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# The Framers Would Have Hated Hate-Crime Legislation

by Don Boudreaux on [October 30, 2009](#)

in [Crime](#), [Law](#)

Nat Hentoff hates hate-crime legislation — for good reasons. [Here's a letter of his](#) appearing in today's *Washington Post*:

The Oct. 28 editorial “[A civil rights advance](#),” applauding President Obama’s imminent signing of “hate crimes” legislation, ignored the legislation’s plain violation of the 14th Amendment’s “equal protection of the laws.” As a result of this law, those convicted of serious bodily harm against protected classes of Americans — based on their gender or transgender identity, sexual orientation, disability, race, color, religion or national origin — could get longer prison sentences than persons convicted of bodily harm against victims outside protected classes. Perpetrators of a violent act not designated a “hate crime” — for example, against a homeless person on the street, or a police officer, or a former employer — could receive lesser prison terms.

Furthermore, the Fifth Amendment states: “Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” This “hate crimes” statute gives federal prosecutors the authority to try a defendant a second time for an alleged hate crime after prosecution in a state court.

*Nat Hentoff, New York*

*The writer is a senior fellow at the Cato Institute.*



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-  *danielkuehn* ★ [1 hour ago](#)

I agree that hate crimes legislation should be wiped from the books (with the possible exception of some statute against terrorizing a broad community... like assaulting a Jewish person in a synagogue and then spray-painting swastikas in the building - which is really assault on more people than just the one Jewish person that is physically assaulted) - but this is a pretty bad argument against it on Nat Hentoff's part.

Who exactly is he suggesting that is "outside the protected classes"???? Who doesn't have a race? Who doesn't have a gender? Would Hentoff use the same argument against treason statutes? If you steal something from the government, like information, just for your own benefit then you will get a different sentence than if you steal something from the government for the benefit of a foreign government. Or if you kill a government employee you're going to get a different sentence than if you kill them in an attempt to overthrow the government. There's nothing new, unusual, or unconstitutional about that difference in treatment. Nobody is going to say that treason laws are unconstitutional because they treat foreign governments more severely than they treat other beneficiaries. And what about child abuse laws? Or statutory rape? Are these laws unconstitutional because they take the variable of age into account but not other variables - like skin color? The mere recognition of different circumstances doesn't violate the 14th amendment. Problems come in when people in the same circumstances are treated differently.

I also think the fifth amendment argument is weak. The whole point is it's a DIFFERENT crime. Besides, again this has precedent. In the McVeigh case, for example, the federal government and the state of Oklahoma both had the right to prosecute McVeigh - the feds for killing 8 federal employees, and the state for killing over 100 other people. That's just dual sovereignty - not double jeopardy. Now,

the DOJ has rules in place so that dual jeopardy doesn't turn into an end-run around the fifth amendment. Presumably those rules will apply to this statute as well. But the very existence of dual sovereignty doesn't violate the fifth amendment - these are two sovereign governments we're talking about. The founders wanted both governments to remain sovereign.

We shouldn't have hate crime laws for a simple ethical reason - all crimes are hateful, hate of a certain group isn't a crime (racism isn't a crime, sexism isn't a crime) so we shouldn't treat people differently for committing crimes based on those perfectly legal (if deplorable) thoughts. That's why we shouldn't have hate crimes. Hentoff's Constitutional arguments ring a little hollow.

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[danielkuehn](#) ★ [1 hour ago in reply to danielkuehn](#)

- I indulged in a long one because I'll be busy the rest of today :) Happy Friday and Happy Halloween everyone.

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[Mommsen1625](#) ★ [43 minutes ago in reply to danielkuehn](#)

- *I also think the fifth amendment argument is weak. The whole point is it's a DIFFERENT crime.*

That's sort of the nub of the problem though. The state can make a whole class of things illegal and that gives prosecutors numerous bites at the apple over what is essentially the same act or bundle of acts. Combine that with growing criminalization of just about everything and you have a real problem.

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[AveSharia](#) ★ [27 minutes ago in reply to Mommsen1625](#)

- I'm inclined to agree, but this is not much different than every other tiered-offense scenario currently in existence.

For example: Kill someone on accident, it might be negligent homicide. But the same exact acts, in the heat of the moment, could be second degree murder. Plan it, and it's Murder 1. None of the differences (being careless, flying off the handle, or planning wrongdoing) are themselves illegal without the consequences (there are some exceptions for actual planning, but again, it's a different crime).

The point is that, where different mental states ("mens rea" in law) lead to different degrees of culpability, or different degrees of social acceptance, it doesn't matter that the outcomes are the same. Society has an interest in punishing more harshly behavior it finds more abhorrent. That's what the hate-crimes bill is about: Assault is unacceptable, but assault because of someone's race is more unacceptable.

As for double jeopardy, in no case is being charged in federal court considered double-jeopardy by virtue of a state-court charge. I happen to think this is BS, but the Supreme Court disagrees, and it's going to take a constitutional amendment to change it. But that doesn't make hate crimes legislation any worse than federal drug charges, or kidnapping. At the same tier (so, two charges in Federal Court, one for assault and one for "hate" assault,) I suspect the

assault charge would be treated like any other lesser-included-offense; because all of the elements of assault are included in the "hate" assault, you could be charged, but not convicted, of both. This is like a prosecutor charging someone with 1st and 2nd degree murder: due to uncertainty about how provable the different element is, the prosecutor charges for both and asks the jury for the strongest conviction proven.

Again, I'm not necessarily defending this practice, but it almost becomes necessary if we're going to institute varying punishments for narrowly different crimes, which I think is a necessity in terms of marginal incentive planning.

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*Mommsen1625* ★ [22 minutes ago in reply to AveSharia](#)

As far as I can tell though, what this leads to is a practice where you are caught not necessarily because you are a wrongdoer - you've committed some actual offense most people would recognize as harmful to another person - but simply because of some rather technical issue that someone happened to notice that no one would think was an actual crime. This is the law vs. legislation distinction that Hayek made.

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*David Shaw* ★ [14 minutes ago in reply to danielkuehn](#)

Two issues daniel

1. Everybody has a race, the problem is the way SCOTUS has interpreted the 14th amendment. In their world, since the purpose of the 14th amendment was to end "suspect classifications," only those races, genders, etc that they deem "suspect classes" have any chance of winning a lawsuit on 14th amendment grounds. So its nearly impossible to commit a "hate crime" against a white male. Yes, I know, historically we white males have had everything handed to us (sarcasm), but the argument is that if the law is not applied equally, then that's not really equal protection right?

As far as your 5th amendment argument- of course its a separate crime, but only because the legislator made it one! Its just like attempt and conspiracy being crimes- nobody is harmed by that action. People are harmed when the act attempted or conspired to (or the act that results from a bigot's race hate) is actually carried out. The prosecutor is correct in prosecuting the actual crime. But making it a crime to hate someone not only infringes on your freedoms of speech, association, privacy, etc, but it creates a double jeopardy situation that is patently unconstitutional.

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*JohnK* ★ [43 minutes ago](#)

The purpose of hate crime laws is to criminalize thought by attaching harsher penalties to certain acts depending upon what the perpetrator was thinking at the time.

We already have laws that criminalize "pre-crime" such as DUI laws, drug laws, and weapon laws.

These laws punish people for what they MIGHT do, not for what they are doing.

Don't be at all surprised when hateful (Politically Incorrect) thoughts become illegal because of what the individual MIGHT do.

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[AveSharia](#) ★ [25 minutes ago in reply to JohnK](#)

Correct me if I'm wrong, but I believe the "pre-crime" charges you're referring to are "attempt" crimes, which are distinctly different from "thought" crimes in that they require a substantial, affirmative step towards the completion of the crime, in addition to corroborating evidence (so, enough to convince a jury) that you intended to commit it.

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[David Shaw](#) ★ [10 minutes ago in reply to AveSharia](#)

Correct, but they still don't require that the harmful, criminal act occur. Yes they punish acts, but not the crime itself, only acts of preparation, which are not actually harmful to any other person. Couple that with the fickle nature of lay-jurors and you have a situation where it becomes increasingly likely that one will be convicted with no criminal mens rea, never mind an actus reus.

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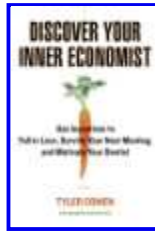
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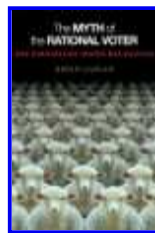
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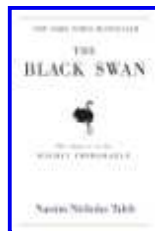
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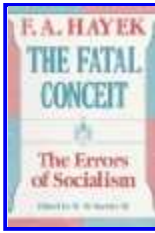
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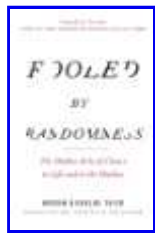
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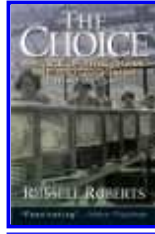
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