

THE ANTI-DEFAMATION LEAGUE AND THE EVOLUTION OF HATE CRIME LAWS

by

Steven M. Freeman*

This January, I marked my 38th anniversary at ADL (the Anti-Defamation League). Hard to believe, but it has been a dream job, and a privilege, to devote my professional career to *tikkun olam*—repairing the world.

Much has changed since I started in January of 1985. Back then, there were no desktop computers, no laptops, no smartphones. We had a typing pool. We wrote memos by hand or dictated them, and they were typed for us. It was a big deal when we got our first computers at our desks. And I still recall quite vividly how fascinated I was by my first Blackberry, and how attached we became to them. Times have changed in many ways, but as I look back, some of the fundamental issues I have been working on at ADL haven't changed.

I am going to talk today about how our work on one area—hate crimes—has evolved over time. But first I would like to say a few words about ADL. I apologize to those of you who are well acquainted with our history, but I know some of you may not be. ADL was founded 110 years ago, in 1913, at a time when antisemitism was widespread. We were founded as a committee of B'nai B'rith, with a mandate “to stop . . . the defamation of the Jewish people . . . [and to] secure justice and fair treatment to all.”

I am not the historian here, but I know many of you are—and know well that the United States in the early decades of the 20th century was a difficult and inhospitable place for many Jews. Discrimination was pervasive—in schools, in private clubs, in employment, in admission to institutions of higher education.

We were founded after Leo Frank was convicted in a trial tainted by rampant antisemitism. It was a frightening time. And yet that mandate established by ADL's founders was noteworthy because it wasn't only about antisemitism. One hundred ten years ago, our founders understood that stopping the defamation of the Jewish people was not work that could or should be done in isolation. True freedom required advocacy designed to secure justice and fair treatment for *all* marginalized groups.

* Steven M. Freeman is senior counsel at ADL. He joined the organization in 1985 as an assistant director in the Legal Affairs Department and has served in several other roles since then. Mr. Freeman is a graduate of Yale University and Stanford Law School.

ADL's mandate reflected this core value with the goal of addressing both immediate threats and long-range threats. It was to address violent antisemitism in the form of harassment and assaults. It was to address discrimination. And it was also to address threats to those of minority faiths seeking to establish freedom to worship as they chose.

The threats were both above the surface, readily apparent, and bubbling below the surface. I am proud to be working with Professor Robert Katz on the casebook he is developing on antisemitism and the law, and a hallmark of that is going to be to recognize the importance in countering antisemitism of principles like the separation of church and state, like checks and balances, like equal protection, like inclusive anti-discrimination laws.

But today I am going to focus and share my experience on one issue that to me has a special relevance and hopefully a special resonance for a conference on antisemitism and the law. I am talking about the evolution of hate crime laws in this country, and the role ADL has played in bringing that about.

In truth, crimes motivated by bias have always been a part of the fabric of this country. Racist assaults, cemetery desecrations, anti-LGBTQ+ attacks, and numerous other forms of hate-inspired violence are a sad but very real part of our history. But I can specifically trace the concept of hate crime laws back to pioneering efforts predecessors of mine at ADL launched four decades ago.

In 1979, ADL released its first annual Audit of Antisemitic Incidents.¹ It was not a comprehensive survey but rather a snapshot—a collection of incidents reported to our regional offices, to the media, and to others who shared information with us. We did it again in 1980 and in 1981, and each year the total was greater than the previous year.

Predecessors of mine in ADL's Legal Affairs Department at that time huddled, feeling a need to come up with some strategy to respond. The traditional responses—media exposure, education, more effective law enforcement—were all important, but there was a piece missing. A legal response.

As my colleagues have said and written on many occasions, we understood that such crimes have an emotional and physical impact that extends beyond the original victim. They intimidate others in the victim's community or those who share the victim's protected identity characteristic, causing them to feel isolated, vulnerable, and unprotected by the law. In so doing, they damage the very fabric of our society. As I wrote in a piece on this subject in the 1992/1993 Annual Survey of American Law published by the NYU School of Law, "the harm caused by bias crimes cannot be measured solely in terms of property damage assessments or physical injuries."²

¹ See *Audit of Antisemitic Incidents 2022*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/report/audit-antisemitic-incidents-2022> (last visited Nov. 9, 2023).

² Steven M. Freeman, *Hate Crime Laws: Punishment Which Fits the Crime*, 1992/1993 ANN. SURV. AM. L. 581, 582 (1994).

The ADL legal team searched for relevant laws but found little. Three states—Arizona, New York, and Oregon—had laws on their books that we thought maybe could apply or be adapted to address those incidents that involved criminal conduct.³ They were the inspiration for the first ADL model laws on institutional vandalism and on ethnic intimidation.

In 1981, ADL produced a report which offered these laws as an example of actions states could take to respond.⁴ Of course, from the start, these ADL lawyers realized that no state was going to pass a law just addressing antisemitic vandalism or violence. That's why they crafted laws that would extend beyond antisemitic crimes to cover all crimes in which individuals are targeted because of race, religion, or ethnicity. This was fully consistent with ADL's original mission, and again reflected the fundamental principle that one cannot effectively use the law to fight antisemitism without also fighting injustice and discrimination targeting all marginalized communities.

When I started at ADL in January of 1985, I was drawn into this work, and we soon understood that we needed to revise the original model to include more identity characteristics such as sexual orientation. We released an updated model statute in 1988, and in many ways that became the precursor of today's hate crime laws.⁵ Today, comprehensive hate crime laws include not only race, religion, national origin, and sexual orientation, but also gender, gender identity, and disability.

The concept was not complicated. There needed to be an underlying crime—typically assault or vandalism—and the perpetrator had to have targeted the victim because of a belief or perception regarding the protected identity characteristic of any person or group.

These laws were in many ways the criminal analog to already-existing civil anti-discrimination laws. The purpose was not only to impose a level of punishment consistent with the harm caused but also to raise awareness of the wide and devastating impact of such crimes.

It was very important, of course, to insist and draft in such a way as to make crystal clear that these laws did not punish hate speech. Hate speech is free speech, and however offensive and objectionable many of us may find it, it is protected by the First Amendment. But criminal conduct is not the same as protected speech. And it is perfectly reasonable for a legislature to decide that certain crimes should be treated differently under the law because of the heightened criminal intent and broader impact they have on our society.

³ ARIZ. REV. STAT. §§ 13-1504(A)(5), 13-1604(A)(1) (2023); N.Y. PENAL LAW § 240.21 (McKinney 2023); OR. REV. STAT. §§ 166.155, 166.165 (2021).

⁴ ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, 1981 AUDIT OF ANTI-SEMITIC INCIDENTS (1981).

⁵ ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIME STATUTES: A RESPONSE TO ANTI-SEMITISM, VANDALISM, AND VIOLENT BIGOTRY app. A (1988).

We do, after all, distinguish between many types of crimes based primarily on the actor's intent. The argument was that when a perpetrator targets a victim because of an immutable characteristic, that crime impacts not only the individual victim and those close to that person. It impacts others who share that person's characteristic. Indeed, it impacts entire communities. When someone daubs a swastika on the side of a synagogue in Los Angeles or commits an act of arson outside an LGBTQ+ bar in New York City, entire communities feel the pain and that sense of vulnerability.

Painting graffiti on a bridge or a bus is also vandalism, but it's different. So is an act of arson to commit insurance fraud—it is a crime, deserving condemnation, but as I noted earlier, it doesn't impact the person targeted or resonate across a community in the same way. Legislatures make judgments like this all the time—so, for example, an attack on a judge or a witness can cause the same physical injury as a similar attack on someone else, but we treat it more seriously because it undermines our society in a broader way.

So ADL articulated and started promoting the concept of what became known as hate crime laws. Before I talk about how that work evolved, let me make a slight detour. As a starting point, whenever I talk about hate crime laws, I always say this—we know we can't legislate hate away. There is no magic wand. And it is always better to prevent crimes whenever we can.

Criminal laws don't prevent crimes. They are one tool, and not the most important one. We need anti-bias education, leadership from elected officials, crisis counseling, and more—all working together and complementing each other.

Laws are one tool, and they are a blunt tool. But the law can also be a teacher. Laws can shape attitudes, and that's important here. Over time, the landmark civil rights laws of the 1960s shaped attitudes, and hate crime laws have as well. Resources also follow laws, and now it is not unusual, for example, for police departments in major cities to have bias units and to train their officers to recognize the indicators of hate crimes.

I must say here that we are also keenly—very keenly—aware that our criminal legal system is flawed, tarnished with systemic racism. We need to work together to address this, to dismantle white supremacy, racism, antisemitism, and other underlying forms of bigotry and oppression that fuel bias-motivated violence. We can't realistically talk about hate crime laws without an awareness of the broader systemic problems we face.

I need to pause for a moment now to emphasize that we at ADL believe deeply in freedom of expression. By design, hate crimes are message crimes, and by design, they should be hard to prove. The "intentional targeting because of" should be hard to prove. And sometimes it can't be proven. It goes without saying that not every crime that involves a perpetrator and a victim of a different race, religion or sexual

orientation is a hate crime. There may also be circumstances in which the perpetrator and the victim of a hate crime share the same characteristics. These cases are all, of necessity, fact-specific.

So, looking through an ADL lens, how did we get from the first glimmer of a hate crime law over 40 years ago to where we are today? We faced many challenges along the way. There were those who wanted to punish people who shouted epithets. There were those who wanted to punish people who spewed antisemitic vitriol. There were those who wanted to call antisemitic rallies, banner drops, and leaflets hate crimes. These are obviously not hate crimes and they shouldn't be, because they are not crimes at all. A hate crime prosecution requires an underlying crime. But incidents of hate need to be publicly condemned even if they cannot be prosecuted.

In the early years, we faced constitutional challenges. Critics said we were thought police—we were punishing people for expressing antisemitism. We were not. The legal challenges came to a head in 1993 when a challenge to Wisconsin's hate crime law—a law similar to our model—made it to the Supreme Court.⁶

We geared up and were gratified by an enormous outpouring of amicus support. Our own brief was joined by 15 other law enforcement and civil rights organizations, including the International Association of Chiefs of Police, the National Gay and Lesbian Task Force, People for the American Way, and the Southern Poverty Law Center. The U.S. Department of Justice filed a brief, as did 35 members of Congress. So did the cities of Atlanta, Boston, Chicago, Cleveland, Los Angeles, New York, Philadelphia, and San Francisco. The ACLU filed a brief in support of the law; so did the NAACP Legal Defense Fund and a wide array of other civil rights groups. ADL worked hard through all of our regional offices around this country to build such a groundswell of support.

Personally, I think one of the most remarkable briefs was one on behalf of all 49 other states—signed by 49 attorneys general—supporting Wisconsin. No matter the issue, I feel pretty comfortable saying that wouldn't happen today. Even 30 years ago, it was rather astonishing. And I am convinced it had an impact.

The facts of the Wisconsin case were unique, and in some ways made it even more compelling as a landmark case. It involved a white victim who was intentionally targeted with an act of violence because of his race and underscored that anyone, of any race, ethnicity, gender, or sexual orientation, can be a victim of a hate crime. If the laws were not written that way, they would almost certainly be struck down as unconstitutional.

One of the individuals in the group, Mitchell, was convicted of aggravated battery, an offense that normally carried a maximum sentence of two years. But under

⁶ *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

Wisconsin's law, because the jury found he had intentionally selected the victim because of the individual's race, his sentence was enhanced to four years.

Mitchell challenged the law, lost his first appeal, but won at the Wisconsin Supreme Court, which said that the law punished offensive thought. The Wisconsin court distinguished anti-discrimination laws, determining that such laws prohibit "objective acts of discrimination."

The Supreme Court granted certiorari. And in June 1993 in a decision by then-Chief Justice William Rehnquist, the Justices unanimously and unambiguously reversed the Wisconsin Supreme Court.

The Supreme Court made two key observations. First, our legal tradition recognizes that a more purposeful intent makes an offense more serious. Second, people cannot be punished for their beliefs. They went on to find that the comparison between criminal hate crime laws and civil anti-discrimination laws was a valid one.

Then came the key part of the decision, and a paragraph that I am proud to say cited ADL's amicus brief—as well as Blackstone! The Chief Justice wrote the following:

Moreover, the 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. See, e.g., Brief for Petitioner 24–27; Brief for United States as *Amicus Curiae* 13–15; Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* 18–22; Brief for the American Civil Liberties Union as *Amicus Curiae* 17–19; Brief for the Anti-Defamation League et al. as *Amici Curiae* 9–10; Brief for Congressman Charles E. Schumer et al. as *Amici Curiae* 8–9. 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 *16.⁷

Following some further discussion of the First Amendment issues Mitchell's lawyers raised, the Court concluded that his First Amendment rights were not violated and reversed the ruling below from the Wisconsin Supreme Court.

With the landmark victory in the U.S. Supreme Court, we were off to the races. More and more states considered hate crime laws, and more and more adopted them. Today, 30 years later, 46 states and the District of Columbia have enacted hate crime laws, many of which are based on or similar to ADL's model.

⁷ *Id.* at 487–88.

It makes sense that the focus of hate crime laws should initially have been at the state level. Most crimes are investigated by local police and prosecuted under state law. But there has also been considerable advocacy at the federal level, with ADL again playing a leading role.

I am proud to say that a former colleague of mine led a coalition of more than 100 organizations advocating for over a decade for the passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act that President Obama signed into law in 2009.⁸ That law filled many of the gaps that existed in various state laws which did not include protection for those targeted because of their sexual orientation, gender or gender identity, or disability.

I have been talking for a while now about hate crime laws that address many crimes in addition to antisemitic ones. It is important to interject here that the case that went to the Supreme Court was an exception. Of course, the vast majority of victims of hate crimes are not white, but rather members of marginalized communities.

Indeed, the data compiled annually by the FBI reveals that race-based hate crimes are consistently the most numerous, and the vast majority of these crimes are anti-Black/African-American. Religion-based hate crimes are next, and antisemitic hate crimes—crimes directed against Jewish individuals or Jewish institutions—are disproportionately reflected in this category.⁹

Today, as I alluded to earlier, we have new challenges. Many of our partners in this advocacy through the years are rethinking the wisdom of any laws that provide for enhanced sentences. It makes sense for us to be talking and thinking about this collectively with these partners. It makes sense to be thinking about alternatives to sentencing; it makes sense to be thinking about restorative justice programs.

It is not necessarily in our best interest as a society to send someone to jail for an isolated act of antisemitic vandalism, for example. In order to address the root causes of hate crimes, education, community service, and restorative practices all need to be on the table, particularly for young people.

I would add that today it also makes sense to be thinking about a more holistic response to hate crimes that centers victims and communities more inclusively. We know that we can do more when it comes to community resources, hotlines, counseling, and similar initiatives.

Another issue we have to address is barriers to reporting from communities to local law enforcement and insufficient reporting from local law enforcement to the FBI. Many victims and witnesses of hate crimes are reluctant to come forward. They

⁸ Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, div. E, 123 Stat. 2835 (2009) (codified as amended at 18 U.S.C. § 249).

⁹ *Hate Crime Statistics, 2019: Incidents & Offenses*, FBI: UNIF. CRIME REP. (2020), <https://ucr.fbi.gov/hate-crime/2019/topic-pages/incidents-and-offenses>.

are fearful based on discriminatory policing practices. There may be language barriers. In some cases, victims may worry about family separation or other immigration-related harms. We need to address these challenges.

In addition, many law enforcement agencies—far too many—don't take their reporting obligations seriously. They fail to report hate crimes to the FBI as they should. Or they affirmatively report “zero” hate crimes. When cities with populations in excess of half a million people report fewer than 10 hate crimes in a year, as a number have done recently, it casts doubt on their credibility. The FBI data is the best we have, but we know it is flawed.

Data, of course, is critically important to understanding the scope of the problem and to allocating the necessary resources to deal with it. Data drives policy. So recently ADL has made it a priority to encourage better reporting. We are calling on Congress to make it mandatory for state and local law enforcement agencies that receive federal funding to participate in the FBI's hate crime data collection efforts each year.

With everything I have said about hate crime laws, I want to emphasize that these laws are a tool. They are an important tool in fighting antisemitism. They are clearly and directly relevant to those of us thinking and talking about antisemitism and the law. But they are not a magic wand. They will not solve antisemitism or any other form of bigotry. That's going to take a whole-of-society effort that goes well beyond what the law can do.

In closing, let me say that I feel honored to be part of this conference, and as a lawyer, I have been proud to devote my career to fighting bigotry and hate and to promoting civil rights. But my parting message is that today we are facing increasing antisemitism and we need to be creative, flexible, persistent, and determined in responding to the challenge.

And we need to recognize, as ADL's founders did, that we can't fight antisemitism in a vacuum. We need also to seek justice and fair treatment for all.

I believe that we at ADL, and all those who have fought to make this country a safe place to be Jewish, can look back with pride on what we have accomplished. The progress has been substantial. Today, the danger posed by bias-motivated criminal conduct is widely recognized and understood.

But we know just from what has been happening in recent months that we can't rest on our laurels. We definitely shouldn't be afraid to think about how we can both improve the tools we have and build new constitutionally sound ones to respond to hate. And I would welcome the opportunity to work with all of you to meet the challenges before us.

I have always been somewhat of an idealist, and I continue to believe in the importance of fighting antisemitism and hate. No one knows what lies ahead, how difficult the future will be. As the great American philosopher Yogi Berra reportedly once said, “It's tough to make predictions, especially about the future.” But I think we have to keep looking forward and believing we can make a difference.

Finally, I would like to express my appreciation to all of you for the way you have been inspiring me at this conference, and for your important work on antisemitism and the law.

Thank you, and together let us move forward from strength to strength.