Public Order Act* also provides that a person is guilty of an offence if he uses threatening, abusive, or insulting words or behaviour, or disorderly behaviour, or displays any writing that is threatening, abusive, or insulting, within the hearing or sight of a person likely to be caused harassment, alarm, or distress thereby. This crime of disorderly behaviour is quite broad and arguably could be used to prosecute persons guilty of racial harassment. Indeed, the government has stated that it hoped that this new offence of disorderly conduct and the associated power of arrest would prove of value in dealing with some racially offensive behaviour.¹³⁸

The Commission for Racial Equality, and some others, have argued for a change in the criminal law to make racial harassment and attacks a specific offence.¹³⁹ In December 1992, a private member's measure, the Racial Harassment Bill, was introduced in Parliament.¹⁴⁰ However, to date, the government has refused to change the law. In 1986, the government stated, in its official response to a report of the Home Affairs Select Committee of the House of Commons on the topic of racial attacks and harassment, that a new offence of racial harassment would cover behaviour already penalized by the law, that it could make convictions more difficult to obtain by requiring the prosecution to prove an additional racial element,

¹³⁷ *Football (Offences) Act 1991* (U.K.), 1991, c. 19, s.3.

¹³⁸ U.K., The Government Reply to the Third Report From the Home Affairs Committee Session 1985-86 HC 409, *Racial Attacks and Harassment* (London: HMSO, 1986), p. 2.

¹³⁹ H. Mills, "Knock on the door brings growing fear of racial abuse and attack", *The [London] Independent*, Monday, November 9, 1992, HOME 3.

¹⁴⁰ For a criticism of this bill, see L. Bridges, "The Racial Harassment Bill: A Missed Opportunity" (April-June 1993) 34 *Race & Class*, No. 4, p. 69.

that the declaratory impact of such a crime could be lost if prosecutors, for perfectly valid reasons, preferred to rely on other criminal law provisions, and that more progress was likely to come from the existing use of existing offences.¹⁴¹

Government efforts have instead focussed on other mechanisms to combat racial violence. At least since the beginning of the 1980s, the British government has recognized that racial violence is a serious problem. In response to pressure from various groups, such as the Commission for Racial Equality, the Home Secretary commissioned a report on the subject of racial attacks, which was published in 1981.¹⁴² In that report, the Home Office acknowledged that racial attacks presented a serious problem. This report was the first official study into the incidence of racial attacks in Britain. A later Home Office document stated:

The results of that survey shocked many people. It revealed that attacks with a racial motive were more common than had been previously supposed and that Asian and black people were far more likely than white people (50 times and 36 times respectively) to be the victims of such attacks.¹⁴³

As well, a number of additional government reports, parliamentary reports, and reports from other interested organizations have been published in the past decade addressing the issue of racial attacks. For example, the Home Affairs Committee of the House of Commons has been active in examining the government's responses to racial attacks and harassment. Its 1986 report, while acknowledging that the police and other agencies had made improvements in their efforts to respond to racial incidents since 1981, stated at the outset that the incidence of racial attacks and harassment remained "[t]he most shameful and dispiriting aspect of race relations in Britain", and recommended that all police and local authorities whose areas contain an

¹⁴¹ The Government Reply to *Racial Attacks and Harassment*, *supra*, footnote 44. A spokesman for the Home Secretary in January, 1992, reiterated this view:

We consider existing laws are adequate. The key is enforcement. If it becomes necessary to prove an element of racial motivation it would make enforcement that much more difficult.

See "Baker rules out race attack law", *The Guardian*, Friday, January 17, 1992, p. 6. This article is also summarized in "Police" (August, 1992) 31 *The Howard Journal of Criminal Justice*, No. 3, pp. 241-242.

¹⁴² *Racial Attacks: Report of a Home Office Study* (London: Home Office, 1981). This study is cited in Report of the Inter-Departmental Racial Attacks Group, *The Response to Racial Attacks and Harassment: Guidance for the Statutory Agencies* (London: Home Office, 1989), at para. 1, footnote 1 [hereinafter Report of the Racial Attacks Group].

¹⁴³ Report of the Racial Attacks Group, *supra*, footnote 48, at para. 1.

appreciable ethnic minority population should give serious consideration to the establishment of a multi-agency approach to racial incidents.¹⁴⁴

In response to that recommendation, the Ministerial Group on Crime Prevention established an interdepartmental working party — the Racial Attacks Group (hereinafter the RAG). In its first report, *The Response to Racial Attacks and Harassment: Guidance for the Statutory Agencies*,¹⁴⁵ the RAG found that there were very few instances of effective multi-agency liaison, or, for that matter, of effective unilateral action by individual agencies. It therefore made a number of proposals to increase the effectiveness of agencies in combatting racial attacks, with particular emphasis on the recommendation that the various agencies offer a multi-agency approach to tackling the problem of racial harassment.¹⁴⁶

In 1991, the Home Office published a follow-up report to this initial report of the RAG.¹⁴⁷ It examined the degree to which the RAG's recommendations had been implemented, both in terms of individual agencies and agencies working

¹⁴⁴ U.K., House of Commons, Third Report from the Home Affairs Committee, Session 1985-86, *Racial Attacks and Harassment*, Report, together with the Proceedings of the Committee, Minutes of Evidence and Appendices, HC 409 (London: HMSO, 1986), para. 1, at iv, para. 32, at xiv-xv.

¹⁴⁵ Report of the Racial Attacks Group, *supra*, footnote 48.

¹⁴⁶ Among its comments: Individual agencies had to first start by recognizing the existence of racial harassment as a serious problem. While such awareness may be obvious in areas where there is a large minority ethnic population, where the numbers of ethnic minorities are small in other areas of Britain the problem can too easily remain invisible. As well, individual agencies (such as the police, housing, and educational authorities) had to accept responsibility for taking action in their own sphere of influence, should consult with local minority ethnic bodies, and should draw up an explicit policy for dealing with racial harassment. Agencies should make it clear to potential victims that they have effective procedures for responding to racial harassment and for assisting victims, and should also make it clear to potential perpetrators that racial harassment will not be tolerated. The report then focussed on specific issues designed to make the individual agencies respond better to the problem. It was recommended that the police build up as complete a picture as possible of the nature and extent of the problem locally, ensure that victims know how to report incidents, take steps to make it easier for victims to report incidents, and increase confidence in the police response to reported incidents. In areas where racial harassment is a particularly serious problem, a chief officer should consider establishing a special squad to investigate incidents and collect intelligence on possible suspects. As well, the police should ensure that prosecuting lawyers are specifically informed about the existence of a racial element in the commission of a crime. The report commended the policy of the Crown Prosecution Service in regarding the existence of a clear racial motivation in an offence as an aggravating feature pointing towards prosecution, assuming there is sufficient evidence to justify proceedings. It also stressed the importance of making the court appearance less stressful for the victim of a racial attack, and the importance of treating racial motivation to commit a crime as an aggravating factor at sentence.

¹⁴⁷ The Second Report of the Inter-Departmental Racial Attacks Group, *The Response to Racial Attacks: Sustaining the Momentum* (London: Home Office, 1991).

together, and gave examples of good practice in order to illustrate how the momentum in tackling racial harassment and violence could be sustained. Among these were an information campaign by the Metropolitan Police directed towards minority groups, explaining the police role in responding to racial attacks and stressing the need to report such attacks; the revising by police of their procedures for passing files to the Crown Prosecution Service (CPS), usually by ensuring that racial motivation in a particular case was brought fully to the attention of the prosecutor; the establishment by the CPS of clear, nationally set guidelines on the subject of racially motivated offences, to be implemented in each of its areas; and an amendment to the *Code* for crown prosecutors, stating that a clear racial motivation will be regarded as an aggravating feature when assessing whether prosecution is required in the public interest.¹⁴⁸

In addition, a number of projects have been set up in Great Britain to combat the problem of racial harassment. For example, in North Plaistow, and in other areas, the concept of a multi-agency approach to dealing with racial harassment and attacks is being evaluated.¹⁴⁹

5.3 Australia

5.3.1 Present Law

At the state level, some Australian states have enacted crimes of serious racial vilification.¹⁵⁰ At the federal level, although a bill was introduced that would have created crimes of racial incitement against a person or group of persons and that

¹⁴⁸ *Ibid.*, pp. 4-7; Annex 6A, p. 67.

¹⁴⁹ See, e.g., W. E. Saulsbury and B. Bowling, *The Multi-Agency Approach in Practice: The North Plaistow Racial Harassment Project* (London: Home Office Research and Planning Unit, Paper 64, 1991), cited in, and the results of which are summarized in, B. Bowling and W. Saulsbury, "A Multi-agency Approach to Racial Harassment" (1992), 32 *Research Bulletin/Home Office Research and Statistics Department* 34; A. Sampson and C. Philips, *Multiple Victimization: Racial Attacks on an East London Estate* (London: Police Research Group, Crime Prevention Unit Series, Paper 36, Home Office Police Department, 1992); P. Neyroud, *The Multi-Agency Approach to Racial Harassment* (London: Police Requirements Support Unit, Home Office Science and Technology Group, 1992); P. Neyroud, "Multi-agency Approaches to Racial Harassment: The Lessons of Implementing the Racial Attacks Group Report" (July, 1992) 18 *New Community*, No. 4, p. 567.

¹⁵⁰ See, e.g., *Discrimination Act 1991 (ACT)*, ss. 66-67.

would have made racist vilification against a person or group unlawful,¹⁵¹ the bill lapsed with the calling of the recent federal election and it does not appear that it will be brought forward at this time.

As regards racist violence generally, the state of the present criminal law has been summarized as follows:

Any case of actual violence would be covered by some existing criminal law (murder, assault, affray, malicious injury to property etc.) without reference to the racist content or motivation of the perpetrator. Certain forms of threats of violence, if sufficiently specific, may also be covered by existing laws Generalised threats which are characteristic of racial intimidation and harassment and other forms of verbal abuse do not constitute criminal offences either at Common Law or under *Criminal Codes*.

...

While motivation may be taken into account at the level of sentencing for any crime, it is not identified as a relevant circumstance to be taken into account by the authorities responsible for investigating and prosecuting crimes. Further, there is no way by which racist motivation may be taken into account in sentencing in a systematic way. A magistrate or judge is at present entitled either to ignore such motivation or to consider it as a factor adding to the gravity of an offence. Evidence is hard to obtain on this point, but there have been suggestions that in some cases racist motives have been regarded as mitigating (rather than aggravating) factors.¹⁵²

In Australia, the issue of racist violence has been specifically addressed by two major federal commissions. The recommendations of each will be discussed separately.

¹⁵¹ See "A Bill for An Act to amend the *Crimes Act 1914* to create an offence of racial incitement and to amend the *Racial Discrimination Act 1975* to make racial vilification unlawful", 1990-91-92, The Parliament of the Commonwealth of Australia, House of Representatives, 1st reading, 16 December, 1992.

¹⁵² Human Rights and Equal Opportunity Commission, Report of the National Inquiry into Racist Violence in Australia, *Racist Violence* (Canberra: Australian Government Publishing Service, 1991), pp. 275-277 [hereinafter *Racist Violence*].

5.3.2 The Human Rights and Equal Opportunity Commission

In 1986, the Australian Parliament created the Human Rights and Equal Opportunity Commission, a permanent independent statutory authority responsible for administering certain federal acts that give force to various international human rights instruments to which Australia has committed itself. It conducted the National Inquiry into Racist Violence, which was created because of a widespread community perception that racist attacks in Australia, both verbal and physical, were on the increase. Public hearings began in 1989, and the Inquiry reported its findings in March 1991.¹⁵³

This report recommended that the following legal measures be taken by the criminal law to combat racist violence:

- (a) Acts of racist violence should be treated as distinctive serious criminal offences in exactly the same way as other specific types of assault (such as aggravated assault or sexual assault). Therefore, it was recommended that the Federal *Crimes Act 1914*¹⁵⁴ be amended to create the new federal offence of racist violence and intimidation. The report stated that this amendment to the *Crimes Act 1914* was not meant to displace existing State criminal offences, but it was intended to ensure the effective protection of fundamental human rights by Federal authorities in accordance with the *International Convention on the Elimination of All Forms of Racial Discrimination* (hereinafter CERD) and Australia's other international obligations;
- (b) A clearly identified offence of incitement to racist violence and to racial hatred likely to lead to violence be created and inserted into the *Crimes Act 1914*. As well, a broad definition of race should be included, covering colour, descent or national or ethnic origin, making the scope co-extensive with that of the federal *Racial Discrimination Act 1975*¹⁵⁵; and
- (c) There should be an amendment to section 16A of the Federal *Crimes Act 1914* and to State and Territory *Crimes Acts* stating the relevance of racist motivation in sentencing upon conviction of any offence. Such motivation

¹⁵³ *Racist Violence, ibid.* This exhaustive report, over 500 pages long, examines, among other issues, the history of racist violence in Australia, racist violence against aboriginal persons, racist violence on the basis of ethnic identity, and racist violence against people opposed to racism. It makes 85 findings and recommendations in total to combat racial violence throughout all levels of Australian society.

¹⁵⁴ *Crimes Act 1914*, No. 12 of 1914, as amended.

¹⁵⁵ *Racial Discrimination Act 1975*, No. 52 of 1975, as amended.

should be stated to increase the gravity of an offence. Racist motivation may require definition in terms of the expression of ideas based on racial superiority or hatred, of incitement to racial discrimination or to racial violence.¹⁵⁶

The report also made recommendations concerning additional legal measures to be taken to combat racial violence, not by the criminal law, but by the federal *Racial Discrimination Act 1975*. These included:

- (a) The *Act* should be amended to prohibit racist harassment on the ground of race, colour, descent or national or ethnic origin. The victims of such conduct should be given a clear civil action in the same terms as those subjected to other forms of racial discrimination by that *Act*;
- (b) The *Act* should be amended to prohibit incitement of racial hostility. This would cover such things as racist graffiti and poster campaigns. The Inquiry felt that incitement of racial hostility was not as serious as outright racist violence and intimidation and therefore need not be subject to criminal laws and criminal penalties; and
- (c) The *Act* should be extended to include those who are discriminated against or who are harassed by reason of their association with advocates against racism and supporters of Aboriginal rights.¹⁵⁷

5.3.3 The Australian Law Reform Commission

The second commission to address the subject of racial violence was the federal Australian Law Reform Commission. Its recent report, *Multiculturalism and the Law*¹⁵⁸, examined, among other issues, whether a specific federal crime of racist violence should be created. The report noted that Australia is a party to the International Convention on the Elimination of All Forms of Racial Discrimination

¹⁵⁶ *Racist violence, supra*, footnote 58, pp. 296, 302.

¹⁵⁷ *Ibid.*, pp. 298-302. Another recommendation dealt with the process by which incidents of racist violence could be prosecuted. As regards enabling prosecutions for the proposed crimes of racist violence to be commenced, the report stated that it would be appropriate, where cases are brought to the attention of the Race Discrimination Commissioner pursuant to the *Racial Discrimination Act 1975*, that the Commissioner be given the power to refer potential criminal cases to the Director of Public Prosecutions. *Ibid.*, pp. 304-305.

¹⁵⁸ The Law Reform Commission, *Multiculturalism and the Law* [Report No 57] (Sydney, Australia: The Law Reform Commission, 1992).

(CERD). Parties to CERD are required to "undertake to adopt immediate and positive measures designed to eradicate all incitement to, and acts of," racial discrimination, which includes declaring "an offence punishable by law . . . all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin."¹⁵⁹ In its view, CERD requires the creation of a criminal offence of racist violence, not civil sanctions.¹⁶⁰

The Commission argued that racist violence was an appropriate matter for federal legislation, given that multiculturalism was an articulated policy of the national government, and that the protection of all Australians from acts and expressions of racist violence and intimidation was an integral part of this policy.

The Commission therefore recommended the creation of a crime of racist violence. In order to create a single uniform offence both in terms of its definition and its penalty, the Commission decided not to create an offence that was linked to the criminal law of the state or territory where it occurred (since this would result in differently defined offences and different penalties). Instead, it proposed to select the law of a single jurisdiction as the underlying law for the whole offence and to apply that body of law as Commonwealth law throughout Australia. The jurisdiction selected was the Jervis Bay Territory, a Commonwealth territory located in the southeast of New South Wales and the only mainland jurisdiction for which the Commonwealth makes criminal law. This enabled the Commonwealth to retain control over all the elements of the offence and the penalty, so that there would be a single law of racist violence throughout Australia. This also would avoid the need to enact a comprehensive code of offences of racist violence ranging from common assault to murder.¹⁶¹

The Commission argued that if a crime of racist violence was created pursuant to its recommendation, the offences under Jervis Bay law that comprise an element of the recommended offence should be specifically identified and set out in a schedule to the Federal *Crimes Act 1914*. The criteria for selecting the relevant Jervis Bay offences would be that they each involve an "act of violence", but because this phrase was not precise enough to clearly identify the relevant offences, these offences had to be individually identified (through the use of a schedule).¹⁶² With that caveat, the Commission defined its proposed offence of racist violence as follows:

¹⁵⁹ *Ibid.*, p. 153.

¹⁶⁰ *Ibid.*, footnote 64, p. 153.

¹⁶¹ *Ibid.*, footnote 64, pp. 155-156.

¹⁶² *Ibid.*, footnote 64, pp. 156-157.

PART VIIBA--OFFENCES RELATING TO RACIST ACTIVITIES

Interpretation

85KZC. In this Part, "identifiable group" means a section of the public distinguished by colour, race, religion or national or ethnic origin.

Racist offences involving violence

85ZKD. (1) If:

- (a) a person commits or threatens to do an act of violence that, if it had been committed in the Jervis Bay Territory, would be an offence specified in the Schedule against a law in force in that Territory; and
- (b) the person intended the act or the threat to cause, or ought reasonably to have foreseen that the act or threat would cause, members of an identifiable group to fear for their physical safety because they are members of the group; and
- (c) the act or threat is likely to cause members of the group to fear for their physical safety because they are members of the group;

the person is guilty of an offence punishable on conviction by a penalty not exceeding one and one-half times the penalty prescribed as the maximum penalty for the act under the law concerned.

- (2) An offence ... under subsection (1) is not an indictable offence unless, because of that subsection, the act is punishable by imprisonment for a period of more than 12 months.¹⁶³

This proposed definition contains three interesting features. First, the *mens rea* for the proposed crime is not limited to intention to cause harm to members of identifiable groups. It suffices to establish criminal liability that the person "*ought reasonably to have foreseen*" that the act or threat would cause members of an identifiable group to fear for their physical safety because of their membership in the identifiable group, provided also that it was likely to cause members of the group to fear for their physical safety because of their membership in the group (emphasis added). In other words, in terms of consequence, it is a crime of negligence.

¹⁶³ This draft legislation for the proposed offence is set out in Appendix A of the Report, *ibid.*, footnote 64, Draft Legislation, p. 283.

Secondly, the maximum penalty proposed for these crimes is set out as a general rule: one and one-half times the usual penalty. Thirdly, the definition of the crime would appear to include the crime of murder.¹⁶⁴ The Commission also recommended that the offence of incitement to commit a federal offence found in the *Crimes Act 1914* should apply here as well, so that, in effect, incitement to racist violence would be a crime.¹⁶⁵ However, incitement to racist hatred and hostility should be made unlawful at the federal level, but not be made a crime. Conciliation, backed by civil remedies, should be the appropriate way to deal with these forms of racism.¹⁶⁶

5.4 New Zealand

New Zealand has a crime of inciting to racial disharmony. Section 25 of its *Race Relations Act 1971* states that every person commits an offence "who with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons, publishes or distributes written matter or broadcasts words which are threatening, abusive, or insulting or uses in any public place, etc., words which are threatening, abusive, or insulting, being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race or ethnic origins of that group of persons."¹⁶⁷

However, there is no specific crime of hate-motivated violence in New Zealand. So far as the Department of Justice of New Zealand is aware, no research is being undertaken or planned by government-funded agencies on the topic of hate-motivated crime, nor is there any interest there in creating separate offences for such crime. It has generally seemed satisfactory for such crime to be dealt with under the offences listed in the *Crimes Act 1961* according to the specific injury or damage committed.¹⁶⁸

¹⁶⁴ Telephone conversation with Commissioner Christopher Sidoti of the Australian Law Reform Commission, Tuesday, January 12, 1993.

¹⁶⁵ The Law Reform Commission, *supra*, footnote 64, p. 158.

¹⁶⁶ *Ibid.*, p. 161.

¹⁶⁷ *Race Relations Act 1971* (N.Z.), 1971, No 150, s. 25.

¹⁶⁸ Letter sent to the author dated December 18, 1992, from Margaret Thompson, Chief Executive Officer Policy and Research, Department of Justice, New Zealand.

5.5 Federal Republic of Germany

The Penal Code of the Federal Republic of Germany has legislated certain hate crimes such as the crime of criminal agitation (§ 130), which includes, in a manner likely to disturb the public peace, attacking human dignity by arousing hatred against segments of the population; that of incitement to racial hatred (§ 131); and that of the crime of insult (§ 185), which, as a result of changes to the complaint process (§ 194), can be used to prosecute instances of Holocaust denial.¹⁶⁹

However, in German criminal law there are no special criminal offences covering racially motivated attacks and superseding general provisions (e.g., those on murder, manslaughter or infliction of bodily harm). However, racist motives for committing a crime would be used as an aggravating factor in the determination of punishment, although the penalty imposed would have to lie within the spectrum of punishment provided by the *Code*.¹⁷⁰

5.6 France

At the time of writing this paper, there are criminal offences found in the current Penal Code in France (in force until September 1, 1993) that criminalize certain discriminatory conduct (e.g., section 416 — refusal to provide goods or services by reason of racial and other discrimination). There are also offences found in the law governing the press that penalize hateful defamation or insult, as well as provoking discrimination, hate or violence towards a person or a group of persons by reason of their origin or their belonging to or not belonging to an ethnic group, a nation, a race, or a religion.¹⁷¹ However, the current Penal Code does not contain specific crimes of hate-motivated violence (such as hate-motivated assault). Robin

¹⁶⁹ These sections are translated in The American Series of Foreign Penal Codes, 28, *The Penal Code of the Federal Republic of Germany* (London: Sweet & Maxwell, 1987). For a discussion of the evolution of these crimes in Germany, see E. Stein, "History Against Free Speech: The New German Law Against the 'Auschwitz' — and Other — Lies" (1986) 85 *Mich. L. Rev.*, p. 277.

¹⁷⁰ This summary is taken from a letter sent to the author from Der Bundesminister der Justiz, dated April 7, 1993.

¹⁷¹ For a summary of the criminal law in this area, see the "Circulaire du ministre de l'Intérieure, Philippe Marchand, envoyée le 21 mars 1991 aux préfets, concernant la lutte contre le racisme, l'antisémitisme et les résurgences du nazisme" in Rapport de la Commission nationale consultative des droits de l'homme, *La Lutte Contre Le Racisme et la Xénophobie 1991* (Paris: La Documentation française, 1992), pp. 327-328. See also M. Véron, "Le renforcement du dispositif répressif contre la discrimination et le racisme. Présentation des lois des 12 et 13 juillet 1990" in (Octobre 1990) 2 *Droit Pénal*, No. 10, 1.

Oakley, in a consultant's report to the Council of Europe on racial violence and harassment, states:

In considering racial violence and harassment, it must be observed that the law on racism is primarily concerned with verbal and written actions, and not those of direct physical attack. The latter incidents are dealt with under the general penal code. The element of racist motivation is not taken into account by the penal law, either as an offence, nor as a factor in sentencing. In January, 1985, however, a change was made to allow anti-racist organizations to take legal action as civil parties in cases where the "racial" dimension is present.¹⁷²

It should be noted that France has recently adopted a new Penal Code, which will come into effect on September 1, 1993.¹⁷³ It contains, with modifications, the crimes of discriminatory conduct found in the present Penal Code. Generally, the new *Code* does not provide for specific crimes of hate-motivated violence (although one exception is that the new Penal Code specifically provides that attacks against corpses or cemeteries that are hate-motivated are to result in a greater penalty¹⁷⁴).

5.7 Sweden

The Swedish Penal Code contains, in Chapter 3, On Crimes Against Life and Health, the crimes of murder, assault, and aggravated assault,¹⁷⁵ and, in Chapter 5, On Defamation, the crime of insulting conduct, which can be prosecuted by the public prosecutor and not just by the aggrieved person where the insult alludes to a person's race, skin colour, national or ethnic origin, religious creed or alleged homosexual

¹⁷² R. Oakley, *Racial Violence and Harassment in Europe*, ref. MG-CR (91) 3 rev. 2, a consultant's report prepared for the Council of Europe ([Strasbourg]: Council of Europe, [1993]), pp. 24-25.

¹⁷³ The New Penal Code for France contains several sections that aim at prohibiting certain hateful or discriminatory conduct. See, e.g., Articles 211-1--213-5 (genocide and other crimes against humanity), 225-1--225-4 (certain discriminatory conduct where the discrimination is based on a person's origin, sex, race, state of health, handicap, ethnicity, religion, etc.); 432-7 (punishment where the discriminatory act is committed by a public servant); 225-18 (attack on a corpse, violation of a cemetery where the attack is motivated by the deceased person's race, ethnicity, nationality or religion). See Loi N° 92-863 à 92-686 du 22 juillet 1992, JO 23 juill. 1992, p. 9864, 9875, 9887, 9893. For an analysis of the new Penal Code and the text of the *Code*, see *Le Nouveau Code Pénal* (Lois du 22 juillet 1992), La Semaine Juridique (Paris: Éditions Techniques 1992).

¹⁷⁴ Article 225-18, *ibid.*

¹⁷⁵ *The Swedish Penal Code* (Stockholm, Sweden: Ministry of Justice, National Council for Crime Prevention, 1990), ss. 1, 5, 6, pp. 13-14.

inclination.¹⁷⁶ There is no specific crime of hate-motivated violence. However, there are other crimes that address racial hatred or racial discrimination. Chapter 16, On Crimes Against Public Order, prohibits agitation against an ethnic group (Section 8), and unlawful discrimination in the conduct of business (Section 9). A person who infamously treats a corpse or who damages a grave, et cetera, can also be sentenced for crime against the peace of the tomb (Section 10).

Recently, a commission set up to investigate the need for, and drafting of, legislation against racist organizations, proposed, among other proposed amendments to the Penal Code, that racist motives for or racist components in a crime should constitute a general ground for the increase in the severity of a punishment, but the government has not yet acted on this proposal (or on the others).¹⁷⁷

5.8 Summary

This chapter has outlined how the criminal law in certain foreign jurisdictions — in the United States, in some Commonwealth countries, and in some Western European countries — attempts to combat hate-motivated violence. Although no uniform criminal law approach has been taken, at the very least all these countries have regarded hate-motivated violence as a serious problem that needs to be addressed. The most vigorous criminal law response has been taken by the United States, where many states have legislated specific hate crimes, where the Congress has been considering creating an amendment to the federal sentencing guidelines that would enhance the penalty for federal crimes that were hate-motivated, and where hate crime statistics, by the operation of a federal hate crime statistics act, are compiled nationally. Generally, excepting crimes of incitement to racial hatred, the approach of the other countries appears to be to rely on basic crimes (such as assault) to prosecute incidents of hate-motivated violence, rather than to create specific crimes to address such violence (such as hate-motivated assault). But this has not meant that the problem of racist violence has been ignored. In England, for example, the emphasis is on using existing criminal law provisions and on using a multi-agency approach to better combat such violence. And, in some countries, such as Australia and Sweden, it has been recommended that the criminal law be changed to combat this problem more directly. For example, in Australia two national reform agencies have recommended the creation of specific crimes of racist violence. In short, these

¹⁷⁶ *Ibid.*, ss. 3, 5, pp. 18-19.

¹⁷⁷ Delbetänkande av utredningen för åtgärder mot etnisk diskriminering, *Organiserad rasism: EDU:s delbetänkande om åtgärder mot rasistiska organisationer* ([Stockholm?]: SOU, 1991: 75), English summary, pp. 27-28. For further discussion of the measures taken in Sweden to combat racism, see *Racial Violence and Harassment in Europe, supra*, footnote 78, pp. 38-39.

jurisdictions have, for the most part, recognized the seriousness of hate-motivated violence either by legislating on the issue or by studying the issue and/or using means other than legislation to combat the problem.

It must be recognized, however, that circumstances can arise where, although it cannot be said that the attacker was motivated by hatred of a person's actual or perceived race, religion, colour, et cetera, nonetheless the circumstances of the violent behaviour raise the spectre of mistreatment of a visible minority by the criminal justice system. Perhaps the best known example of this kind is the Rodney King beating. Does the response of the American criminal justice system to the Rodney King beating offer an additional means by which to combat bias-motivated conduct? This will be addressed in the next chapter.

6.0 THE RODNEY KING CASE AND POSSIBLE IMPLICATIONS FOR CANADA

6.1 The Rodney King Case

On March 3, 1991, in Los Angeles, California, several police cars chased Rodney G. King, a robbery parolee who was allegedly speeding. Two friends were with him in the car. After a police chase during which he drove through several intersections against red lights, King eventually was forced to stop. Although the two passengers in the car complied with police requests to exit the car and were subdued with minor resistance, King apparently refused to exit the car and was physically assisted in doing so. He was subsequently struck as many as 56 times by officers wielding batons, kicked at least six times, and shot with a Taser electronic stun gun. The beating was administered by three Los Angeles police officers, allegedly at the order of a police sergeant who was on the scene. Twenty-three other law enforcement officers were also present and watched the beating, but apparently made no effort to stop it. There were also several civilian bystanders, including George Holiday, who witnessed the incident. Holiday videotaped the beating of King. King suffered extensive injuries as a result of the beating, including skull fractures and nerve damage to part of his face.¹⁷⁸

On March 15, 1991, three police officers — Laurence Powell, Timothy Wind and Theodore Briseno — and police sergeant Stacey Koon, were indicted by a Los Angeles grand jury in connection with the beating. All four were charged with "assault by force likely to produce great bodily injury and a deadly weapon" and with assault "under color of authority". The deadly weapons involved were police batons or nightsticks, except in the case of Briseno, who was charged only with using his feet to kick King. Powell and Koon also were charged with filing false reports, and Koon was charged with being an accessory. Koon did not actively participate in the beating but allegedly aided and abetted it.¹⁷⁹

Prior to the trial on these charges, the accused sought to obtain a change of venue for the trial to a county other than Los Angeles County. The change of venue application, originally denied at trial, was granted on appeal. The California Court of Appeal, Second District, approved the change of venue application, given the

¹⁷⁸ This brief summary of the Rodney King beating is taken primarily from *The Guide to American Law: Supplement 1992* (St. Paul, MN: West, 1992) pp. 286-289 and from the description of the beating given by G. P. Alpert, W. C. Smith, and D. Watters, "Law Enforcement: Implications of the Rodney King Beating" (1992) 28 *Crim. L. Bull.* p. 469.

¹⁷⁹ *The Guide to American Law: Supplement 1992, supra*, footnote 1, p. 286.

extensive pre-trial publicity surrounding the case, the fact that the defendants' being police officers had caused a high level of indignation and outrage, and political factors involving criticism of the then Chief of Police, Daryl Gates.¹⁸⁰ The trial site chosen was Simi Valley in Ventura County. Simi Valley is a predominantly white, middle-class community 35 miles from downtown Los Angeles. The jury comprised ten white persons, one Hispanic person, and one Asian person.

On April 29, 1992, the jury rendered its verdicts, generally finding the accused not guilty of the charges.¹⁸¹ The result of the verdicts was immediate: rioting, which resulted in loss of life and extensive damage to property (more than 50 dead and upwards of one billion dollars in damage). Many legal commentators argued that a major reason for the verdicts of not guilty was the change of venue to a location that was not comparable demographically to Los Angeles County.¹⁸²

These acquittals on state criminal charges, however, did not end the matter. Under federal law, the officers could also be prosecuted for violation of Rodney King's constitutional rights. In August 1992, a federal grand jury returned a two-count indictment charging that Stacey Koon, Laurence Powell, Timothy Wind and Theodore Briseno, while under colour of law, deprived Rodney King of his federally protected civil rights. The first count of the indictment charged three of the defendants — Powell, Wind, and Briseno — with violating King's federal constitutional rights by wilfully using unreasonable force against him while arresting him. The second count of the indictment charged Koon, then a sergeant of the Los Angeles Police Department, with violating King's federal constitutional rights by wilfully permitting the three other officers to unlawfully assault him, thereby wilfully depriving him of his right to be kept free from harm while in official custody. Both counts charged violations of 18 U.S.C. § 242, which, if injury results to the victim, is

¹⁸⁰ *Powell v. Superior Court (People)*, 283 Cal. Rptr. p. 777 (Cal. App. 2 Dist. 1991).

¹⁸¹ Police officers Sgt. Stacey Koon, Timothy Wind and Theodore Briseno were acquitted on all counts. However, the jury failed to reach a verdict on the charge that Officer Laurence Powell had used unnecessary force under colour of authority. For a summary of this trial, and its aftermath, see *The Guide to American Law: Supplement 1993* (St. Paul, MN: West, 1993) pp. 291-297.

¹⁸² See, e.g., D. Margolick, "Switching Case to White Suburb May Have Decided Outcome", *The New York Times*, Friday, May 1, 1992, p. A20. For a criticism of the judge's decision to change venue in the Rodney King case, an examination of recent state proposals for changes to the law in response to the King case for obtaining a change of venue, and an argument for a judge's taking race into account in deciding whether to make a change of venue application, see Note, "Out of the Frying Pan or Into the Fire? Race and Choice of Venue after Rodney King" (1993) 106 *Harv. L. Rev.* p. 705.

punishable by a maximum term of ten years' imprisonment and a \$250,000 fine.¹⁸³ As previously noted,¹⁸⁴ section 242 generally makes it a crime for anyone under colour of law to deprive any inhabitant of any state, territory or district of any rights protected by the Constitution or laws of the United States. The jury in this instance was composed of nine white persons, two black persons and one Hispanic person.

On Friday, April 17, 1993, the jury rendered its verdicts on these prosecutions. Two police officers, Stacey Koon and Laurence Powell, were found guilty of the charges against them. The other two officers, Theodore Briseno and Timothy Wind, were found not guilty. Unlike the previous trial, no riots broke out as a result of the verdicts. Instead, there appeared to be a collective sigh of relief. On August 4, 1993, these officers were sentenced to two and a half years in prison for the beating of Rodney King.¹⁸⁵

Although the Rodney King beating and the subsequent acquittals at the first state trial clearly raised in the public's mind the issue of racism in American society, none of the prosecutions specifically alleged racial motivation. Indeed, it was only at the later federal trial that Rodney King, taking the stand for the first time, initially testified that the officers had made racial epithets at the time of his beating; even then, he later had to admit that he was unsure that the police did in fact use such epithets.¹⁸⁶

¹⁸³ The details of the charges are outlined in a news release, 92-201, dated August 5, 1992, entitled "Four Indicted by Federal Government for Civil Rights Law Violations in King Case", issued by the United States Department of Justice.

¹⁸⁴ See pp. 36-38 of this paper.

¹⁸⁵ S. Mydans, "2 of 4 Officers Found Guilty in Los Angeles Beating", *The New York Times*, Sunday, April 18, 1993, at 1, 32; S. Mydans, "Sympathetic Judge Gives Officers 2 1/2 Years in Rodney King Beating", *The New York Times*, Thursday, August 5, 1993, pp. A1, A16.

¹⁸⁶ See S. Mydans, "Rodney King Testifies on Beating: 'I Was Just Trying to Stay Alive'", *The New York Times*, Wednesday, March 10, 1993, p. A1; S. Mydans, "Rodney King Unsure on Beating Details", *The New York Times*, Thursday, March 11, 1993, p. A18.

How is it that, after generally being acquitted at trial on state criminal charges, the police officers responsible for beating Rodney King were able to be prosecuted again under federal law? In the United States, the courts have applied a "dual sovereignty doctrine" that generally allows a state to prosecute a person under state law after the person has been prosecuted under federal law, or allows the federal government to prosecute a person under federal law after the person has been prosecuted under state law, even though the state or federal violation arises out of the same act and even though the state and federal offences are substantially the same.¹⁸⁷ However, the dual sovereignty doctrine has been limited somewhat by federal policy and by various state statutes.¹⁸⁸

In the context of federal civil rights prosecutions, this means that there is no constitutional double jeopardy bar to launching a federal criminal prosecution in the event that, at an earlier state trial, an accused was acquitted of the crime charged. There has been criticism of this approach. For example, the American Civil Liberties Union recently voted to oppose as unconstitutional the federal civil rights trial of the officers who beat Rodney King, saying it violates the officers' right not to be tried twice for the same offence.¹⁸⁹

¹⁸⁷ For example, in *Bartkus v. Illinois*, 359 U.S. p. 121 (1959), the accused originally had been prosecuted under federal law for robbery of a federally insured bank, but had been acquitted. The accused was later tried for robbery under the penal law of the State of Illinois. Although the federal authorities and state prosecutorial authorities cooperated with each other, the court concluded that the state prosecution was not a sham and a cover for the federal prosecution, and applied the dual sovereignty doctrine to uphold the person's conviction on the state prosecution. See also *Abbate v. United States*, 359 U.S. p. 187 (1959).

¹⁸⁸ For example, the Justice Department has a "Petite Policy", by which the federal government will not prosecute a defendant who has been previously prosecuted in a state court for the same conduct unless "compelling interests" support a second prosecution. See M. A. Dawson, "Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine" (1992) 102 *Yale L.J.* pp. 293-294 for a discussion of this policy. Dawson, p. 294, describes the state statutes limiting the dual sovereignty doctrine as follows:

Twenty-three states have adopted statutes limiting the dual sovereignty doctrine. However, the limitation effected by these statutes is even less complete than that effected by the *Petite Policy*. The *Petite Policy* limits federal prosecution of offenses arising out of the *same conduct* previously subject to state prosecutions. Thirteen states impose a similar limitation, limiting state prosecution of offenses arising out of the *same conduct* previously subject to federal prosecution. Another seven states limiting the dual sovereignty doctrine, however, do so by limiting re prosecution for the *same offense* — not for the *same conduct*. As in the case of federal prosecutions following state prosecutions, state prosecutions following federal prosecutions for offenses arising out of the same conduct are brought routinely.

¹⁸⁹ N. A. Lewis, "A.C.L.U. Opposes Second Trial for Same Offense", *The New York Times*, Monday, April 5, 1993, p. A10. Policy # 238a of the A.C.L.U., on file with the author, entitled "Double Jeopardy", states at p. 299b that there should be no exception to double jeopardy principles simply because the same offence may be prosecuted by two different sovereigns. The policy goes on to state, at footnote 3 of p. 299b, that "there are many tools at the disposal of Congress or federal prosecutors to prevent the states from eviscerating the power of the federal government to vindicate important interests, such as those embodied in the civil rights laws. These

6.2 Possible Implications for Canada

To what extent does double jeopardy protection arise as an issue in Canadian law in the foregoing context? First, unlike American states, provinces have no constitutional authority to legislate on criminal law matters, since the making of criminal law lies within the exclusive jurisdiction of the federal government. Therefore, there is no possibility of a Canadian province legislating a crime of, say, assault, and the federal government legislating another crime of, say, violation of one's rights protected by the *Charter*, that would give rise to a similar "dual sovereignty" doctrine regarding criminal offences in Canadian law.

However, given that criminal law authority lies exclusively within the jurisdiction of the federal government, double jeopardy issues may arise in the context of prosecutions of hate-motivated crime. First, suppose that a crime or crimes of hate-motivated violence were to be created. If a person were to be prosecuted for such a crime (e.g., committing an assault by reason of hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera), then upon an acquittal or conviction for that crime, a subsequent prosecution for the basic crime (e.g., assault) would be barred because the assault would be an included crime of the hate-motivated crime.

Canada's constitutional guarantees of rights and freedoms, it should be noted, differ from those of the United States, in that they are restricted to protect against abusive government action only. Section 32 of the *Charter* ensures that the *Charter* applies to the Parliament and government of Canada or to the legislature or government of a province. By section 24, a person whose rights are denied could apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. In those proceedings, the court may exclude evidence if established that its admission would bring the administration of justice into disrepute.

might include preempting state prosecutions, creating a federal removal statute for situations where federal prosecution is deemed desirable, or prosecuting or enhancing penalties for activities designed to impede federal prosecution." The above article by N. A. Lewis points out the division that occurred within the A.C.L.U. on this policy in the wake of the Rodney King beating. After the acquittal of the police officers involved in the Rodney King beating on April 29, 1992, the Southern California chapter of the A.C.L.U. urged the Justice Department to try the officers on federal civil rights charges. The A.C.L.U.'s strict policy opposing double jeopardy was suspended in June, 1992 to consider the impact of the policy on the officers' case. On April 4, 1993, in a close vote, the national board of the A.C.L.U. enacted a resolution opposing any exceptions to the American Constitution's prohibition against double jeopardy. However, all ten of the black members who were present voted to allow for second trials on civil rights grounds after acquittal on local charges.

In a Rodney King situation of police brutality that was covered up, if the government was prosecuting the accused who was beaten and the evidence of brutality came out at trial, the prosecution's case would collapse as being an abuse of process. But what if there were no prosecution brought? Government agents have acted brutally. They are tried on assault charges and acquitted. The victim's constitutional rights have been infringed. Could the officers be tried a second time? What if Parliament passed a law, aimed at peace officers, making it a crime to infringe a person's constitutional rights?

In light of the American experience, it may be useful, albeit speculative, to consider what the double jeopardy consequences would be if a new crime of violating one's constitutional rights were to be created. In this context, two issues arise. The first would be, assuming that the peace officer has been prosecuted previously (e.g., for assault) and acquitted, whether the officer could be subsequently prosecuted for the crime of violating a person's constitutional rights. The constitutional right being violated in such a case would arguably be that of section 7 of the *Charter*, that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

In this regard, two questions arise. First, could the plea of *autrefois acquit* be raised in relation to the later prosecution for the crime of violating one's constitutional rights? To succeed on this claim, it appears that the courts would have to conclude that this is the same or substantially the same crime as the crime prosecuted earlier.¹⁹⁰ This seems reasonably certain given that the violation of the right consists of the assault itself. Secondly, in the unlikely event that the court concluded the plea of *autrefois acquit* did not apply, would proceeding with the subsequent prosecution constitute an abuse of process by unreasonably splitting the case? In *R. v. B.*,¹⁹¹ it was held that splitting a case can become an abuse of process in certain circumstances: when the second trial will force the accused to answer for the same delinquency twice, when the second trial will relitigate matters already decided on the merits, and when the second trial is brought because of malice or spite so as to harass the accused. It is most likely that the second trial would, in these circumstances, be seen to constitute an abuse of process.

The second issue is, assuming that the courts held that the crimes of assault and of violating a person's constitutional rights were different crimes and the crimes were to be tried together, whether the rule against multiple convictions would apply to prevent the accused from being convicted on both charges. The rule against multiple

¹⁹⁰ The issue would appear to be whether or not the two charges are different in nature. See *R. v. Van Rassel*, [1990] 1 S.C.R. 225; (1990), 53 C.C.C. (3d) 353.

¹⁹¹ *R. v. B.* (1986) 29 C.C.C. (3d) 365 (Ont. C.A.).

convictions was first enunciated by the Supreme Court of Canada in *Kienapple v. The Queen*.¹⁹² Subsequent cases have attempted to clarify the scope of this rule, the most notable being that of *R. v. Prince*.¹⁹³ In that case, the Supreme Court of Canada held that the rule against multiple convictions applies only where there is both a factual and legal nexus existing between the offences. A legal nexus between the offences exists if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle.¹⁹⁴

In light of these decisions on the rule of multiple convictions, what would happen if, for example, a criminal prosecution was brought both for a crime of assault and for the crime of violating a person's constitutional rights arising out of the assault? Would convictions on both charges ensue? The issue would be whether or not the crime of violating a person's constitutional rights, as was stated in *Prince*, had additional and distinguishing elements that go to guilt. Again, it seems most likely that the rule against multiple convictions would apply in the circumstances of the case, because the violation of the fundamental right to life, liberty, and security of the person was the assault by the police. In short, the protections against double jeopardy in Canadian law would restrict the operation of such a crime.

¹⁹² *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; (1974), 15 C.C.C.(2d) 524. There, the accused had been charged with separate counts in one indictment of the then crimes of rape and unlawful sexual intercourse with a female under 14 years of age. At trial, the accused had been convicted of both counts. The Supreme Court of Canada held that, although the crime of unlawful sexual intercourse was not included in the crime of rape, nonetheless the doctrine of *res judicata* applied, which precluded multiple convictions for the same delict even though the same matter was the basis of two separate offences.

¹⁹³ *R. v. Prince*, [1986] 2 S.C.R. 480; (1986), 30 C.C.C. (3d) 35.

¹⁹⁴ In *Prince, ibid.*, the Court ruled that the rule against multiple convictions did not preclude a subsequent prosecution and conviction for manslaughter arising out of the death of an infant prematurely born when the accused had previously been tried for attempted murder of, and convicted of causing bodily harm to, the infant's mother.

In another case, *Wigglesworth v. The Queen*, [1987] 2 S.C.R. 541; (1987), 37 C.C.C. (3d) 385, the Supreme Court of Canada held that a police officer who had been found guilty of a major service offence under the *Royal Canadian Mounted Police Act* arising out of an unlawful assault upon a prisoner could also be prosecuted and convicted of the crime of assault without contravening the double jeopardy guarantee of subsection 11(h) of the *Charter*. The majority of the court held that the offences were quite different so as not to attract the rule against multiple convictions. One offence — the major service offence — was an internal disciplinary matter for which the accused was accountable to his profession, whereas the other was a crime for which the accused was accountable to society at large. Clearly, this rationale would not apply where two crimes are in issue.

This leaves the fundamental issue to be addressed: Should a crime of violation of a person's constitutional rights be created? The obvious advantage of creating such a crime is that it would strongly and specifically denounce violations by government agents of the rights and freedoms guaranteed by the *Charter*. In the context of violent police behaviour, the crime could be used without the necessity of proving that the peace officer was motivated by hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera. However, it also has disadvantages. It is not defined as a hate crime although it could be used in cases of hate-motivated conduct. If other measures were enacted to address specifically the issue of hate crimes, would not a prosecution pursuant to those more specific provisions be more advantageous? As well, why not just prosecute the officers for assault? Also, a crime of violating a person's constitutional rights could be very broad. For example, such a definition would mean the possibility of a crime arising where a police officer fails to allow an accused to obtain the right to counsel. Arguably, the broad scope of such a crime would run contrary to the fundamental principle of restraint in the use of the criminal law,¹⁹⁵ unless, of course it were to be narrowly defined — for example, by restricting its application to violent police actions that infringe on a person's rights. Finally, the advantage of having such a crime in the United States — the ability to later prosecute an accused after a previous acquittal in relation to the same conduct under state penal law — does not apply in Canada. The rules governing protection against double jeopardy would apply in relation to this crime just as to all other crimes.

6.3 Summary

This chapter examined the Rodney King beating and the resulting trials to show that, under American federal law, a police officer who uses excessive force against a member of a visible minority may be prosecuted for violation of the victim's constitutional rights, even though the officer may have been acquitted of charges in relation to the same conduct brought pursuant to state penal law. Because of the doctrine of "dual sovereignty", the protection against double jeopardy does not apply to bar the subsequent prosecution under federal law. The advantage of American federal law, therefore, is to afford to a person whose civil rights have been violated another forum for a criminal prosecution where a state prosecution has failed. However, the criticism made of this approach is that it denies the accused adequate double jeopardy protection.

¹⁹⁵ For an examination of this fundamental principle of restraint see Law Reform Commission of Canada, *Our Criminal Law* [Report 3] (Ottawa: Minister of Supply and Services Canada, 1976).

The chapter pointed out that this "dual sovereignty" doctrine would not apply to prevent the application of double jeopardy protection under Canadian law, in the hypothetical event that a crime of violating one's constitutional rights were to be created in Canada. This is because the creation of criminal law in Canada falls exclusively within the federal domain. It also pointed out aspects of protection against double jeopardy that the courts would have to consider. These protections against double jeopardy, such as the special plea of *autrefois acquit*, the rule against unreasonably splitting a case and the rule against multiple convictions, could well limit the usefulness of such a crime in a Rodney King scenario. The chapter concluded by revealing problems in defining such a crime, that make the utility of creating such a crime questionable.

But if the focus for reform is to be on measures directed specifically at bias-motivated conduct, what direction should this reform take? The next chapter sets out a series of options that our criminal law could take in addressing the issue of hate-motivated violence.

7.0 OPTIONS FOR REFORM

Over the past decade, hate-motivated violence has come to be recognized by several foreign jurisdictions as a serious problem that the criminal justice system must try to address. From the United States, where hate crimes statutes have been created in many states, to England, where government initiatives to combat such violence have focussed on better policing and inter-agency cooperation, and Australia, where reform-minded organizations such as the Australian Law Reform Commission have recommended specific hate crimes legislation, there is seen a need by government to combat this problem.

How should Canadian criminal law respond to bias-motivated violence? Is the present law satisfactory? Or are other, better options available? This issue will be addressed in the following list of options. A full range of options is provided; some are exclusive of others. For example, Option 1, which sets out that the criminal law should not in any way attempt to combat the problem of hate-motivated violence, is obviously irreconcilable with an approach that favours the use of the criminal law to help in combatting the problem. However, other options may be viewed as complementary to each other. For example, the creation of a specific crime or crimes of hate-motivated violence could be used to complement a general policy set out either in the form of sentencing guidelines or a *Code* amendment that would increase the penalty for any crime committed by reason of hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera.

7.1 Refusing to Allow the Criminal Law to Respond to Hate-Motivated Violence

Option 1. If a person commits a crime by reason of hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera, the criminal law should not increase the person's penalty for committing the crime either by using the hateful motivation as an aggravating factor at sentence or by creating a separate crime or crimes of hate-motivated conduct.

In order to encompass the full range of options available in any analysis of the problem of hate-motivated violence, this option must be considered.

What can be said in favour of this option? At best, it ensures that the criminal law remains neutral when faced with an accused who commits a crime by reason of hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera. Such a person would fare no better or no worse than a person who commits the same crime without having such a hateful motive. This result arguably affords maximum protection to freedom of expression, because it ensures that a person will not be punished for his or her hateful beliefs.

However, such an option is obviously untenable. The protection afforded to freedom of expression is clearly overstated, because what is prohibited is engaging in criminal conduct by reason of hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera, not activity that is exclusively that of exercising the right of free speech. It would negate the existing case law, which asserts, correctly, that acts of hate-motivated violence constitute a grave assault on the person attacked, the group to which the person belongs, and society itself. If put into force, it would significantly weaken the protection that the criminal law affords to members of minority or other identifiable groups.

7.2 Creating a Federal Hate Crime Statistics Act

Option 2. The federal government should take immediate action to obtain better information on the incidence of hate-motivated crimes in Canada by passing a federal hate crime statistics act.

This option would, by the use of federal law, create a mechanism to record data about the incidence of hate-motivated crime in Canada. One of the difficulties in assessing the scope of hate-motivated violence in Canada is the limited scope of data on the subject. Compared with other jurisdictions — such as the United States, where procedures are in place to obtain national data on such incidents — Canada's data-gathering mechanisms on this subject are inadequate.¹⁹⁶

The advantage of creating this kind of data-gathering system would be to obtain more information about the incidence of hate-motivated crimes and thereby to help in formulating both legislative and nonlegislative responses to this problem. For example, such data could be useful in obtaining information about how often such attacks take place, and where most attacks take place, as well as in obtaining general profiles about victims and attackers.¹⁹⁷ In some Canadian cities, such as Ottawa and Toronto, bias crimes investigative units have been set up recently. Thus, some

¹⁹⁶ See pp. 10-14 of this paper.

¹⁹⁷ Indeed, as noted earlier, in Australia, the National Inquiry into Racist Violence called for the development of "uniform national procedures" for the collection of such data. Human Rights and Equal Opportunity Commission, National Inquiry into Racist Violence, *Racist Violence* (Canberra: Australian Government Publishing Service, 1991) p. 314 [hereinafter *Racist Violence*]. As well, it should be noted that a private member's bill, Bill C-45, *Bias Incidents Statistics Act*, 3d Sess., 34th Parl., 1991-92-93 (1st reading 8 June, 1993) was introduced into the Canadian House of Commons that would have police forces across the country collect statistics that would indicate the number of incidents investigated by them that were wholly or partly motivated by bias against those sections of the public identifiable on the basis of colour, race, religion, sexual orientation or ethnic origin.

mechanisms are now being put in place at the local police level to help determine if criminal activity is hate-motivated. Creating a federal hate crime statistics act could serve to spur other police forces into collecting similar data.

The disadvantage of this proposal, arguably, is that to create such a law now, when its effect would be initially limited, might be an ineffective use of federal resources. The effect would be thus limited because incidents of hate-motivated crimes are not at present systematically recorded by all police forces. Therefore, it would be premature at this stage for the federal government to arrange to have such data collected at the national level until more collection of such data is done at the provincial and municipal levels.

7.3 Combatting Hate-motivated Violence By Increasing the Penalty for the Basic Crime

Option 3. The approach of the present criminal law in combatting hate-motivated violence, which uses evidence of hateful motivation as an aggravating factor to increase the penalty for the basic crime by means of judge-made sentencing principles, should be continued. No changes to the present criminal law should be made to combat this problem.

This option would continue the policy of the present law, which does offer protection to victims of hate-motivated crime by way of judge-made sentencing principles developed through case law. Evidence of the accused's hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera, is used as an aggravating factor to increase the penalty for the basic crime beyond the usual sentence given for that crime when not so motivated.

The benefit of this approach is that it views hateful motivation as one of a number of aggravating factors used to enhance the penalty for committing a crime, and one that is capable of broad application. It also has the benefit of familiarity, since it is, after all, present practice.

The costs, however, of continuing the present practice would appear to outweigh the benefits. Even though case law has held that evidence of hateful motivation should be used as an aggravating factor to increase sentence, to what extent is this practice followed by judges across the country? After all, the reported cases are instances where the appeal courts have imposed a more severe sentence than that imposed at trial. Moreover, is this the most effective way to denounce such behaviour? To discover the use of such hateful motivation as an aggravating factor at sentence, a person must either search case law or textbooks on sentencing practice. It

therefore should not be surprising that those who would seek to have the criminal law act more effectively in combatting hate-motivated violence are critical of the approach taken by the present law.¹⁹⁸

Option 4. Either sentencing guidelines or the *Criminal Code* should specify that the fact that a person has committed a crime by reason of hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera, should increase the penalty for the crime.

The benefits of this approach would be that increasing the penalty for a crime where the crime was hate-motivated would be set down, either in guideline or in statutory form. Being more visible than the current law, it therefore would have a more denunciatory and educative impact than the present law. As well, by being clearly set out, it could have the effect of ensuring that in all cases of hate-motivated violence, the penalty for the crime would be increased, thereby reducing the possibility that a trial judge might fail to increase the sentence accordingly. As noted earlier, the use of motivation as an aggravating factor in sentencing guidelines has been proposed with regard to federal crimes in the United States.¹⁹⁹

The use of guidelines has one disadvantage: it may not have the greatest impact in denouncing bias-motivated conduct. Obviously, the less forceful the effect of the guidelines (e.g., merely advisory as opposed to presumptive), the more they approximate the present law, which relies on case law to develop principles of sentencing policy. Moreover, the use of hateful motivation as an aggravating factor in sentencing guidelines makes sense only insofar as the government is resolved to create such guidelines. The longer the delay in setting up such guidelines and the mechanism for monitoring them on an ongoing basis, the more realistic it becomes to look for other methods that could be used as an alternative to sentencing guidelines. The clearest alternative to the use of guidelines in this regard is to amend the *Code* itself.

One possible reform would be to set out in the *Code* a statutory list of aggravating factors that would increase the sentence for committing a crime. For example, the Law Reform Commission of Canada, in its final report on *Recodifying*

¹⁹⁸ See, e.g., the criticisms of the present law set out at pp. 26-28 of this paper.

¹⁹⁹ See pp. 38-39 of this paper.

Criminal Law,²⁰⁰ recommended the creation of a list of aggravating factors that would be placed in the *Criminal Code*, although provisions relating to the effect of such factors on sentence would be governed by a code of criminal procedure. (These aggravating factors did not, however, include hateful motivation.)²⁰¹ This approach has the advantage of any codification of the criminal law: it sets out plainly what citizens should or should not do, and therefore has a strong denunciatory effect. In this regard, some American states have created a statutory list of aggravating factors going to increase sentence.²⁰²

One possible advantage of treating evidence of hateful motivation as just one aggravating factor among many is that this approach would be less criticized by those who would object to specific statutory reforms addressing hate-motivated violence — for example, the creation of a specific penalty provision that increases the penalty for any crime committed by hateful motivation, on the ground that such an approach fractures the general scope of the criminal law by singling out certain groups for special attention and protection.

A more direct reform would be to amend the *Code* so that it specifically addresses increasing the sentence for a crime where a person has acted by reason of hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera. For example, as noted earlier, Canadian critics of the present law have suggested that the *Code* be amended to provide specifically that evidence of racist motivation should result in an increased penalty.²⁰³ The advantage of amending the *Code* to this effect is to denounce such hateful behaviour as being particularly heinous.

²⁰⁰ Law Reform Commission of Canada, *Report on Recodifying Criminal Law (Revised and Enlarged Edition of Report 30)* [Report 31] (Ottawa: Law Reform Commission of Canada, 1987) [hereinafter *Recodifying Criminal Law*].

²⁰¹ *Ibid.*, p. 71. This list of aggravating factors was to apply, where appropriate, to crimes against bodily integrity such as assault, crimes against psychological integrity such as threatening, crimes against personal liberty such as confinement, and crimes causing danger such as endangering.

²⁰² For an example in American law of the use of racial motivation as an aggravating factor in sentencing, see Illinois Annotated Statutes, c. 38 ¶ 1005-5-3.2 (10) (Smith Hurd, 1992 P.P.). It provides the following as an aggravating factor that shall be accorded weight in favour of imposing a term of imprisonment or may be considered by the court in imposing a more severe sentence:

[T]he defendant committed the offense against a person or a person's property because of such person's race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin. For the purposes of this Section, "sexual orientation" means heterosexuality, homosexuality, or bisexuality

²⁰³ See pp. 26-28 of this paper.

The disadvantage of this approach for those favouring an increased use of the criminal law is that treating evidence of hateful motivation as, in effect, an aggravating factor that raises the penalty for committing a basic crime, still does not adequately recognize the unique kind of harm caused by hate-motivated violence.

Option 5. The definitions of certain crimes in the present *Code*, such as mischief and assault, should be amended to provide specifically for an automatic penalty enhancement where the crime is committed by reason of a person's hatred of another's actual or perceived race, religion, ethnic origin, et cetera.

This option proposes that statutory changes to existing crimes could be made whereby, if the commission of certain crimes was hate-motivated, the maximum penalty range of those specific crimes would be automatically increased. The *Code* currently does this in relation to some other crimes. For example, in the context of impaired driving and related offences, *Code*, section 255 provides that a person who is convicted of impaired driving, on proof of a previous conviction for the same offence, receives an automatic increase in punishment.

The benefit of this approach would be that the use of hateful motivation to increase the penalty for committing a crime would be carefully structured to apply only to those crimes most associated with acts of hate-motivated violence. It would appear to have a denunciatory and educative impact equal to the use of a broadly applied aggravating factor — in fact, it could be argued that, as part of the definition of the crime (in that it would be placed in a subsection relating to the range of punishment for committing the crime), it would have a most effective denunciatory and educative impact.

However, there are disadvantages to this approach. It presumes that only a limited number of crimes would be so changed (otherwise a majority of the definitions of the crimes in the present *Code* would have to be similarly changed, which would be most awkward in terms of drafting). Thus, this approach would be narrow in scope, especially if it were meant to replace the concept of the use of an aggravating factor having broad application. There is also the difficulty of determining which crimes to so alter. On what basis would some crimes be chosen and others not? Finally, like options 3 and 4, this approach assumes that hate-motivated violence is a just a more serious instance of crimes already set out in the *Code*, rather than something especially harmful in its own right.

7.4 Creating Specific Hate-Motivated Crimes

7.4.1 Arguments for the Creation of Hate Crimes

The fundamental issue for Canadian criminal law is whether or not there should be a specific crime or crimes of hate-motivated violence. The obvious question that arises is: Why create such crimes when the criminal law already catches this conduct? For example, hate-motivated vandalism is still vandalism, hate-motivated assault is still assault, and hate-motivated murder is still murder. Would not the creation of a crime of hate-motivated violence, therefore, be superfluous?

Let us start at the beginning. What is the difference between a crime of hate-motivated violence and any other crime of violence? Is the harm the same? Or is the harm different?

The answer given by many legal commentators is that hate-motivated violence causes greater harm both to the victim and to society than does regular crime. For example, American legal commentator Peter Finn states:

Many criminal justice personnel view hate violence as just another crime — no more serious or worthy of special attention than any other comparable crime. According to this view, murder is murder, and assault is assault, regardless of whether the offender was motivated by hatred for a class of people, by a desperate need to get cash to feed a drug habit, or by an outburst of jealous rage. However, many criminal justice personnel and community leaders believe that crimes motivated by bias have a far more pervasive impact than comparable crimes that do not involve prejudice *because they are intended to intimidate an entire group*. The fear they generate can therefore victimize a whole class of people. Furthermore, our country is founded on principles of equality, freedom of association, and individual liberty; as such, bias crime tears at the very fabric of our society.²⁰⁴

²⁰⁴ P. Finn, "Bias Crime: Difficult to Define, Difficult to Prosecute" (Summer, 1988) 3 *Criminal Justice*, No. 2, 19, p. 20. Another legal commentator, focussing on the harm done to society, states: "The harm which arises from bias crimes is distinct because an entire disfavoured and discrete group of people is assaulted whenever an individual is assaulted as a result of an immutable characteristic. Communal harmony within society in general is totally disrupted by a single act of arbitrary hatred because of the distrust and fear that is ignited. What is needed is public recognition of these distinct and serious harms, to be achieved through separate state criminal statutes that make an official statement that bias crimes will not be tolerated." (T. K. Hernández, "Bias

A description of the effect that hate-motivated crime has on its victims also shows the insidious nature of such attacks. In its analysis of the impact of bias crimes, the New York State Governor's Task Force on Bias-Related Violence quoted from a study conducted by the National Institute Against Prejudice and Violence (NIAPV) on bias violence victim experiences in nine American cities, which stated, in part, that many individuals and families became isolated, withdrawn and paranoid out of fear, others were overcome by anger and revenge fantasies, others fought to stymie feelings of hatred for their attackers, and others experienced sadness and a feeling of powerlessness.²⁰⁵

As a result of that study and the testimony received before it, the Task Force found:

The bias crime victimization experience is especially traumatic for victims and their loved ones. The physical injury, property damage and emotional trauma that can accompany any victimization are complicated for bias crime victims by anger, fear and a sense of isolation. Victims who are non-English speaking may suffer additional complications and distress. This emotional stress may occur repeatedly and severely restrict the individual's ability to lead a free and rewarding life.²⁰⁶

Arguably, the effect of hate-motivated violence on victims in Canada would be the same.

In a different but analogous context, that of the publication of hate propaganda, recent studies have analyzed the impact that the publication of hate propaganda has had on Jewish Canadians. From 1987 to 1989, research was carried out on a sample of 165 Jewish respondents living in Metro Toronto to assess the impact on them of the Zundel and Keegstra trials. The former accused was charged with the crime of publication of false news (now *Code*, section 181); the latter was charged with the crime of wilfully promoting hatred (now *Code*, section 319(2)). Among the results was the following:

Crimes: Unconscious Racism in the Prosecution of 'Racially Motivated Violence'" (1990) 99 *Yale L.J.*, p. 848.)

²⁰⁵ National Institute against Prejudice and Violence, *The Ethnoviolence Project* Institute Report No. 1 (Baltimore: 1986), quoted in State of New York, *Governor's Task Force on Bias-Related Violence [Final Report]* (New York: Division of Human Rights, 1988) pp. 4-5 [hereinafter *Governor's Task Force on Bias-Related Violence*].

²⁰⁶ *Governor's Task Force on Bias-Related Violence, supra*, p. 5.

Almost 80 percent of respondents reported that they experienced suffering/psychological harm as a result of following the trials. Qualitative responses to these questions revealed that Jewish respondents felt ... silenced ... targeted and exposed ... insecure and fearful ... angry and frustrated ... deep, gut-wrenching agony and ... too painful to say. Further, 89 percent of respondents expressed the belief that hate propagandizing activities have caused harm and suffering ... psychic harm and trauma ... mental anguish ... to Jews as a people.²⁰⁷

If hate propaganda alone produces such harm, would the harm be any less if a person were the victim of a hate-motivated attack? This seems extremely unlikely.

The particularly heinous nature of hate-motivated violence, therefore, justifies treating this form of violence differently from other forms of violence. This rationale is the basis for using hateful motivation as an aggravating factor to enhance the penalty in relation to general crimes such as mischief, assault or manslaughter. Equally, though, the rationale also justifies considering instances of hate-motivated violence as crimes in their own right.

A strong argument put forward for the creation of specific criminal legislation directed at bias-motivated conduct is that such action is required by international human rights treaties. In this regard, Canada is a signatory to both the International Convention on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Specifically, Article 4 of CERD provides, in part, that State Parties, with due regard to the principles embodied in the Universal Declaration of Human Rights:

- (a) *Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof (emphasis added).*

²⁰⁸
...

What is the effect of these international human rights documents in Canadian criminal law? The Supreme Court of Canada will rely on Canada's international legal commitments to assist in determining whether or not criminal law legislation is

²⁰⁷ E. Kallen, "Never Again: Target Group Responses to the Debate Concerning Anti-Hate Propaganda Legislation" (1991) 11 *Windsor Y.B. Access Just.*, p. 58.

²⁰⁸ *International Convention on the Elimination of All forms of Racial Discrimination*, [1970] Can. T.S., No. 28, Art. 4(a).

consistent with, or contravenes, the *Charter*. For example, in *R. v. Keegstra*,²⁰⁹ the majority of the Supreme Court used CERD and ICCPR to show that Parliament had a legitimate objective in enacting the crime of wilfully promoting hatred (*Code*, section 319[2], one of the hate propaganda crimes), thus using those international human rights instruments to help uphold the legitimacy of that criminal legislation.²¹⁰

In other contexts, the federal government has taken action on several fronts to better comply with its obligations under CERD.²¹¹ At the federal level specifically, the *Canadian Multiculturalism Act*, passed in 1988, sets out Canada's multiculturalism policy. The preamble to the Act states that Canada is a party to CERD and ICCPR, and the purposes set out there are clearly informed in part by Canada's desire to adhere to its treaty commitments.²¹²

In this context, the specific issue that arises is whether or not these international obligations compel lawmakers to the conclusion that criminal legislation aimed specifically at hate-motivated violence should be created. On one hand, one could argue that there is no need to alter existing criminal law to tackle this problem:

²⁰⁹ *R. v. Keegstra*, [1990] 3 S.C.R. 697, 61 C.C.C.(3d) 1.

²¹⁰ *Ibid.* Dickson C.J.C. stated p. 754 (S.C.R.):

C.E.R.D. and *I.C.C.P.R.* demonstrate that the prohibition of hate-promoting expression is considered to be not only compatible with a signatory nation's guarantee of human rights, but is as well an obligatory aspect of this guarantee. ... [C]anada, along with other members of the international community, has indicated a commitment to prohibiting hate propaganda, and in my opinion this court must have regard to that commitment in investigating the nature of the government objective behind section 319(2) of the *Criminal Code*. That the international community has collectively acted to condemn hate propaganda, and to oblige state parties to *C.E.R.D.* and *I.C.C.P.R.* to prohibit such expression, thus emphasizes the importance of the objective behind section 319(2) and the principles of equality and the inherent dignity of all persons that infuse both international human rights and the *Charter*.

For a discussion of the use of international human rights law in Supreme Court *Charter* cases, see A. F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Markham, Ont.: Butterworths, 1992) pp. 74-100. Another possible interpretation of these international human rights documents is that which sees these international commitments as creating international offences which are part of Canadian law by virtue of the *Charter*, whether or not Parliament decides to create legislation to that effect. See, in the context of war crimes, D. Matas, "The *Charter* and Racism", a copy of which is on file with the author, originally published in (1990) 2 *Const. Forum* p. 82.

²¹¹ For a discussion of recent federal and provincial initiatives, see Multiculturalism and Citizenship Canada, *International Convention on the Elimination of All Forms of Racial Discrimination* [Eleventh Report of Canada, covering the period January, 1990 to December, 1991] (Ottawa: Minister of Supply and Services Canada, 1992).

²¹² *Canadian Multiculturalism Act*, R.S.C. 1985 (4th Supp.), c. 24.

that the present law adequately satisfies our international obligations in this area. On the other hand, one could argue that these international treaties require Canada to create new criminal law to satisfy its international obligations. Clearly, the creation of specific criminal legislation to combat hate-motivated violence more forthrightly satisfies Canada's obligations under international law. In this regard, as previously noted, reform-minded organizations in Australia, a country that has much in common with Canada,²¹³ have strongly argued for the creation of a crime of racist violence, in large part because they believe that such a reform would better comply with Australia's international obligations under CERD and ICCPR.²¹⁴

Another reason that can be given for the creation of new criminal law to combat hate-motivated violence is that it would serve an important symbolic or educational purpose. As stated in the Law Reform Commission of Canada report, *Our Criminal Law*, the primary purpose of the criminal law is to reaffirm the fundamental values of society by publicly condemning conduct that violates those values.²¹⁵ In this case, the argument would be that the fundamental values of modern Canadian society include those of human dignity and equality, which are undermined by hate-motivated violence. Therefore, even though there already are general criminal laws that can be used to prosecute such conduct, the creation of a hate crimes statute would better affirm these values by most clearly denouncing this conduct.

7.4.2 Constitutional Concerns

Would the creation of a crime or crimes of hate-motivated violence be unconstitutional under Canadian law? To answer this question, it is respectfully suggested that the American experience is most useful as a guide. Why? For this reason: American law has more zealously guarded freedom of expression than has Canadian law. Because of the differences in our respective constitutions and cultures, the United States Supreme Court and the Canadian Supreme Court have reached opposite views about the constitutionality of laws prohibiting hateful expression. In

²¹³ For example, Australia, like Canada, has a parliamentary democracy, has in recent years conducted inquiries into its treatment of aboriginal people, and has a national multiculturalism policy.

²¹⁴ See The Law Reform Commission, *Multiculturalism and the Law* [Report No 57] (Sydney, Australia: The Law Reform Commission, 1992) p. 153, 155; *Racist Violence, supra*, footnote 2, pp. 296-298.

²¹⁵ Law Reform Commission of Canada, *Our Criminal Law* [Report 3] (Ottawa: Minister of Supply and Services Canada, 1976) pp. 5-6.

R.A.V. v. City of St. Paul,²¹⁶ the United States Supreme Court ruled that a city ordinance prohibiting racist vilification was unconstitutional by violating the First Amendment of the Constitution. In contrast, in *R. v. Keegstra*,²¹⁷ the Supreme Court of Canada held that the crime of wilfully promoting hatred against an "identifiable group" was constitutional.

And yet, even though the United States Supreme Court has more forcefully defended freedom of expression in this context than has the Supreme Court of Canada, it has still upheld, in *Wisconsin v. Mitchell*,²¹⁸ the constitutionality of hate crimes legislation that increases the penalty for certain crimes committed by reason of hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera. Given this American precedent, and given the *Keegstra* precedent, it is inconceivable that the creation of similar hate crimes legislation in Canada would be found to be unconstitutional — especially since the current practice in Canadian criminal law at the sentencing stage is to use evidence of hateful motivation as an aggravating factor to increase the penalty for committing a crime.

Nonetheless, some critics of the hate crimes legislation in the United States claim that these laws do not afford sufficient protection to minorities. To make the prosecution of hate crimes more effective, they have proposed controversial changes to the hate crimes laws that could render those laws, if so changed, subject to attack as being unconstitutional. These proposed changes involve defining hate crimes in such a way as to create a presumption of racist intent, but to allow an accused to raise an affirmative defence of no racial motivation, thereby shifting the burden of proof on the issue of motive from the state to the accused. As well, minorities would be exempt from prosecution under this criminal law, so that it would only be used to prosecute racist individuals of the majority white population who assault members of a minority group.²¹⁹

A hate crimes statute designed in a manner that requires the prosecution to prove hateful motivation, and that affords protection to both minority and majority groups in society, raises no *Charter* problems. However, if the definition of the

²¹⁶ *R.A.V. v. City of St. Paul*, 505 U.S.--, 120 L Ed 2d p. 305 (1992).

²¹⁷ *Keegstra*, *supra*, footnote 14.

²¹⁸ *Wisconsin v. Mitchell*, decided in the United States Supreme Court, on June 11, 1993, No. 92-215, 61 LW p. 4575 (unreported).

²¹⁹ See M. L. Fleischauer, "Teeth for a Paper Tiger: A Proposal to Add Enforceability to Florida's Hate Crimes Act" (1990) 17 *Fla. St. U. L. Rev.*, p. 697; Note, "Combatting Racial Violence: A Legislative Proposal" (1988) 101 *Harv. L. Rev.*, p. 1270.

crime presumed racist intent and was restricted to allow for prosecution only in cases where the perpetrators of violence were members of the white majority, possible *Charter* violations clearly would arise. In such a case, the presumption of innocence is arguably violated. Also, there is a violation of the equality guarantee, because the law would deny a significant proportion of the Canadian population protection from such harmful attacks.

These controversial proposals for reform, however, do not affect the constitutional validity of hate crimes legislation modelled upon the lines suggested by the Anti-Defamation League. Thus, the fundamental question remains: Should the criminal law of Canada be amended to create such crimes as a matter of policy?

7.4.3 Tests of Criminality

In this regard, the philosophy espoused by the Law Reform Commission of Canada serves as a guide for determining when crimes should be created. In its report, *Our Criminal Law*, the Commission emphasized restraint in the use of the criminal law.²²⁰ It proposed a stringent four-pronged test to determine if an act should be subject to criminal penalties:

- Does the act seriously harm other people?
- Does it in some other way so seriously contravene our fundamental values as to be harmful to society?
- Are we confident that the enforcement measures necessary for using criminal law against the act will not themselves seriously contravene our fundamental values?
- Given that we can answer "yes" to the above three questions, are we satisfied that criminal law can make a significant contribution in dealing with the problem?²²¹

²²⁰ *Our Criminal Law*, *supra*, footnote 20, pp. 19-28.

²²¹ *Ibid.*, pp. 33-34. The Commission applied these tests of criminality consistently in determining whether or not crimes should be reformed or abolished. For example, in 1984, the Commission applied these tests to conclude that the crime of defamatory libel should be abolished, primarily because there already existed an alternative remedy to deal with the problem — the civil suit of defamation. Law Reform Commission of Canada, *Defamatory Libel* [Working Paper 35] (Ottawa: Ministry of Supply and Services Canada, 1984) pp. 45-60. As well, the Commission applied the tests to determine the scope of crimes against the foetus. Law Reform Commission of Canada, *Crimes Against the Foetus* [Working Paper 58] (Ottawa: Law Reform Commission of Canada, 1989) pp. 29-47.

The first issue to be determined is: Does the act seriously harm other people? Obviously, an act of vandalism or assault is an act deserving of criminal sanction, because either the person is deprived unjustifiably of his or her property, or the person is physically harmed. However, these acts are already caught by the criminal law. Consistent with the principle of restraint in the use of the criminal law, one could strongly argue that there is no need to create new law that would duplicate the existing criminal law, where the only difference would be the additional component of hateful motivation. By this argument, the proper approach for the criminal law would be to use evidence of such motivation as an aggravating factor to increase the penalty for committing an existing crime, just like all other aggravating factors. This would also promote a principled approach in the use of the criminal law by having just one crime (e.g., assault) focus on the harm caused, rather than by creating a variety of crimes all aimed, essentially, at the same wrongful conduct.

This argument assumes that the central harm aimed at by these general criminal laws is the same as that aimed at by a criminal law prohibiting hate-motivated violence. But it is recognized that hate-motivated violence causes distinct harms. First, a person's being selected as the victim of violence by reason of his or her actual or perceived race, religion, et cetera, causes particular harm that is arguably more severe than the usual harm suffered by a victim of crime. Secondly, harm is caused to the group of which the person is a member. The impact on other members of the group is the creation of fear about their place in society. Like the crimes of hate propaganda, crimes of hate-motivated violence offend the fundamental values of both human dignity and equality. While these arguments support creating a sentencing enhancement provision for hate-motivated behavior in relation to general crimes, the greater these distinct harms, the greater the need to denounce such conduct most forcefully by the creation of a specific crime or crimes of hate-motivated violence.

In this context too, the provisions dealing with sexual assault in the *Criminal Code* may be useful. The present *Code* not only prohibits general crimes of assault; it also has created crimes of sexual assault.²²² It may be argued that the creation of the sexual assault provisions was required to replace the old, outdated laws governing rape, which is substantially different from adding new crimes to penalize criminal conduct already caught by traditional crimes. But clearly, one of the purposes of the crimes of sexual assault is to denounce such conduct more severely than regular assault. Hence, the punishment set out for such criminal conduct is more severe than for other assaults. For example, the crime of aggravated assault in *Code*, section 268 sets out a maximum penalty of 14 years' imprisonment; in contrast, the crime of aggravated sexual assault in *Code*, section 273 sets out a maximum penalty of life

²²² See *Code* ss. 271-273.

imprisonment. Arguably, it would be equally valid to create a separate crime or crimes of hate-motivated violence where a policy decision is made that such conduct is deserving of more severe punishment.

The second test of criminality is: Does the act in some way contravene other fundamental values so as to be harmful to society? This is essentially an alternative to the first test. Clearly, attacks on members of minority groups have the effect of creating fear among other members of the group, thereby sowing the seeds of disharmony within society. In this way, society itself is harmed by hate-motivated violence.

The third test is: Will resorting to criminalization offend our fundamental values? In this regard, it has already been strongly argued that the creation of such crimes would not offend the *Canadian Charter of Rights and Freedoms*.

The fourth test is: Would resorting to the criminal law make a significant contribution in dealing with the problem? In this regard, certain criticisms of the use of hate crimes statutes have been made by American commentators. As noted earlier, it is claimed — given what is known about the psychological make-up of such offenders — that such statutes will not deter such offenders; that they will not decrease prejudice but more probably increase it; that they could be used against the very minorities they are designed to protect; that such crimes are complex and difficult to define; and that the difficulty of proving a hateful motive will make prosecutors wary about applying such crimes, as opposed to general crimes, to prosecute hate-motivated offenders.²²³

Are these arguments persuasive? First, as regards deterrence: The existence of a criminal law prohibiting hate-motivated violence serves to denounce and condemn such conduct, so that, while it may not dissuade those who are motivated by hatred of a person's race, colour, religion, ethnic origin, et cetera, from committing violence (any more than the law prohibiting murder would dissuade someone who kills in a rage), it does serve to reaffirm the fundamental values of human dignity and equality that are particularly attacked by such conduct. And, by such reaffirmation, the criminal law serves to educate the public that such acts are intolerable. Secondly, as regards the view that these crimes might create more prejudice on the part of the majority in society against minorities: One can argue that, given Canada's commitment to a multicultural, pluralistic society, such laws would be seen as a complement to the crimes of hate propaganda, which do not appear to have created resentment towards minorities by the majority population. Thirdly, although it is possible that such crimes may be used to prosecute members of minority groups who

²²³ See pp. 19-22 of this paper.

commit crimes of hate-motivated violence, in principle there is nothing wrong with prosecuting under such crimes anyone who commits a hate crime against another. In such a case, the minority community need not see the prosecution as a threat to itself. Fourthly, as regards difficulties in defining a hate crimes law: There are indeed important issues to be resolved in determining how to define such a law, but these issues are not an absolute bar to creating a definition. Finally, as regards the issue of motivation: This would be no more or no less a problem for the courts than that which they now face in addressing the issue of hateful motivation at sentence.

Thus, it is arguable that creating specific criminal legislation to combat hate-motivated violence would satisfy the tests of criminality set out by the Law Reform Commission of Canada. Admittedly, opposite arguments can be made that creating such legislation is not consistent with the principles so set out — that it would offend the fundamental principle of restraint in the use of the criminal law by creating duplicate crimes for activity already caught by the criminal law, and that such legislation would not significantly contribute to dealing with the problem any more effectively than does the present criminal law.

7.4.4 Options in Defining Hate-Motivated Crimes

Assuming that a crime (or crimes) of hate-motivated violence should be created, how should the crime be defined? A wide variety of options are possible.

There are two components to a crime. First, there is conduct that is prohibited: most often, the criminal law prohibits acts, or the doing of something. Most persons think of crimes in this way; for example, murder or assault. Less often, the criminal law imposes on a person a legal duty to do something, so that a failure to act pursuant to the duty creates criminal liability: for example, the failure of a parent to provide necessities to his or her children (*Code*, section 215) or — although currently not law in Canada but proposed by the Law Reform Commission of Canada — the failure to take reasonable steps to assist a person in danger of death or serious harm.²²⁴ Secondly, a fault requirement is needed to accompany such conduct. The latter is often referred to as the *mens rea*, or more accurately, the *mentes reae* necessary to be proved for the finding of guilt in relation to the crime. This fault requirement may be a subjective one — generally, either the person purposely did or did not do something, or was reckless in so doing or not doing. Recklessness means that the person, although not intending to cause harm, foresaw the likelihood of the harm occurring. Or, depending on how the crime is defined, the fault requirement may be an objective one — in other words, the crime may catch

²²⁴ *Recodifying Criminal Law*, *supra*, footnote 5, pp. 67-68.

negligent conduct. In this case, the accused's subjective state of mind is irrelevant in establishing the requisite *mens rea*. For example, in the recent case of *R. v. Hundal*,²²⁵ the Supreme Court of Canada rejected claims that the crime of dangerous driving set out in section 249 of the *Code* requires that an accused be aware of the consequences of his or her driving, and instead approved of an objective standard of liability as being sufficient to establish the *mens rea* requirement for the crime.

What conduct should be caught by any proposed law prohibiting hate-motivated violence? What should the *mens rea* requirement be for the crime? A number of options are possible.

- Option 6.** A specific crime of institutional or religious vandalism should be created. In addition, there should be created a crime of bias intimidation, which would have as part of its definition committing certain general crimes, such as mischief, assault, or threatening harm, by reason of hatred of a person's actual or perceived race, colour, religion, et cetera, and which would be more severely punished than the general crimes.

This option is designed to create a crime or crimes of hate-motivated violence largely based on the ADL model legislation, noted earlier.²²⁶ That model legislation created two separate crimes: institutional vandalism (such as vandalizing a place used for religious worship), and intimidation. The definition of this latter crime states that the crime should catch the penal code provision for "criminal trespass, criminal mischief, harassment, menacing, assault, and/or other appropriate statutorily proscribed criminal conduct".²²⁷ The selection of substantive crimes for the purpose of a bias intimidation statute could be based, to some degree, on this model

²²⁵ *R. v. Hundal*, judgment rendered by the Supreme Court of Canada March 11, 1993. It should be noted that negligent conduct for the purposes of a criminal prosecution requires conduct that is a marked departure from the standard of care that a reasonable person would observe in the accused's situation. This a higher standard of negligent behaviour than is required for a civil action. For proposals regarding the standard of negligence to be met in the context of the criminal law and when negligent conduct should be caught by the criminal law, see *Recodifying Criminal Law*, *supra*, footnote 5, pp. 25, 56, 62, 67-68. The recent House of Commons Report of the Sub-Committee on the Recodification of the General Part of the *Criminal Code* of the Standing Committee on Justice and the Solicitor General, *First Principles: Recodifying the General Part of the Criminal Code of Canada* (Ottawa: Queen's Printer, 1993) recommended, on p. 22, that a recodified General Part be based on the principle that subjective fault is the usual requirement for criminal liability and that objective fault be used with restraint.

²²⁶ See pp. 39-40 of this paper.

²²⁷ Anti-Defamation league of B'nai Brith, ADL Law Report, *Hate Crimes Statutes: A 1991 Status Report* (New York: Anti-Defamation League, 1992) p. 4 [hereinafter Anti-Defamation League].

legislation. For example, it could catch hate-motivated mischief (*Code*, section 430), assault (*Code*, section 266), assault with a weapon or causing bodily harm (*Code*, section 267), aggravated assault (section 268), and uttering threats (*Code*, section 264.1).

The benefit of such legislation would be that certain kinds of hate-motivated conduct would be treated as crimes in their own right and hence would have the maximum possible denunciatory and educative impact.

Those who would disagree with the creation of specific criminal legislation to combat hate-motivated violence, however, would argue that there are several disadvantages to such legislation. It unnecessarily duplicates the protection offered by the present law; it arguably may be used only in the most certain of circumstances where hateful motivation can be proved beyond a reasonable doubt; it may have the unintended effect of creating resentment against minorities in society; and it may be used against members of minority groups.

One arguable disadvantage for those who would favour the maximum protection of the criminal law is that creating a criminal law that singles out only certain kinds of basic crimes for inclusion in criminal legislation to combat hate-motivated violence is adopting an ad hoc approach.²²⁸ There are many acts that can be committed in criminal law, ranging from theft to fraud, from assault to murder. Why should some acts of violence be covered by a criminal law prohibiting hate-motivated violence, while others are not?

Option 7. A general crime of hate-motivated violence should be created.

An alternative to the approach outlined in Option 6 would be to adopt a more principled approach and create a criminal law of hate-motivated violence that would apply, generally, to *all* acts of violence. This approach would no doubt best ensure that hate-motivated violence of whatever kind is denounced by the criminal law.

This approach, arguably, best ensures compliance with CERD, since that international instrument requires that a State Party "declare an offence punishable by

²²⁸ American states vary in their description of the basic criminal conduct that ground their hate crimes statutes. The present Illinois hate crime statute singles out the crimes of assault, battery, aggravated assault, misdemeanour theft, criminal trespass to residence, misdemeanour criminal damage to property, criminal trespass to vehicle, criminal trespass to real property or mob action. Ill. Ann. Stat., Ch. 38, § 12-7.1 (Smith Hurd, 1992 P.P.). Michigan's ethnic intimidation statute catches a person who "[c]auses physical contact with another person" or who "[d]amages, destroys, or defaces any real or personal property of another person", or who threatens to do so. Mich. Ann. Stat., § 28.344(2) (Callaghan, 1990).

law . . . all *acts of violence or incitement to such acts of violence* against any race or group of persons of another colour or ethnic origin" (emphasis added).²²⁹ An example of this approach is the draft law prohibiting racial violence proposed by the Australian Law Reform Commission, which speaks of a person who "commits or threatens to do an act of violence".²³⁰

And yet, one disadvantage of this approach would be that such a definition, in itself, without more, would be too vague. The Australian Law Reform Commission recognized the vagueness of the term "an act of violence", stating that "because this phrase is not precise enough in itself to identify the relevant offences, it is essential that they be individually identified" and attached to a schedule to the act creating the crime.²³¹ Yet the use of a schedule to aid in understanding the more precise scope of a broadly defined crime is difficult to justify, because it appears to detract from the principle that crimes should be defined with reasonable clarity so that persons can understand them. Resort to a schedule can be seen as an admission of failure: that the crime itself is too broadly defined to be able to inform the public with adequate clarity what conduct is prohibited.

In response, however, one could argue that the *Code* does recognize certain instances (e.g., firearms offences) where the precise scope of a crime is not found exclusively in the *Code*, but is fleshed out by governmental regulations. Moreover, it should be noted that our present *Code*, in some sections, does use broad terminology to define the conduct it wishes to catch. For example, *Code*, section 269.1, the crime of torture, is defined as meaning "any act or omission by which severe pain or suffering, whether physical or mental", is intentionally inflicted on a person for certain purposes or for any reason based on discrimination of any kind.²³² Arguably, there is little difference between an "act of violence" that is hate-motivated and an "act or omission by which severe pain or suffering" is inflicted.

This gives rise to another issue: Should a crime of hate-motivated violence cover not only acts of violence, but also hate-motivated omissions that cause harm? For example, consider the case of a doctor who is under a duty of care to care for his

²²⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 4(a), *supra*, footnote 13.

²³⁰ The Law Reform Commission, *supra*, footnote 19, Appendix A, Draft Legislation, p. 283.

²³¹ The Law Reform Commission, *supra*, footnote 19, pp. 156-157, 294-295.

²³² See also section 7 of the *Code*, which contains several crimes, such as committing a crime aboard an aircraft, crimes against humanity and war crimes, which are defined broadly in terms of a person committing "an act or omission", that, in many cases, would be a crime in Canada if committed in Canada.

or her patient. If the doctor were to fail to provide the requisite duty of care by reason of hatred of the patient's actual or perceived race, colour, religion, ethnic origin, et cetera, should not this conduct be caught by a crime of hate-motivated violence? The advantage of this approach is that it would ensure that the criminal law comprehensively addresses hate-motivated violence of all kinds. However, the disadvantage is that such cases (if they ever occur) would be rare indeed, and that it would be more useful to have the law concentrate on the conduct that is targeted by state laws, courts, and legal commentators when discussing hate-motivated violence — *acts of violence*.

The use of broad terminology has other disadvantages. A broadly defined crime or crimes of hate-motivated violence, without more clarity, could stretch the bounds of credulity. As Chief Justice Rehnquist stated in *Wisconsin v. Mitchell* when discussing the Wisconsin hate crimes statute, "[t]o stay within the realm of rationality, we must surely put to one side minor misdemeanour offenses covered by the statute, such as negligent operation of a motor vehicle . . . for it is difficult, if not impossible, to conceive of a situation where such offenses would be racially motivated."²³³ And this leads to the most serious disadvantage of this approach. The more broadly defined a crime or crimes of hate-motivated violence, the more it is arguable that the unity and cohesion of the present *Code* are lost because what is being created, in effect, is a separate parallel criminal code relating to bias-motivated conduct. A large-scale duplication of many of the crimes set out in the present *Code* would result, for the sole purpose of comprehensively addressing hate-motivated violence. In this sense, it could be said that the pursuit of general principle in relation to hate-motivated crimes leads to an ultimate absurdity.

Option 8. As regards the crime of murder, present *Code*, section 231 should be amended to provide that where a person murders another by reason of hatred of the victim's actual or perceived race, religion, ethnic origin, et cetera, that murder is first-degree murder.

This option would address the issue of hate-motivated murder, and as such, would have the benefit of denouncing the most serious kind of hate-motivated conduct. Why is this needed? A crime of hate-motivated violence that raises the penalty for basic crimes when they are hate-motivated is unsuitable in relation to the crime of murder, because murder has a mandatory sentence of life imprisonment.²³⁴

²³³ *Wisconsin v. Mitchell*, *supra*, footnote 23, p. 4578 (unreported).

²³⁴ See *Code*, section 235 (penalty for murder, minimum sentence of life imprisonment); other crimes that involve the killing of a person allow for the possibility of a sentence of life imprisonment — see section 220 (causing death by criminal negligence, liable to imprisonment for life); section 236 (penalty for manslaughter,

Where the mandatory sentence is that of life imprisonment, how can one increase the sentence? Life is life.

However, a different option for reform could be made regarding the crime of murder. Section 742 of the *Code* sets out the punishment on conviction for the crimes, among others, of first-degree or second-degree murder. A person who is convicted of first-degree murder and sentenced to life imprisonment is generally not eligible for parole until he or she has served 25 years of the sentence. (*Code*, section 745 allows a person convicted of first-degree murder who has served at least 15 years of his or her sentence to apply to the Chief Justice of the appropriate province for a reduction in the number of years of imprisonment without parole.) Generally, for those convicted of second-degree murder, the eligibility for parole arises after the prisoner has served at least ten years of his or her sentence. Section 231 sets out when murder is to be treated as first-degree murder instead of second-degree murder. Basically, first degree murder is planned and deliberate murder, although there are exceptions to this rule. For example, when the victim is a police officer or when the death of a person is caused while the accused was committing or attempting to commit a sexual assault, first-degree murder is committed.²³⁵ To address the issue of hate-motivated murders, this option proposes that where a victim was murdered because of hatred of the victim's race, religion, et cetera, that murder should be treated as first-degree murder, and the offender therefore the murderer should not be eligible for parole until 25 years of sentence have been served.²³⁶

The disadvantage of this option is that, as argued in the previous option, it may be viewed as a means of fracturing the unity and cohesion of the present *Code*; although, given the limited nature of this option, this is unlikely.

Option 9. Incitement to commit hate-motivated violence should be caught by the criminal law.

This option proposes that a person who incites someone to commit hate-motivated violence, although not the perpetrator of the actual act, should be caught by the criminal law. However, there would be no need to create a specific crime to this

liable to imprisonment for life).

²³⁵ See *Code*, ss. 231(4)(a); 231(5).

²³⁶ Alternatively, a more limited variation could be made. If a crime of hate-motivated violence was narrowly defined to mean, e.g., hate-motivated assault, *Code*, subsection 231(5) could be amended to provide that if the death of the victim was caused while the person committing that crime was hate-motivated, the death would be defined as first-degree murder.

effect because, by the operation of the present criminal law, generally a person who incites such violence would be subject to criminal liability.²³⁷ Under present law, a person who counsels another to be a party to a crime is also a party to the committed crime and a person who counsels another to commit a crime that is not committed is also liable to be punished.²³⁸ For example, a person who incites another person to commit murder is a party to that crime and is liable to the same criminal penalty. Similarly, a person who incites another to commit acts of hate-motivated violence would be caught by the same provisions.

The advantage of this option is that it would treat all those involved in the commission of hate-motivated crimes — whether it be the person who committed the act, or the person who incited, aided or counselled another to commit such crime — as being subject to criminal liability. To do otherwise would carve out an exception to this crime that does not exist in relation to all other crimes, and which does not appear justified in this context.

There does not appear to be a disadvantage to this option, assuming that there is agreement that a specific legislation to combat bias-motivated conduct should be created.

Option 10. The maximum penalty for committing a crime or crimes of hate-motivated behaviour preferably should be one that operates in a principled manner to increase the penalty, such as having the maximum penalty for committing a hate-motivated crime equal to one and one-half times that for committing the basic crime.

One of the difficulties in creating a crime or crimes of hate-motivated violence is how to determine the penalty for committing such a crime. For example, the ADL model legislation, in relation to its proposed crime of intimidation, specifies that the degree of criminal liability should be at least one degree more serious than that

²³⁷ This is also the conclusion reached by the Australian Law Reform Commission, *supra*, footnote 19, at 158 in explaining that the present Australian offence of inciting the commission of a federal offence would make incitement to commit the crime of racist violence a crime in the event that a crime of racist violence were to be created. In contrast, the Australian National Inquiry into Racist Violence recommended the creation of a specific offence of incitement to racist violence and to racial hatred likely to lead to violence. *Racist Violence, supra*, footnote 2, p. 298.

²³⁸ See Code section 22 (a person who counsels [which includes incites] another to be a party to an offence is also a party to the offence, notwithstanding that the offence was committed in a way different from that which was counselled, etc.); section 464 (criminal liability is imposed for someone's counselling another to commit an indictable offence even though the offence was not committed but only attempted, etc.). For proposals for a reform of the principles governing secondary liability, see *Recodifying Criminal Law, supra*, footnote 5, pp. 43-48.

imposed for commission of the basic offence.²³⁹ How would this principle apply in the Canadian context? For example, what would be the penalty range for simple assault, now punishable by summary conviction or by indictment for a term of imprisonment up to five years, if the assault were hate-motivated? Would the next level of punishment be equivalent to that of assault with a weapon or causing bodily harm, which is punishable by indictment for a term of imprisonment not exceeding ten years?

To avoid these difficulties, this option proposes that a more principled attempt be made to determine the proper scope of punishment in relation to a hate-motivated crime; that is, that the maximum penalty for committing such a crime should be a certain percentage greater than the maximum penalty now given for committing the basic crime. For example, the draft legislation suggested by the Australian Law Reform Commission provides that the penalty for its proposed crime of racist violence not exceed one and one-half times the penalty prescribed as a maximum penalty for the act under the law concerned.²⁴⁰ This would help to promote a consistent, principled sentencing approach in relation to such crimes.

The disadvantage of this option may be that it proposes too high a penalty for the commission of such crimes: that instead of increasing the penalty range, a better approach would be to allow judges to increase the penalty closer to the maximum penalty range existing in the present law.

Option 11. The definition of a hate-motivated crime should have as its *mens rea* requirement that of purposely or recklessly harming a victim or vandalizing property by reason of hatred of the victim's race, religion, ethnic origin, et cetera. Alternatively, the definition of a hate-motivated crime should include in its *mens rea* requirement the concept of negligence.

This option outlines what the *mens rea* requirement for a crime or crimes of hate-motivated violence should be. Assuming that the central component of the crime would be that the attacker was motivated by hatred of a person's actual or perceived race, religion, et cetera, it would seem logical that the *mens rea* component of the crime would be purposely or recklessly selecting the victim for attack (or property for destruction) because of such hatred. This requirement of purpose or recklessness would be consistent with the concept that the perpetrator of such violence must be

²³⁹ Anti-Defamation League, *supra*, footnote 32, p. 4.

²⁴⁰ The Law Reform Commission, *supra*, footnote 19, p. 283.

subjectively aware of what he or she was doing.²⁴¹ This "purpose" or "recklessness" requirement would exclude a definition of the crime that included the fault component of negligence.

In contrast with the proposal that the *mens rea* requirement for the crime be that of "purpose" or "recklessness", it may be argued that a crime or crimes of hate-motivated violence should include negligent behaviour, on the ground that the criminal law should be as vigilant as possible in combatting such violence. For example, the Australian Law Reform Commission has recommended the creation of a crime of racist violence that includes both subjective and objective fault requirements. In other words, the crime would catch both intentional harm to the members of an "identifiable group" and harm that the accused "ought reasonably to have foreseen" would be caused to members of the group, provided that the conduct was likely to cause members of the group to fear for their physical safety because they are members of the group.²⁴² Our criminal law, as previously noted, does criminalize certain negligent behaviour; for example, the crime of dangerous driving (*Code*, section 249). However, the disadvantage of extending a crime of hate-motivated violence to include negligent conduct is that it is arguably inconsistent with the rationale for treating hate crimes as separate from other crimes in the first place. This rationale is that it is wrong to harm someone by reason of hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera. A crime of hate-motivated violence that includes negligent conduct, however, effectively denies that the element of hateful motivation is necessary; instead, the focus of the crime becomes the effect that the conduct has had on the members of the group put at risk by such behaviour. In short, such a law would appear to criminalize conduct that was the result of unconscious racism. In such a situation, the crime arguably has a minimal deterrent impact.²⁴³

²⁴¹ For example, in the shooting death of Leo Lachance, the accused Nerland was charged with manslaughter, an offence of recklessness, and the trial court had to determine whether the accused was motivated by racism in acting recklessly. See *Report of Commission of Inquiry into the Shooting Death of Leo Lachance* (Saskatchewan, 1993) (Chair: E.N. Hughes).

²⁴² The Law Reform Commission, *supra*, footnote 19, p. 157.

²⁴³ Assuming that the law should require proof of hateful motivation, should the formulation of such motivation be broadly worded or should it be more precise? For example, should it require that hatred of a person's actual or perceived race, colour, religion, ethnic origin, etc., be the sole reason, a substantial reason or just one reason among others for committing the crime? For a further discussion of vagueness in the formulation of the hateful motive as regards mixed-motive situations, see S. Gellman, "Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws" (1991) *UCLA L. Rev.*, p. 357. Of course, the more strictly worded the hateful motivation component, the more difficult it becomes to prove such motivation, and this criminal law may become less used than intended as a result.

Option 12. The definition of either a sentencing provision or a specific criminal law relating to hate-motivated violence should protect a person who is a member of a group identifiable on the basis of race, national or ethnic origin, colour, religion, sex, age, mental or physical disability, or sexual orientation.

The next issue is how to define the members of an "identifiable group" who should be protected by the criminal law. There are arguably three ways to proceed: continue to apply the same definition of "identifiable group" that now exists with regard to the crimes of hate propaganda; expand the definition of "identifiable group" to include those groups explicitly mentioned by the equality guarantee of the *Charter* (i.e., subsection 15(1)); or expand the definition of "identifiable group" to include even more groups than those explicitly set out in the *Charter*.

The benefits of the first approach are its familiarity (not a useful argument to advance when one is deciding if the law should be reformed), and its consistency with existing law. The latter benefit should not be dismissed easily. It would seem somewhat strange if the definition of "identifiable group" for the purpose of a crime or crimes of hate-motivated violence were different from that used in defining the crimes of hate propaganda. However, the consistency argument works both ways: If an expanded definition of "identifiable group" were to be created for a crime of hate-motivated violence, consistency in approach would still exist so long as, at the same time, the definition of "identifiable group" for the crime of hate propaganda were changed accordingly.

The benefit of the second approach is that it creates more consistency between the treatment of members of groups singled out for protection by the criminal law and that of members of groups explicitly protected from discriminatory treatment under the equality guarantee set out in subsection 15(1) of the *Charter*. Its disadvantage is, first, that the list of criteria set out in the equality guarantee remains an ad hoc one (since the criteria are not listed in a restrictive manner) and, secondly, that it expands the definition of groups to include some whom it would seem unnecessary to include because there is no evidence of attacks motivated by hatred of certain immutable characteristics set out there (e.g., the categories of age, or physical or mental disability). Regarding the category of sex, it is submitted that using criminal law to prosecute a misogynist who harms women is, in principle, justifiable.

Concerning the third approach, if one of the rationales for protecting members of certain groups is to protect those who appear to be most at risk of physical violence by reason of being a member of that group (clearly a justifiable reason for invoking the use of the criminal law), then it would be most reasonable to include the category of "sexual orientation" within the definition of "identifiable group". Thus, by adding this category to that recommended in the previous paragraph, the result

would be to have "identifiable group" mean a group identifiable on the basis of race, national or ethnic origin, colour, religion, sex, age, mental or physical disability, or sexual orientation.

However, in the event that such a broad list of criteria is seen to be unacceptable because it includes too many groups who are not at risk of hate-motivated violence, it would nonetheless still be justifiable to add the category of "sexual orientation" to whatever narrower list of criteria is selected. There does not appear to be any disadvantage to including "sexual orientation" as a group whose members should be protected from hate-motivated violence.

Option 13. The definition of a sentencing provision or of a specific crime or crimes of hate-motivated violence should protect not only those who are members of the identifiable group, but also those who are attacked because of their support for members of such groups. It should not be restricted so as to protect only members of minority groups.

This option sets out whom else the law should protect other than members of those groups set out in Option 12. Obviously, the law should catch the usual situation where the victim is a member of the identifiable group that the person hates; for example, a white supremacist attacking a young black person. But, in addition, it should also protect a person who is attacked by reason of the attacker's hatred of the actual or perceived race, colour, religion, ethnic origin, et cetera, of someone who is not the victim. For example, as the Australian Human Rights and Equal Opportunity Commission points out, another category of racist violence is that of violence directed against people who have "made a public stand against racism and racist violence. These people had been attacked because of their anti-racist stance and not because of their ethnicity."²⁴⁴ In principle, it seems only logical that any criminal law prohibiting hate-motivated violence should protect as much as possible all victims of such violence. This part of the option does not appear to have any disadvantages.

Another, more controversial, issue is whether such a criminal law should be defined so that, in effect, members of minority groups would not be caught by the definition of the crime. As previously noted, some American legal commentators have suggested reforms to this effect that include a presumption of racist intent, which a white accused would have to rebut.²⁴⁵ Such a proposal has obvious disadvantages. Constitutional problems arise: it appears to contravene the presumption of innocence

²⁴⁴ *Racist Violence*, supra, footnote 2, p. 181. See pp. 181-208 of that report for a full discussion on "Racist Violence against People Opposed to Racism".

²⁴⁵ See Fleischauer and "Note", supra, footnote 24.

and the equality guarantee of the *Charter*.²⁴⁶ Also, the creation of such a crime ignores the real possibility that a hate-motivated attack could be made against someone who is white. (This occurred in the *Mitchell* case recently decided by the United States Supreme Court.) Finally, the creation of such a crime could very well be counterproductive by creating resentment among the majority of the population that minorities are being singled out for special protection by the criminal law.

7.4.5 Options Relating to Ancillary Issues

Two ancillary issues are addressed here: the extent to which the criminal law should be used to provide damages to a victim of hate-motivated violence, and the utility of providing for a crime of violating a person's constitutional rights.

Option 14. Consideration should be given, as ancillary to a crime or crimes of hate-motivated violence, to creating a damages provision that would allow a criminal court, on completion of a hate-crimes trial, to award punitive damages to the victim of such violence.

This option is essentially a criminal law variation of American proposals and enactments that enable a victim of racist violence to sue in a civil action for damages caused by the attack. For example, such a provision is provided for in the ADL model legislation. These proposed civil remedies are quite broad. They include a civil action for damages, which also allows for punitive damages, payment of the reasonable fees of the prosecutor, parental liability for a judgment against a minor, and the ability to obtain an injunction as well as any other form of equitable relief.²⁴⁷ Some American states have also created the ability to obtain civil damages for a hate-motivated attack.²⁴⁸

Is the criminal law an inappropriate forum for the creation of a punitive damages mechanism? Although rare, the power to award punitive damages is not

²⁴⁶ The argument in favour of the constitutionality of such a proposal is that the crime operates like an affirmative action program in ameliorating the conditions of disadvantaged individuals or groups. However, this proposal has been criticized as being unconstitutional in the American context. See J. Morsch, "The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation" (Fall, 1991) 82 *J. Crim. L. & Criminology*, No. 3, pp. 681-686.

²⁴⁷ Anti-Defamation League, *supra*, footnote 32, pp. 4-5.

²⁴⁸ See, e.g., Florida, which provides, where there is a violation of its hate crimes statute, for a civil cause of action against the attacker for treble damages, an injunction or any other appropriate relief in law or equity. Fla. Stat. Ann. § 775.085, section 2 (West 1992).

unknown to our criminal law. In electronic surveillance cases, *Code*, section 194 provides, in part, that a court that convicts a person of crimes such as unlawful interception or disclosure of a private communication may order, on the application of an aggrieved person, that the aggrieved person be paid an amount not exceeding five thousand dollars as punitive damages. By analogy, one could argue that a punitive damages section should be created and included as a necessary component of any proposed crime of hate-motivated violence. After all, a victim of hate-motivated violence has been subjected to a particularly heinous attack, and may not be financially able to pursue a civil action. (An additional remedy could be the possibility of obtaining injunctive relief against such attackers, particularly if the violence is part of an ongoing activity.)

The advantage of this proposal is that, by having this uncommon remedy available, the criminal law would be seen to strongly denounce such violence. It also would be able to provide a partial monetary remedy to the victim of hate-motivated violence.

The disadvantage, however, of this option is that an overbroad use of this remedy may fall afoul of the constitutional requirement that what must be legislated is something that is in pith and substance criminal law, not civil law. Perhaps a punitive damages provision tied to the sentencing process in relation to some, not all, hate-motivated crimes and structured to produce the exercise of restraint in its application would satisfy this concern. A further disadvantage is that this would create an inconsistency in approach between hate-motivated violence and other kinds of violence or hatred. For example, why should punitive damages be imposed for hate-motivated violence but not for the crimes of sexual assault or wilful promotion of hatred?

Option 15. Consideration should be given to the creation of a crime of violating a person's constitutional rights.

This option would create a crime of violating a person's constitutional rights. This option is modelled after American federal civil rights law, whereby a person acting under color of law who is prosecuted under state criminal law and acquitted may be prosecuted again under this federal law for violation of the victim's federal civil rights. The most topical example of this federal legislation was the recent

federal trial of the police officers who beat Rodney King in Los Angeles, California.²⁴⁹

The advantage of this proposal would be to have the *Criminal Code* expressly protect the rights and freedoms set out in the *Charter* from the abusive exercise of authority by government agents.

However, there are serious disadvantages to this option. Unlike in the United States, the creation of criminal law in Canada falls exclusively within the jurisdiction of the federal government, and so the use of a federal prosecution in situations where a "state" criminal prosecution has previously failed does not arise in Canada. There are also other problems with adopting the American approach here, which have been mentioned earlier. How broad in scope would such a crime be -- arguably it should catch only violent conduct? How effective would the crime be, given the need to respect protection against double jeopardy? Also, should cases akin to the Rodney King case arise in Canada -- where peace officers are accused of using unreasonable force against a member of a minority group -- existing criminal law provisions can be used to prosecute the officers. Arguably, if the aim is to address hate-motivated violence, the most effective way to do so is by way of criminal legislation that aims at such violence. Therefore, it is suggested that this aspect of reform merely be given consideration.

²⁴⁹ See pp. 61-65 of this paper.

8.0 CONCLUSION

This paper has attempted to examine comprehensively the issue of hate-motivated violence, by looking at the treatment of such criminal conduct in Canada and in certain other foreign jurisdictions, and by looking at various proposals for reform in this area in Canada and in those other jurisdictions.

The paper argues that the issue of hate-motivated violence is deserving of public policy attention, given past and recent incidents of hate-motivated violence in this country, Canada's multicultural heritage, and the attention given this problem in other countries.

How should the criminal law combat hate-motivated violence? Should it do nothing? Or is it best to use the existing criminal law, which, through judge-made sentencing practice, treats evidence of such motivation as an aggravating factor to increase the penalty for committing the basic crime? Or are better solutions available?

The paper presents a range of policy options for consideration. Briefly summarized (as they are more fully explained in the previous chapter), these options are:

1. Unlike the present law, refuse to treat a person who has committed a crime by reason of hatred of a person's actual or perceived race, religion, ethnic origin, et cetera, more severely than any other person who commits the crime without such hateful motivation.
2. Create a federal hate crime statistics statute requiring the collection of national statistics on hate-motivated violence in Canada.
3. Continue the present law and have judges increase the penalty where the crime was hate-motivated, in accordance with judge-made sentencing principles established by case law.
4. Use such hateful motivation as an aggravating factor to increase penalty as part of a comprehensive regime of aggravating factors set out in sentencing guidelines or in the *Criminal Code*, or create a specific statutory formulation in the *Code* to increase the penalty for any crime committed by such hateful motivation.
5. Create an automatic penalty enhancement for certain crimes, such as mischief and assault, built into the actual definitions of these crimes, where these crimes are committed by reason of an attacker's hatred of the victim's actual or perceived race, colour, religion, ethnic origin, et cetera.

6. Create a specific crime of institutional or religious vandalism. And, create a crime of bias intimidation, which would have the effect of creating a more severe penalty where certain general crimes, such as assault or threatening harm, are committed by reason of hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera.
7. Create a general crime of hate-motivated violence that would catch most criminal conduct that is hate-motivated and that would impose a severe penalty for committing such criminal conduct.
8. Redefine the crime of first-degree murder so that it includes a murder committed by reason of hatred of a person's actual or perceived race, colour, religion, ethnic origin, et cetera.
9. Ensure that, if a separate crime (or crimes) of hate-motivated violence is created, incitement to commit such violence is also caught by the criminal law.
10. Ensure that the maximum penalty imposed in relation to hate-motivated behaviour preferably operates in a principled way, such as by increasing the maximum penalty to one and one-half times that for committing the basic crime.
11. As regards the mental element for a crime of bias-motivated conduct, it should be required to be proved that the accused purposely or recklessly harmed the victim because of hatred of the victim's race, religion, colour, et cetera. However, expanding the crime to include negligent behaviour should also be considered.
12. Define any sentencing provision or crime of hate-motivated violence in such a way that it protects members of those groups identifiable on the basis of their race, national or ethnic origin, colour, religion, sex, age, mental or physical disability, or sexual orientation.
13. Ensure that measures taken by the criminal law to combat hate-motivated violence protect those who are attacked because of their support for members of those identifiable groups.
14. Consider giving a judge at a trial of a person accused of committing hate-motivated violence the power to award punitive damages to the victim of the crime.

15. Consider creating a crime of violating the constitutional rights of a person.

The paper inquires into the advantages and disadvantages of each approach. Refusing to take at all into account evidence of hateful motivation is dismissed as an untenable approach. The more difficult question is: Does fidelity to the principles governing the use of the criminal law require that law to address this conduct by enhancing the penalty in relation to currently existing crimes (however this may be structured)? Or is it justifiable to create a separate crime or crimes of hate-motivated violence?

The arguments against creating a crime or crimes of hate-motivated violence include the view that the conduct is already covered by existing crimes such as mischief, assault or murder, so that creating new crimes is not only unnecessary, but also a violation of the fundamental principle of restraint in the use of the criminal law; and that these crimes would have little or no deterrent effect on those who would commit such acts.

However, considering the seriousness of the harm caused to the victim, the victim's group, and society as a whole arising from such acts of violence, considering the need to affirm the fundamental values of equality and human dignity, and considering Canada's international commitments to combatting racism and its national commitment to the development of a multicultural society, the paper argues that it may well be justifiable to create a separate crime or crimes of hate-motivated violence. Whether or not this approach is accepted, it is to be hoped that the range of options presented in this paper will inform the reader about possible avenues to reform.

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