



## More Hate Crime Laws Would Not Have Prevented The Monsey Hanukkah Attack

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“Tens of thousands of people, some covered in Israeli flags and others singing Hebrew songs, poured into Lower Manhattan on Sunday in a show of solidarity for New York’s Jewish community in the wake of a spate of anti-Semitic attacks in the region in the last month,” reports the New York Times. “The most recent attack occurred inside a Hasidic rabbi’s home in a New York City suburb, when a man wielding a machete stabbed at least five people who had gathered for Hanukkah celebrations.” According to an upcoming report from the Center for the Study of Hate and Extremism at California State University, San Bernardino, antisemitic hate crimes in New York, Los Angeles, and Chicago are poised to hit an 18-year peak.

The recent high-profile attack came as dozens celebrated the seventh night of Hanukkah in Monsey, New York. A man entered the house, his face covered with a scarf, and told those gathered, “No one is leaving.” Witnesses say he then unsheathed a machete and started slashing at random. He later headed toward the nearby synagogue, but congregants had already locked the doors. Prosecutors say the suspect’s notebooks and internet search history indicate an interest in antisemitic tropes.

In the aftermath, many have decided that the way to bring about the marchers’ chant of “no hate no fear” is to ramp up hate crime laws. Governor Andrew Cuomo characterized the episode as “an act of domestic terrorism.” In an interview on NPR, Cuomo said, “And we treat them as individual, episodic, random acts. They are not. There is a pattern. . . . It has to be called out, and it has to be stopped. And it has to be prosecuted. I want to pass a domestic terrorism law in New York state. It is terrorism.” State Senator Joe Griffo of Rome has proposed legal changes to that effect. “Even though there are pre-existing anti-discrimination laws that can apply,” Griffo said, “this bill would actually elevate this type of crime to a hate crime under the human rights law in the state of New York, which then gives the opportunity for law enforcement to charge and prosecutors to prosecute accordingly.”

To many, this all sounds reasonable. Why not punish hate crimes more harshly, given that hate crimes are bad? There are a few reasons not to, many of them laid out by law professor Janine Young Kim in a 2006 article in the Nebraska Law Review.

Nearly all states in the U.S., and the federal government, have hate crime statutes. The first thing to note is that these laws do not change what can and cannot be prosecuted. All of the conduct they include is already a crime and can already be prosecuted. These laws merely enhance

penalties for certain crimes if they are found to be motivated by bias or hatred toward a particular group. Some have criticized them because of their effect on free expression. Professors James B. Jacobs and Kimberly Potter, have argued that the First Amendment “is implicated when extra punishment is meted out for bigoted beliefs and motives.” It should be noted, however, that in 1993, the Supreme Court upheld the constitutionality of Wisconsin’s hate crime law against a First Amendment challenge. But it may strike some as strange that the difference between a hate crime and a normal crime can sometimes be found in constitutionally protected speech.

In an article in the journal *Law and Philosophy*, scholar Heidi Hurd “takes issue with the claim that hate crime statutes are justified because hatred and bias constitute uniquely culpable mental states that merit increased punishment. . . . Because hatred and bias are uniquely dispositional, the enactment of hate crime statutes marks a shift from an act-centered theory of criminal punishment to a character-centered theory.” She urges, “we should be wary of using punishment to regulate not only what we do, but who we are.”

The most trenchant issue, however, might be the justified skepticism that hate crime laws actually help eradicate hate or hate crimes. An analyst at the Cato Institute has written that these laws are unnecessary and possibly counterproductive. “Making the ideology of the perpetrator a centerpiece of the trial doesn’t deter like-minded extremists; it encourages them.” As one professor argued in *Law and Philosophy*, enhancing penalties for hate crimes “may be shirking rather than taking responsibility for making the needed changes.” Indeed, increasing criminal penalties is how our politicians have tackled scores of social problems over the past few decades, a strategy that has inflicted great harm and produced little benefit. Funding studies of online radicalization and how to prevent it, and then implementing those prevention strategies would be a far better use of government resources than simply tacking on more years to prison terms that would be quite long anyway. But proactive efforts are harder, and they don’t scratch that vengeful itch that hate crimes laws do. Politicians, including Democrats, are basically saying that although mass incarceration has been a failure, perhaps a little more of it is what we need to combat our most intractable problems.

The Sylvia Rivera Law Project, a legal collective, says that it “opposes the use of hate crimes legislation as a way to protect queer and trans people, as well as people of color, people with disabilities, immigrants, and all marginalized people. We believe hate crimes legislation build up systems that cannot protect us and deflect resources from systems that sustain and support our communities, such as education and health care.”

The only legitimate justification for hate crime legislation is for the purpose of expressing societal values. The *Daily Appeal* delved into the expressive function of the law when discussing President Trump’s controversial decision to pardon Edward Gallagher, a Navy SEAL accused of serious war crimes. Some have argued that enhancing punishment for hate crimes is “necessary for the full expression of commitment to American values of equality of treatment and opportunity.” But in a 2001 article evaluating whether to make hate crimes federal, law professor Sara Sun Beale writes that although “emphasis on the expressive function of federal criminal law has the potential to alter public perceptions . . . it is not clear how that process will play out.” Beale explores the political science literature on symbolic politics and interest group theory, concluding that although hate crime laws provide “symbolic reassurance to key interest groups,” they “would have little impact on law enforcement.”

It is this function that prosecutors have seized on to justify the charges in the Monsey case. The Washington Post reports: “Federal prosecutors said the hate-crime charges should send a “crystal-clear” message, as the filing drew approval from groups that had called for concrete steps to address anti-Jewish attacks.”

But especially in a case like this one, where mental health issues seem to have played a significant role, it is difficult to believe that hate crime laws could possibly have played a preventive role. Indeed, the attorneys and the media have wrongly framed the question as one hinging on whether the suspect is either mentally ill or an antisemite. The Washington Post reported that the suspect’s attorney “rejected descriptions of his client as a ‘domestic terrorist’ who carried out a targeted attack. He said his review of papers from [Grafton] Thomas’s home revealed not anti-Semitism but the ‘ramblings of a disturbed individual.’” Why are those two things mutually exclusive?

Mental illness is often shaped by societal inputs. A 2013 article in the New Yorker focused on “Truman Show” delusion, defined as a form of psychosis in which “the patient believes that he is being filmed, and that the films are being broadcast for the entertainment of others.” “Truman Show” delusion is not the only example of a situation-specific disorder. “Between 1995 and 2004, the International Study on Psychotic Symptoms, a survey of eleven hundred patients from seven countries, found that the mind supplies the contours of delusions, and culture fills in the details. Grandiose schizophrenics from largely Christian countries often claim to be prophets or gods, but sufferers in Pakistan, a Muslim country, rarely do. In Shanghai, paranoid people report being pricked by poisoned needles; in Taipei, they are possessed by spirits. Shifts in technology have caused the content of delusions to change over the years: in the nineteen-forties, the Japanese controlled American minds with radio waves; in the fifties, the Soviets accomplished this with satellites; in the seventies, the C.I.A. implanted computer chips into people’s brains.”

There is no reason, then, to believe that the suspect in the Monsey case did not suffer from mental illness and was not therefore susceptible to one of the most readily accessible conspiracy theories on the internet: that the Jews are to blame. And if that is the case, there is very little hope that any hate crime law would have done anything to prevent it. It is hard to imagine a person with, as his family described it, “profound mental illness,” calculating the number of additional prison years he would have to serve if caught, and then deciding against committing an attack. Funding mental health research and treatment, and combating hate and radicalization, might actually have helped. But politicians are still hungry for those extra prison years. It’s easier.