



Hate Crimes

by Gordon Babst

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Hate Crimes is a recent category in the law that distinguishes crimes against a person or his or her property when motivated by bias towards a group or groups from the same crimes when not animated by the offending bias. Types of offending bias include crimes motivated by the victim's race, color, religion, national origin, and, more controversially, sexual orientation and gender identity.

Whereas demarcating a category in the law for crimes animated by a desire to inflict some form of harm on a member of a group characterized by its racial heritage or religious beliefs may rest comfortably with most Americans, who tend to react negatively against racial or religious bias, the inclusion of sexual orientation and gender identity as categories has proved more challenging, perhaps because of the ambiguous social status of gay men, lesbians, and transgendered persons in American society, or, in the case of gender, the question of whether it is appropriate to consider crimes of rape or domestic violence, already fairly well-delineated in the criminal law, as hate crimes against women.

Although the categories sexual orientation and gender identity do not specify which orientations or identities are protected (and indeed all orientations and identities are covered when such categories are included in hate crimes legislation), it is often assumed that such categories convey some kind of "special" rights on homosexuals or transgendered persons.

The challenge has been to persuade Americans that crimes against gay men, lesbians, or transgendered people, when motivated by animus towards all homosexuals or towards homosexuality in general, or toward all transgendered people, merit condemnation, just as do crimes motivated by racial or religious animus.

The Problem

The problem of violence directed against gay men and lesbians and those who do not conform to gender expectations is a serious one. Gay bashing is pervasive in many areas of the world and in the lives of most glbtq people.

The National Gay and Lesbian Task Force released a report in 1984 that documented the extent of violence directed against glbtq people in the United States. Based on a survey of nearly 2,000 gay men and lesbians in eight cities, the report indicated that almost all of the respondents had experienced some form of verbal, physical, or property-related abuse.

Gay men, lesbians, and transgendered people are less likely to report abuse than other groups, largely because of fear of police brutality or public exposure. Some sources indicate that as much as 90 percent of all antigay crime goes unreported.

In response to the problem of violence directed toward members of the glbtq community, many organizations, usually in larger cities, have formed anti-violence task forces and patrols, aimed at creating safe spaces for members of the community, opening dialogue with police authorities, and gathering

statistics regarding the prevalence of hate crimes in the glbtq community. Others have monitored courtrooms to make certain that individuals charged with hate crimes are prosecuted fully. Still others have campaigned for hate crimes legislation.

Although the move for hate crimes legislation began in the mid-1980s, some particularly graphic examples of hate crimes against glbtq people in the 1990s gave urgency to the movement, especially the gruesome murders of young transman Brandon Teena in 1993 (the subject of Susan Muska and Greta Olafsdottir's documentary *The Brandon Teena Story* [1997] and Kimberly Peirce's feature *Boys Don't Cry* [1999]), Wyoming college student Matthew Shepard in 1998, and Alabama textile worker Billy Jack Gaither in 1999.

Although these brutal murders were all too familiar to glbtq people, they garnered a great deal of media attention. They thereby made the problem of antigay violence real for the larger public.

Today, over 30 states and the District of Columbia have hate crimes statutes that include sexual orientation. A much smaller number of states also include gender identity protection. Four states have no hate crimes legislation whatsoever.

Federal Hate Crimes Legislation

Perhaps the most important development in hate crimes law is the adoption of federal hate crimes legislation.

The *Hate Crimes Statistics Act* took effect in 1990, having been signed into law by President George Bush at a public ceremony in the Rose Garden of the White House, the first ceremony there officially to include members of the gay and lesbian community.

This law asks local law enforcement officials, on a voluntary basis, to gather and maintain statistics on the incidence of hate crimes, including those motivated by bias on the basis of sexual orientation, so as to ascertain the extent of the problem and whether to legislate further hate crimes laws. In 2001 there were 9,730 hate crimes reported by the F. B. I. in its Uniform Crime Report, about 14% of which were based on sexual orientation.

The *Hate Crimes Sentencing Enhancement Act* took effect in 1994, and provides for perhaps the most controversial aspect of any hate crimes legislation, an enhanced penalty for convicted perpetrators of hate crimes, but it did not cover sexual orientation, gender, or disability as categories to be protected.

In 2000, a bill introduced into the Senate as the *Hate Crimes Prevention Act* was revised and renamed the *Local Law Enforcement Enhancement Act* by the House of Representatives. This bill, had it been passed, would have added sexual orientation, gender, and disability to the categories, and have brought some uniformity to the nation's hate crimes laws.

The bill would have also mandated federal prosecution should the hate crime have been violent and not prosecuted at the local level, or occurred on federal lands, or hindered a person in the exercise of a civil right.

Although the bill was not adopted in 2000, it was introduced in subsequent Congresses and, indeed, managed to pass both the House of Representatives and the Senate in 2008 as an amendment to a Defense Appropriation bill. However, with the threat of a veto by President George W. Bush, the amendment was dropped from the Defense bill before final passage.

In 2009, however, after the election of President Barack Obama and a large Democratic majority in both Houses of Congress, the Matthew Shepard and James W. Byrd, Jr. Hate Crimes Prevention Act--named for a

college student brutally murdered because of his sexuality and for a young Black man viciously murdered because of his race--easily passed Congress, again as an amendment to a Defense Appropriation bill.

On October 28, 2009, President Obama signed the act into law. It was the first federal bill that specifically recognized the civil rights of glbtq people. Fittingly, the parents of Matthew Shepard, Judy and Dennis Shepard, were present at the signing ceremony.

Later that day, Judy Shepard issued the following statement: "When Dennis and I started calling 10 years ago for federal action to prevent and properly prosecute hate crimes against gay, lesbian and transgendered Americans, we never imagined it would take this long. The legislation went through so many versions and so many votes that we had to constantly keep our hopes in check to keep from getting discouraged," she said. "We are incredibly grateful to Congress and the president for taking this step forward on behalf of hate crime victims and their families, especially given the continuing attacks on people simply for living their lives openly and honestly."

At a reception in the White House later on October 28, 2009, President Obama eloquently declared that "we must stand against crimes that are meant not only to break bones, but to break spirits--not only to inflict harm, but to instill fear."

The law is necessary, he said, "Because no one in America should ever be afraid to walk down the street holding the hands of the person they love. No one in America should be forced to look over their shoulder because of who they are or because they live with a disability."

Critiques of Enhanced Penalties

Critics of hate crimes legislation have charged that such legislation in effect makes certain groups of Americans more worthy, and other groups less worthy, because the "same" crime committed against a group not enumerated in hate crimes legislation does not merit as severe a punishment as when committed against a member of a protected group.

Some critics have further argued that enhanced sentencing punishes thought because the only difference between an ordinary crime and the "same" crime when motivated by bias is the animating bias, and all Americans, even criminals, have freedom of expression and should not be punished for their thoughts.

The Argument for Enhanced Sentencing

A defender of hate crimes legislation might reply that a crime motivated by hate is not the "same" crime at all, but a different one, warranting a different response from the criminal justice system, including the possibility of a stiffer sentence. Were the animating motive absent, the crime would not have occurred. Moreover, the criminal law routinely considers motive, as in making distinctions between murder in the first degree, homicide, and manslaughter, even though the victim is as dead in each case.

Perhaps the best argument in favor of hate crime legislation is that such crimes are attacks not merely against an individual, but also against the entire group of which he or she is, or is perceived to be, a member. They are "message crimes," usually addressed to groups that are particularly vulnerable.

Consequently, hate crimes intimidate, degrade, and effect psychologically not merely the individual attacked, but all members of the associated group. They tear at the fabric of American society by reinforcing negative stereotypes about certain groups, and imply that some groups are legitimate targets.

Laws against hate crimes are based on the assumption that all Americans are equal and deserve equal

protection. Ignoring hate crimes in the law gives the impression that the state is unmoved when groups of Americans are singled out because of a social bias against them.

In addition, having statutes against hate crimes makes it far less easy for members of the criminal justice system, including police, prosecutors, judges, and juries, to discriminate against victims of hate crimes. With the enactment of hate crimes laws, these officials are less likely to fail to take the victim seriously or to multiply the victim's injury by not investigating the crime or prosecuting the perpetrators to the fullest extent of the law simply because they share in the social prejudice against the victim's group.

Bias Crime Indicators

To determine whether a hate crime has occurred, trained law enforcement officials review factors known as "bias crime indicators," such as racial, ethnic, or cultural differences, comments or written statements, gestures or graffiti, membership in organized hate groups, and lack of other motives.

These factors suggest that the crime was not random, and that the victim was specifically targeted *because* of her or his race, religion, or sexual orientation, for example. Although a victim may allege a hate crime has occurred, or a prosecutor may pursue a conviction for an alleged hate crime, this is by no means a guarantee that a judge or jury will be persuaded that what occurred was not simply an ordinary crime.

Between 1991 and 2000, for example, the Department of Justice pursued only 37 prosecutions under a hate crimes law because, among other reasons, in the thousands of other cases the evidence warranting the upward adjustment of the category of crime and penalty was deemed insufficient, and a lesser crime and penalty were more likely to be prosecuted successfully.

Hate Crimes against Gay Men and Lesbians

Hate crimes based on sexual orientation are not the most frequently reported type of hate crime. Such crimes constitute about 14% of all reported hate crimes by category. However, when these crimes are violent, they tend to be particularly brutal, involving, for example, pummeling with a baseball bat, or multiple gunshot wounds, or stabbing.

Such violence may indicate that the perpetrator intends thoroughly to wipe out his victim, having targeted the gay man or lesbian for just this purpose, and for no other, and may suggest that the gay and lesbian community itself is slated for eradication.

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